

Originalism and the Treaty of Waitangi

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Abstract

Originalism has long been used as a conceptual approach for interpreting the United States Constitution. Its premise is that the authoritative interpretation of constitutional documents is best obtained by determining the meaning of their texts as they were understood at the time of their creation, along with the intent of their drafters and adopters. This article examines both the potential and the limitations of originalism when applied to the Treaty of Waitangi, and explores how the manner in which the Treaty's provisions were devised, drafted, and subsequently acceded to militates against the sort of exactness of interpretation that originalism offers elsewhere.

Introduction

Since 1975, the Waitangi Tribunal has been primarily responsible – along with the courts, politicians, and academics – for interpreting the meaning and application of the Treaty of Waitangi (“the Treaty”) (1840). One of the underlying challenges in this process has been to establish the role and function of this instrument of colonialism in what some might claim is a post-colonial setting. And as the few remaining historical claims before the Tribunal near settlement, the status of the constitutional role of the Treaty has been kept buoyant by an increase in calls for it to be formally installed as a central element in New Zealand's constitutional framework.¹ However, in both the work of the Tribunal and in the arguments of those advocating for the Treaty to have a more formal constitutional position in the country, the interpretation of the agreement has altered dramatically from that apparently intended by its creators.

What is explored here is the potential role of originalism – of the sort employed in debates about the meaning of United States Constitution – as a method of constitutional interpretation to be applied to the Treaty. As the Treaty shifts from being the focal point of a heavily contested relationship between the Crown and Māori based on the resolution of grievances to potentially assuming a more explicit constitutional status, issues of the Treaty's original meaning (and the intent of the framers of and assenters to the agreement) are likely to become more pronounced.

The Treaty is presently interpreted in statute and by the Tribunal according to its spirit or principles, and it is these principles, and “not the literal words” of the Treaty that the courts consider when interpreting legislative references to the agreement.² Sharp refers to the principles as contributing to the “jurisprudence of the wairua of the Treaty,” in which there is a “still-living spirit” of the agreement that governs its interpretation.³ This approach to the Treaty, in which the principles take precedence over its provisions, is the orthodox position regarding its interpretation. As far as the literal meanings of the Treaty's texts are concerned, the courts have determined that they “should not be approached with the austerity of tabulated legalism.”⁴ The example of the “partnership” principle is cited by Matthew Palmer as evidence of this current orthodoxy, in which the interpretation of the Treaty is oriented away from the provisions of its texts – what could loosely be called an originalist approach – and towards the principles and spirit of the text.⁵

The dependence on the “principles of the Treaty” – which has been the preferred phrase (since the passage of the Treaty of Waitangi Act 1975) for capturing elements of the spirit of the Treaty has enabled the interpretation of the Treaty to adjust to accommodate legislative and social changes that have occurred since its conclusion. This orthodoxy has been augmented not only through legislation and the decisions of the courts and Waitangi Tribunal, but also in

anticipation of a more prominent role of the Treaty in an anticipated written constitution for New Zealand.⁶

Exploring the application of originalism to the Treaty affords the opportunity for an alternative and/or complementary interpretation of the agreement. It need not be a challenge to current Treaty orthodoxy, although some dimensions of originalism do question the connection of certain Treaty principles with the intent both of the agreement's provisions, and those of its authors. Establishing an originalist position on the Treaty is complex, however, because parts of the texts are ambiguous, and after nearly 180 years, there remains no consensus on its precise meaning and application.⁷ And unlike the United States Constitution, from the outset the Treaty has lacked provision for formal amendments to be added. Consequently, its subsequent interpretations have evolved in a more ad hoc fashion, with certain principles and readings of the agreement serving as de facto amendments. To an extent, these reflect a presentist approach to the Treaty's interpretation – the antithesis of any attempt to reach an originalist understanding of the agreement. Formalising the Treaty in a constitution would almost certainly require a more specific statement or agreement of its meaning, thus likely bringing into focus (among other considerations) the issue of originalism in its interpretation.⁸ The current interpretive orthodoxy that applies to the Treaty, which emphasises its principles and spirit over consideration of the original meaning of the Treaty's text and intent of its authors and signatories, suggests that there could be a significant role an originalist perspective could play as consideration is given to the Treaty's future constitutional status.⁹ Fletcher argues that the purpose in focussing on the intent of the framers of the English text of the Treaty 'is not to elevate the status of the English draft or to diminish that of the Maori text. Nor is it to depreciate modern efforts, particularly those of the Waitangi Tribunal, in developing an understanding of the Treaty that reconciles and transcends its texts'. He also cautions against promoting original intent as a means of 'controlling Treaty interpretation, as is familiar from interpretations of the United States Constitution by reference to the understandings of the Founding Fathers', (although he adds the caveat that the possibility exists that 'some of the historical assumptions which have been starting points for contemporary legal argument should be revisited').¹⁰

Putting aside concerns over the motive or consequences of the application of an originalist approach, however, what is revealed here is that applying originalist analyses to the Treaty not only does little to advance the understanding of the agreement, but potentially makes the task of establishing a precise and coherent and uniform meaning and purpose of the Treaty more challenging.

Originalism

Originalism is used most commonly to emphasise both the binding authority of the text of the United States Constitution and the intention of its framers. Despite the term being devised as recently as 1979, the principles behind it have been applied in the United States since at least 1803 in connection with the Constitution.¹¹ And for centuries before that,¹² in common law, the object of all statutory interpretation has been 'to determine what intention is conveyed, either expressly or impliedly, by the language used'.¹³ Because of this long history of emphasising the interpretation of legal documents (into which category constitutional texts can sometimes fall as quasi-legal documents)¹⁴ based primarily on their wording, a corresponding degree of precision has typically been invested in their drafting (the United States Constitution, for example, was praised by one jurist for 'the remarkable... exactness of its text').¹⁵ The Treaty of Waitangi, on the other hand, is noted for having been 'hastily and inexpertly drawn up', and 'ambiguous and contradictory in content'.¹⁶ This introduces the issue of the extent of the precision of wording in constitutional texts as a consideration in the application of originalism to those texts: the more imprecise the wording, the less originalism can be employed in general as an exclusive tool of interpretation.

Originalism is comprised of two general principles: textualism and intentionalism. The first of these – textualism – relies on interpreting a constitutional text as it was intended to be understood when it came into being. The wording of such documents is thus treated as ‘a vehicle for the voice of the people at the time of enactment’.¹⁷ The notion is more nuanced, though than just depending on a contemporaneous understanding of the relevant texts. It has evolved from focussing on the ‘original intent’ of the drafters of the constitutional document to the ‘original understanding’ of those who first gave consent to it,¹⁸ and the ‘original public meaning’ of the text in question.¹⁹ This latter approach is sometimes known as the Doctrine of Original Meaning.²⁰ Among the challenges this modified version of originalism presents is that while the text of a constitutional document is fixed, the contemporaneous understanding of those who consent to or enacted it not only is likely to be varied, but the documentary record of those views might be inconsistent, or in the case of some of the Māori signatories to the Treaty of Waitangi, non-existent in many instances.

There are also degrees of originalism. The strongest of these is the exclusive form, in which the meaning of original constitutional texts are interpreted with no reference to any subsequent precedent, practice, policy, or interpretation. From this, the next stage is a more inclusive originalism, which admits later precedent, policy and practice, to the extent that they can be incorporated or concur with the original text in question.²¹ The final gradient is partial originalism, in which the original meaning and intent of the constitutional document becomes just one (albeit possibly a significant one) of several criteria for interpretation.²² In all these variants, however, the underlying principle of originalism remains: that it is possible to discover the certain meaning of a constitutional text at the time of its creation or adoption, but also, crucially, that this meaning “is authoritative for the purposes of constitutional interpretation in the present.”²³

However, as has sometimes been the case with the Treaty of Waitangi, the imprecision of the wording of a constitutional document can make the application of textual originalism so challenging that meaning has to be sought elsewhere to assist with efforts at interpretation. The use of contemporaneous contextual evidence to enhance the interpretation of the Treaty is vital. Yet drawing on such evidence dilutes the purist textualist element of originalism by implying that interpretation of the agreement without this additional context-setting evidence would diminish rather than enhance the ability to derive a useful and reliable meaning from the Treaty’s text.

The counterpart in originalism to textualism (in its various forms) is intentionalism. In principle, intentionalism is supposed to serve a complementary function – marrying the historical meaning of the text of a constitutional document with the intentions of those involved in its drafting and adoption. However, such a union is based on the uncertain presumption that the two categories of understanding are likely to be very similar, with each illuminating the other in a largely consistent manner. The problem with such an approach, though, is that it bypasses consideration of those circumstances in which various parties involved in the formation or ratification of a constitutional text may have divergent or even contradictory interpretations of the text. The intent of these parties would still come under the umbrella of originalism, but that alone is no guarantee that a homogeneous interpretation of the text will emerge. The application of intentionalism to the Waitangi treaty presents a particular set of challenges, in that the accounts of the intent of the Māori signatories to the agreement are sparse, and what fragments were recorded were done through the optic of a colonial European perspective. The Waitangi Tribunal’s 2014 report on Stage One of the Te Papanahi o Te Raki Inquiry explored the possible understandings that the Māori signatories of the Treaty had about the agreement, but these tended to focus on the definitions of sovereignty rather than what one rangatira referred to as “squinty legalism.”²⁴ Some of the testimony presented before the Tribunal illustrates the variants of originalist interpretations of sovereignty that Hickford has

described. For example, there can be a claim of overarching territorial sovereignty coexisting with jurisdictional autonomy within the territory.²⁵

Generally, within the originalist framework of thought, the role of intentionalism has greater potential than textualism because the text of any constitutional document is the product of specific intentions, and because there is an extra layer of intentions held by those who endorse or ratify, and thereby give effect to the text. This means at the very least that attempts to recover the original meaning of a constitutional text do not have to be limited solely to scrutiny of the text itself.²⁶ Indeed, it could be argued that a textualist approach would be deficient without some intentionalist context. A related argument used by intentionalists to support this approach to interpreting constitutional texts is that “[i]f history can provide a reliable guide to the intent of those who crafted constitutional language, then it may be possible for judges to base their decisions upon neutral principles as opposed to their personal predisposition.”²⁷ In an area as fraught with division over interpretations as the Treaty of Waitangi, this appeal to apparent neutrality can be a compelling argument in support of intentionalism. Use of the concept can serve as “a solution to the question of legitimacy,” which both reveals the “authoritative” intent of a constitutional text, and “solves the question of interpretation” in a way that is unaffected by later partisan approaches to interpretation of the agreement.²⁸

There are, however, some deficiencies with originalism that need to be given consideration in any assessment of its potential application to the Treaty. Advocates of originalism presuppose that there is a degree of authenticity in textualism and intentionalism, on the basis that it is somehow uncontaminated by later constitutional, policy, or general historical developments (which are perceived almost as accretions that need to be cleaned away to reveal the “true” relief of the meaning of the original constitutional text). But from a broader perspective, the efficacy of originalism depends not so much on any inherent merit it possesses as on the contribution it makes to a good system of constitutional interpretation, which ultimately is a subjective judgement.²⁹ Claims of original intent, original textual meaning, and greater authenticity and authority are a false syllogism in this context.

Moreover, when it comes to the intentionalist branch of originalism, there is a presumption in originalism that the intention of the drafters, endorsers, or adopters of a constitutional text can be completely or at least sufficiently known.³⁰ Yet allowances have to be made for secret motives, unknown motives, the distinction between public and private motives, the absence of evidence of intentions, and evolving intentions as the constitutional text goes from being formulated to being adopted and approved. All of these can obstruct the task of determining a unitary set of intentions of the drafters of a constitutional text. A distinction therefore needs to be drawn in intentionalism between the covert (and therefore presumably speculative or unknowable) motives of those involved in formulating a constitutional text, and the sort of intentions that others involved in the text at the time (including signatories, in the case of the Treaty) could reasonably have been expected to know.³¹ Yet even if this distinction can be made, there can be a substantial methodological challenge when trying to convert the intentions of the various drafters and those who acceded to a constitutional text into a single collective representative intent that is coherent enough to assist with contemporary interpretations.³²

In addition, originalism positions whichever constitutional text is under consideration as a culminating point in policy-making and document-drafting. From the moment of its ratification or adoption, its meaning is thereafter held in perpetuity – despite any subsequent changes in culture, society, and economy – by what has pejoratively been referred to as the “will of the dead.”³³ This can lead to the risk of constitutional texts metaphorically calcifying, and being incapable of subsequent suppleness in interpretation and application. The alternative

to this aspect of originalism is to regard the moment at which constitutional texts come into effect as a commencement rather than termination point for subsequent interpretation.³⁴

At some point, originalism inevitably enters the realm of counterfactual history, in that its advocates are required to hypothesise how the drafters of or signatories to a constitutional text would have interpreted later events in light of the document they produced or assented to. Would they, for example, have insisted that the original meaning or intent remain fixed regardless of any subsequent social, political, cultural or other changes occurring? Speculation thus becomes a corollary to the implementation of originalism, and in the absence of any evidence to the contrary, it could be just as possible that those involved in the creation and acceptance of a constitutional text would have allowed later changes in interpretation of the text. The difficulty is that there is no way of knowing for sure, and so the absence of evidence one way or the other unavoidably makes claims of originalism open to conjecture.

Inevitably, originalism serves as a political as much as a purely interpretive instrument. By privileging the supposed authority of the original meaning and intent over subsequent understandings of a constitutional text, the originalist interpretation can potentially be used to sway opinion in decisions where the meaning of the text has some material effect. In some instances, it can act as a reactive theory, or as a mode of criticising views that are contrary to its advocates.³⁵ Those promoting an originalist approach do so either purely as an academic exercise (in which case the purpose has little practical application beyond exploring the possible implications of an alternative interpretation), or because an originalist interpretation can provide a meaning more suited to their interests than other meanings. This undermines claims that originalism is somehow a superior form of interpreting constitutional texts, or that it carries any specific authority over other interpretive approaches.

Finally, dogmatic originalism has the potential to eschew broader academic debate about the meaning of constitutional texts. Indeed, taken to its logical conclusion, it can imply that all later interpretations of a constitutional text are somehow either improper or erroneous, and therefore do not carry the same weight as originalist interpretations do.³⁶ Yet, ironically, it can be through the analysis of subsequent interpretations and applications of a constitutional text that the originalist reading becomes more defined.

An originalist interpretation of the Treaty

In order to see what the potential implications of an originalist approach to the Treaty of Waitangi could be, it is first necessary to outline – as far as possible – the intent of the creators and signatories to the agreement, and the meaning of the text itself. Although the Treaty has been subject to extensive research, particularly since the late 1970s, universal agreement on its meaning and application has yet to be reached. This is partly because of the poor wording of the text as it was drafted, in English (and the ensuing deficiencies when the text was translated into Māori), partly because the intersection of textualism and intentionalism still does not provide a unitary meaning of the agreement's provisions, and partly because of the several interpretations of the Treaty's meaning that have emerged since its conclusion in 1840, including the derivation of a set of “principles” from the text. The following two sections sketch out an originalist interpretation of the Treaty using first a textualist followed by an intentionalist approach.

(i) A textualist approach to originalism in the Treaty

What is examined here is the “raw” meaning of the Treaty's three operative articles (which give effect to the agreement) in both its English and Māori texts.³⁷ Some (but certainly not all) of the original meanings of the articles are surveyed, and the various challenges faced when attempting to determine the express or implied intention of the language used is examined as a

means of illustrating the type of deficiency that the textualist form of originalism poses when it comes to interpreting the Treaty.³⁸

In Article the First of the English version of the Treaty, all sovereignty is ceded by Māori to the Crown “absolutely and without reservation.”³⁹ The meaning is unambiguous at first sight, except that it raises some important questions, including: sovereignty over whom (which is not specified); what was the Māori conception of sovereignty at this time (which is not clarified); and from a circumstantial perspective, why would even one rangatira (chief), let alone 542, surrender all their sovereignty to the Crown, where there was neither a threat nor any great inducement to do so? The translated version only muddies the waters, with the rangatira surrendering their right of governance (“kāwanatanga”) to the Crown. This raises additional questions, including: did governance mean the same thing as sovereignty in 1840? And did Māori understand what kāwanatanga meant? (given that its root word, “kāwana” was a neologism for the English word “governor”).

Article the Second is a more intricate and ambiguous part of the Treaty from a textualist perspective. It comprises two elements, the first of which guarantees Māori “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties” which they may own. What is not clear from this, though, is whether the extent of ownership made explicit in this article – especially the undisturbed nature of the possession – leaves at least a faint residue of sovereignty with Māori (in that presumably no other sovereign power can disturb the nature of their possession). The translated version makes the role of sovereignty even less clear, with rangatira being guaranteed “the unqualified exercise of their chieftainship over their lands, villages and all their treasures” – in this context, chieftainship has connotations of sovereignty, which undermines the full cession of sovereignty by the Crown in Article of the First of the English version.⁴⁰ Textualism alone offers no adequate resolution to this apparent contradiction.

The second part of Article the Second deals with the issue of pre-emption. In the English text, Māori give to the Crown the right to purchase their land at an agreed price. However, if a price is not agreed on, it is unclear from the article whether Māori would then have the right to offer their land for sale to non-Crown parties. Nor is it obvious for what period this provision was meant to apply. The translated portion of this article mirrors both this meaning and these deficiencies in the English text.

The Treaty’s final article (which has a similar meaning in both the English and Māori versions) guarantees that Māori will be protected by the Crown and will enjoy “all the Rights and Privileges of British Subjects.” One of the first questions to arise from this portion of the text is from whom are Māori to be protected? And does this protection extend to one group of Māori which is under attack from another? This latter question is not merely hypothetical as it could have been a consideration for some rangatira when giving their assent to the Treaty. And neither is there any indication as to what form the protection would take, and for how long it would last. When Crown forces invaded the Waikato in 1863, for example, and forcibly seized 486,500 hectares of Māori land, did this mean that the Crown was bound by the Treaty to defend Māori from its own offensives? This may seem like a vexatious example, but it is nonetheless a useful one because it highlights precisely a practical case where the permutations of Crown protection of Māori and the exact citizenship status of Māori are not able to be determined from the text alone.

The issue of sovereignty emerges again in Article the Third. The promise that Māori will be imparted “all the Rights and Privileges of British Subjects” suggests that they will have these benefits without possibly actually becoming British subjects. The key word in this phrase is “of,” which can imply that Māori did not become British subjects according to the text of the Treaty. Yet, if Māori had ceded sovereignty to the Crown, as is made explicit in Article the First of the English text, then it would be fair to interpret this as evidence that Māori were thus

subject to British rule and therefore British subjects (making this segment of Article the Third redundant if it is to be interpreted as Māori being confirmed as British subjects). This ambiguity is not resolved by applying a textualist form of originalism to the agreement.

It is evident that the wording of the English text of the Treaty does not allow for a single, unambiguous meaning of the agreement to emerge, and that this uncertainty is compounded by the differences between the English and Māori texts of the Treaty. A purely textualist approach to the agreement therefore fails to produce anywhere near the exactness of meaning that some jurists believe they have achieved by applying textualism to the United States Constitution.⁴¹

(ii) An intentionalist approach to originalism in the Treaty

Applying an intentionalist approach to interpreting the Treaty is more complex in some ways than the textualist method because there is no single set of intentions which can be explored to approximate the original meaning of the agreement. In the case of the Treaty of Waitangi, there are three broad groups whose intentions need to be determined in order to explore an intentionalist interpretation of the agreement. The scope of such an undertaking would be well beyond the constraints of space of an article such as this, but a few selected intentions from each of the three groups can be examined, and at least allow for an impression of how intentions can shape the interpretation of a constitutional text – especially one where the text itself is plainly inadequate in parts to determine its exact meaning.

The first of the three groups whose intentions have a bearing on establishing the original meaning of the Treaty are the officials in the British Government who worked on the idea of a treaty with New Zealand during 1839. There are three main sources of material on their intentions: their minutes, memoranda, letters, and other written communications at this time which reveal their evolving thinking about the content and purpose of the proposed Treaty; the instructions for the Treaty given to William Hobson in August 1839; and traces of the philosophical influences on these policy-makers.

The documents generated by British officials in the year preceding the instructions for the Treaty being issued to Hobson are certainly useful when trying to determine the intentions of colonial officials for this constitutional text.⁴² During 1839, Sir James Stephen, the Permanent Undersecretary of the Colonial Office, was primarily responsible for developing the policy on a treaty with New Zealand. In March of that year, he stated his preference for an administration to be established in the prospective colony to govern “the Anglo Saxon Race” living in New Zealand, and three months later, as the British population in the country continued to expand, he argued for the extension of the Crown’s jurisdiction to “British subjects” who had settled in New Zealand.⁴³ In May, the British Colonial Secretary, Lord Normanby, wrote to the British Attorney General, recommending that a cession of Māori sovereignty be secured so that there could be “some system for governing the numerous body of British subjects who have taken up their abode in the New Zealand Islands.”⁴⁴ On 22 June 1839, a Treasury official wrote to Stephen, reiterating that a consul be appointed to New Zealand in order to establish “some competent control over British subjects” living there, and the following month, the Treasury sanctioned the funding for the proposed administration which would be charged with exercising this “competent control.”⁴⁵

What is evident from this very cursory review is that the intention for the Treaty, as far as British officials were concerned during 1839, was explicitly to gain the right for British law to apply to British subjects living in New Zealand. There was no mention made at all in this period of British jurisdiction extending to Māori. Yet, while this intent is clear in the documentation produced by officials in the period leading up to the conclusion of the Treaty, it does not necessarily allow for a more precise understanding of the intent of the agreement itself. This is partly because the boundaries of British sovereignty are not made explicit in the

texts of the Treaty, and because the various humanitarian, cultural, religious, social, and economic intentions of a range of British officials (mainly from the Colonial Office and the Treasury) became slightly more implied than explicit when they were condensed into a single document that was the one of the bases (but by no means the only one) from which the text of the Treaty was assembled by its drafters.⁴⁶

In mid-August 1839, a set of Instructions was given to William Hobson (who was about to leave for New Zealand to draft and conclude the Treaty) by Normanby.⁴⁷ These were the distillation of the preceding year's deliberations on the New Zealand question by British officials (mainly from the Colonial Office, with some input from the Treasury), and give as clear an indication as exists of the British Government's intentions for the Treaty immediately prior to its text being written.⁴⁸ Yet even the Instructions are insufficient to derive an unambiguous inventory of points that the British intended for the Treaty, which Hickford has identified as being one of the challenges in attempting to construct an originalist interpretation of the (English text of the) Treaty.⁴⁹

The teleological basis of the Instructions was to "adopt the most effective measures for establishing amongst them [British immigrants] a settled form of civil Government." This is described in the Instructions as the "principal object" of Hobson's mission, and suggests that this is the way in which the text of the Treaty was originally intended to be interpreted, although it still does not overcome the dilemma evident in the textualist interpretation, in which sovereignty appears to be distributed in ambiguous ways among both Māori and the Crown.

The issue of sovereignty in the Instructions is not straightforward, though. Britain acknowledged Māori sovereignty, but in a severely qualified form, as officials regarded Māori society as being "composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even deliberate in concert." However, the instructions are not sufficiently explicit on whether the Māori sovereignty that was to be ceded to the Crown was to allow Hobson to govern the "not less than two thousand British subjects" in the country, amongst whom were "many persons of bad and doubtful character," or whether Hobson was required to assert a blanket sovereignty over everyone in the country. The Instructions tilt towards the former interpretation, but nowhere near categorically. Certainly, the Attorney-General William Swainson, commenting two years after its conclusion, did not think that the Treaty intended British sovereignty to extend to Māori. In a letter to the Colonial Office, he wrote that "[i]f the sovereignty of the country has been usurped, it has not been usurped on the part or with the sanction of the British Government."⁵⁰ Thus, because of the heavily qualified and imprecise discussion of sovereignty in the Instructions, coupled with the ambiguity of the division of sovereignty in the Treaty, using originalism as an interpretive approach does not necessarily provide a more exact interpretation of these portions of the Treaty's text.

In the case of the pre-emption provision of the Treaty, the intentions for this portion of the text are only faintly expounded on in the Instructions. However, the Instructions were explicit that "[t]he acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate without distress or serious inconvenience to themselves." Yet there was no mention of this in the text of the Treaty, and no protection along these lines was offered in the agreement. This illustrates how the intent for a constitutional document does not necessarily filter through into the document itself, but still has the capacity to inform how the text is to be interpreted. In this case, though, originalism is confronted by a dilemma over which takes priority when interpreting a constitutional text: textualism or intentionalism? And what is the value of a specific intent if it fails to materialise in a constitutional text? Should it be an implicit interpolation in the text or should it be ignored as being contrary to the intention of the drafters of the text? In the case of the pre-emption

clause in the Treaty, instead of intentionalism “solv[ing] the question of interpretation,” as its proponents might expect, it confounds it.⁵¹

A deeper layer of intentionalism can be gleaned from the philosophical influences that bore down on colonial officials in this era. Chief among these were the works of Jeremy Bentham, which advocated (among much else) that the imposition of British law ought to be a key tenet of British colonies in this era, but that this law ought not to apply to “non-civilised” communities until they had become sufficiently civilised to benefit from the presence of British law.⁵² This philosophical element was extremely influential in British government policy-formation in the 1830s.⁵³ It can help explain the intent of the Treaty’s first article (in the English version), in which Māori sovereignty was ceded to the Crown, but possibly only to allow the Crown to govern its own subjects living in the colony, and then later, as Māori became “civilised,” the jurisdiction of British law could extend to them too (this would also explain the need expressed in the Instructions for the formation of the Office of Protector of Aborigines, which had as its specific goal the “civilising” of Māori). While such a suggestion is consistent with Bentham’s philosophies, it does not provide an exclusive interpretation of that part of the Treaty at the expense of other interpretations. Consequently, the influence of Bentham’s philosophies can be added as a possibility which gives another dimension to the meaning of the Treaty’s text, but broadens rather than narrows the range of meanings the Treaty can have.

Of course, Bentham’s ideas never held exclusive sway over the thoughts of those responsible for formulating Britain’s policy on New Zealand in the late 1830s, which culminated in Normanby’s instructions. The fact that there was a multiplicity of intellectual influences that contributed to the form of British policy on the Treaty⁵⁴ make the challenges of seeking an original intent of the Treaty that much more problematic.

It was a handful of officials and others on the ground at Waitangi at the beginning of February 1840, however, who were responsible for converting Normanby’s Instructions into the text of the Treaty. The details of the process of this drafting, and of all of those involved, has already been comprehensively documented.⁵⁵ As for their intentions, the record is incomplete. For the purpose of examining the efficacy of originalism in this context, it is worthwhile considering the evidence of the motives of the Treaty’s two key authors: Hobson and the outgoing British Resident to New Zealand, James Busby. As the Colonial Office did not supply Hobson with a draft treaty, it was principally up to him and Busby to devise the text.

Hobson had completed some notes for the Treaty by 1 February 1840, based on his interpretation of the Instructions he had received before departing London, but fell ill, and so Busby fleshed these out and introduced his own additions to produce a full draft of the Treaty which formed the basis of the final version, that was completed by 4 February. The problem here for originalists is that neither Hobson nor Busby left any significant record of their intentions for how the Treaty ought to be interpreted, other than elementary statements they made regarding having been involved in the drafting and subsequent presentation of the text to the signatories. Hobson simply explained that when he met rangatira to obtain their accession to the Treaty, he “expounded its provisions, invited discussion, and offered elucidation,” without elaborating what this elucidation included.⁵⁶ His statements on the purpose of the Treaty were largely reiterations of segments of the Instructions. For his part, Busby simply rehearsed (at the Waitangi signing) the essence of the Treaty’s content, in a simplified manner, in the hope that the rangatira present would understand its provisions.⁵⁷

Finally, the intentions of the Māori signatories to the Treaty need to be considered in order to assess the possible application of originalism from the perspective of the “original understanding,” or the “original public meaning of the text among those who accepted it.”⁵⁸ Doubts about Māori being able to “comprehend the exact meaning or probable results” of the Treaty were raised by British officials even before the text had been produced.⁵⁹ However, while there are contemporaneous accounts of Māori responses to the Treaty, these are

problematic for three main reasons: they were selected, translated and transcribed mainly by Europeans, and so a degree of cultural filtering affects their reliability; the opinions of only around five per cent of the signatories were collected; and in most cases, the comments of the rangatira that were recorded tended to be statements of opposition or support for the Treaty, rather than detailed accounts of how Māori interpreted all the provisions of the agreement.⁶⁰

Conclusion

What is evident from this survey is that one of the probable reasons why originalism has not featured in any significant way in analyses of the Treaty is that it does not enable a more exact interpretation of the text to emerge. Indeed, the textualist approach only highlights the deficiencies in the wording of the agreement, and, if anything, risks obscuring the Treaty's intended meaning. And in the search for an intentionalist interpretation, the Treaty's meanings become even more diffuse, and there is little realistic chance of all the varied views coalescing – a problem that is compounded by the absence of sufficient evidence in the case of the drafter and signatories to determine their respective intentions in any comprehensive way.

Given the possible varieties of interpretations of the text of the agreement, and the multiplicity of meanings that can be derived from the intentions (or absence of explicit intentions) of the parties involved in its devising, drafting, and endorsement, an originalist approach to the Treaty is more likely to confound efforts at recovering the original meaning of the document, and in fact suggests strongly that there may not have actually been a single original meaning of the Treaty in the first place – at least not one that would reconcile the intentions and understandings of all the parties involved in its creation and acceptance.⁶¹ In turn, this absence of a consensus among the Treaty's framers, drafters, and signatories on its intended interpretation makes it much harder for any claim to be made that an originalist approach to the Treaty would somehow produce a more neutral or authoritative interpretation of the document, let alone that it could solve the question of the Treaty's interpretation altogether.⁶²

A broad consensus of the Treaty's meaning had emerged by the close of the twentieth century (although there is still not absolute uniformity in its current interpretation), but this was despite rather than because of any effort to seek an originalist interpretation of its provisions. Originalism – and the irreconcilable challenges it presents to interpreting the Treaty – has been superseded by the emergence of the Principles of the Treaty, which have both complemented the text of the agreement, and helped give effect to its provisions in a social, cultural, and political environment that would probably have been inconceivable to the creators and endorsers of the Treaty.⁶³

As much as later interpretations of a constitutional text potentially subvert its original meaning, there is a correlative risk that adherence to originalism as a presumably authoritative means of interpreting texts such as the Treaty subverts subsequent efforts to enable those texts to serve the evolving circumstances that affect the parties bound by it. And in the case of the Treaty of Waitangi, an originalist approach would more likely exacerbate the deficiencies of the text of the Treaty, rather than ameliorate them.

Notes

- ¹ Jock Brookfield, “The Treaty of Waitangi, The Constitution and the Future,” *British Review of New Zealand Studies* 18 (1998): 4-19; Geoffrey Palmer, “Māori, the Treaty and the Constitution,” *Māori Law Review* (June 2013): 2-10; Geoffrey Palmer and Andrew Butler, *A Constitution for Aotearoa New Zealand* (Wellington: Victoria University Press, 2016); Matthew S. R. Palmer, *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Wellington: Victoria University Press, 2008), 297-348.
- ² Te Puni Kōkiri, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri: Wellington, 2002), 78.
- ³ Andrew Sharp, *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand Since the 1970s*, second ed. (Auckland: Oxford University Press, 1997), 167-68.
- ⁴ *New Zealand Maori Council v Attorney General* (“Broadcasting Assets” case) [1994] 1 NZLR 513 PC, 517.
- ⁵ Palmer, *The Treaty of Waitangi in New Zealand’s Law and Constitution*, 124-25; Sharp, *Justice and the Māori*, 168-170.
- ⁶ Palmer and Butler, *A Constitution for Aotearoa New Zealand*, 154-57.
- ⁷ The most thorough attempt to recover the intent of the Treaty’s drafters is Edwin Fletcher, “A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi” (PhD thesis, University of Auckland, 2014).
- ⁸ Margaret Mutu, “Constitutional Intentions: The Treaty Texts,” in *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, ed. Malcolm Mulholland and Veronica Tawhai (Wellington: Huia Publishers, 2010), 13-10; Palmer and Butler, *A Constitution for Aotearoa New Zealand*; Palmer, *The Treaty of Waitangi in New Zealand’s Law and Constitution*, 351-365.
- ⁹ As an example, see *New Zealand Maori Council v Attorney General* (“Broadcasting Assets” case) [1994] 1 NZLR 513 PC, 517.
- ¹⁰ Fletcher, *A Praiseworthy Device for Amusing and Pacifying Savages?* xiv-xv.
- ¹¹ Paul Brest, “The Misconceived Quest for the Original Understanding,” *Boston University Law Review* 60 (1980): 204.
- ¹² Jeffrey Goldsworthy, “Originalism in Constitutional Interpretation,” *Federal Law Review* 25 (1997): 8; Keith E. Whittington, “The New Originalism,” *The Georgetown Journal of Law and Public Policy* 2 (2004): 599.
- ¹³ Peter B. Maxwell, *On the Interpretation of Statutes*, sixth ed. (London: Sweet and Maxwell, 1920), 1.
- ¹⁴ The issue of constitutions vs statutes is dealt with in John F. Manning, “The Eleventh Amendment and the Reading of Precise Constitutional Texts,” *The Yale Law Journal* 113 (June 2004): 1695-1700.
- ¹⁵ Joseph Story, *Commentaries on the Constitution of the United States*, vol. 2 (Boston: Little, Brown and Co., 1858), 191.
- ¹⁶ Ruth M. Ross, “Te Tiriti o Waitangi: Texts and Translations,” *New Zealand Journal of History* 6 (1972): 154.
- ¹⁷ Jeb Rubenfeld, “The Moment and the Millennium,” *The George Washington Law Review* 66 (June/August 1997-1998): 1103.
- ¹⁸ Carl H. Esbeck, “Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation,” *Utah Law Review* 2 (2011): 490.
- ¹⁹ Lawrence B. Solum, “What is Originalism: The Evolution of Contemporary Originalist Theory,” in *The Challenge of Originalism: Theories of Constitutional Interpretation*, ed. Grant Huscroft and Bradle W. Miller (Cambridge: Cambridge University Press, 2011), 12.
- ²⁰ Solum, “What is Originalism,” 23.
- ²¹ David A. Strauss, “Common Law Constitutional Interpretation,” *The University of Chicago Law Review* 63 (Summer 1996): 877.
- ²² William Baude, “Is Originalism Our Law?” *Columbia Law Review* 115 (2015): 2355.
- ²³ Whittington, “The New Originalism,” 599.

- ²⁴ Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty. Report on Stage One of the Te Paparahi o Te Raki Inquiry*, Wai-1040 (Wellington: Waitangi Tribunal, 2014), 447-484. The quotation is from Erima Henare, 482.
- ²⁵ Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford: Oxford University Press, 2011), 13-14; Mark Hickford, "Interpreting the Treaty: Questions of Native Title, Territorial Government and Searching for Constitutional Histories," in *After the Treaty: The Settler State, Race Relations and the Exercise of Power in Colonial New Zealand*, ed. Brad Patterson, Richard Hill and Kathryn Patterson (Wellington: Steele Roberts, 2016), 92-131. This specific example is discussed in "Interpreting the Treaty," 99-100.
- ²⁶ Whittington, "The New Originalism," 610.
- ²⁷ John B. Gates and Glenn A. Phelps, "Intentionalism in Constitutional Opinions," *Political Research Quarterly* 49 (June 1996): 245.
- ²⁸ Ilan Wurman, "The Original Understanding of Constitutional Legitimacy," *Brigham Young University Law Review* 4 (2015): 819.
- ²⁹ Cass R. Sunstein, "Five Theses on Originalism," *Harvard Journal of Law and Public Policy* 19 (1995): 311.
- ³⁰ Larry Alexander, "Simple-Minded Originalism," in *The Challenge of Originalism*, ed. Huscroft and Miller, 90.
- ³¹ Goldsworthy, "Originalism in Constitutional Interpretation," 10.
- ³² Whittington, "The New Originalism," 605; Larry G. Simon, "The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?" *California Law Review* 73 (1985): 1483; David Lyon, "Constitutional Interpretation and Original Meaning," *Social Philosophy & Policy* 4 (Summer 1986): 77.
- ³³ Frank H. Easterbrook, "Textualism and the Dead Hand," *The George Washington Law Review* 66 (1997-1998): 1119.
- ³⁴ An example of these approaches playing out is dealt with in Goldsworthy, "Originalism in Constitutional Interpretation," 1-4.
- ³⁵ Whittington, "The New Originalism," 601.
- ³⁶ Simon, "The Authority of the Framers of the Constitution," 1482.
- ³⁷ Richard R. Baxter, "International Law in 'Her Infinity Variety,'" *International and Comparative Law Quarterly* 29 (1980): 549-566.
- ³⁸ These are the originalist principles expressed in Maxwell, *On the Interpretation of Statutes*, 1.
- ³⁹ For this section, the source of the Treaty's text in English and Māori, and its back-translation into English is Ian Hugh Kawharu, "Appendix," in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, ed. Ian Hugh Kawharu (Auckland: Oxford University Press, 1989), 316-21.
- ⁴⁰ As in the line for the Lord's Prayer, *Nou hoki te rangatira-tanga*, ("Thine is the kingdom"), Luke 23, 42. See Bruce Biggs, "Humpty-Dumpty and the Treaty of Waitangi," in *Waitangi*, ed. Kawharu, 310. Also see Roger Maaka and Augie Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa," in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton and Will Sanders (Melbourne: Cambridge University Press, 2002), 90.
- ⁴¹ Story, *Commentaries*, 191.
- ⁴² A more detailed discussion of this correspondence can be found in Paul Moon, *Te Ara Ki Te Tiriti: The Path to the Treaty of Waitangi* (Auckland: David Ling Publishing, 2002), chap. 4.
- ⁴³ James Stephen to Henry Labouchere, 15 March 1839, in *Speeches and Documents on New Zealand History*, ed. W. David McIntyre and W. James Gardiner (Oxford: Clarendon Press, 1971), 8-10; James Stephen to Alexander Y. Spearman, 13 June 1839, in *Great Britain Parliamentary Papers*, 33 (Shannon: Irish University Press, 1970), 33.
- ⁴⁴ Normanby to the Attorney General, 30 May 1839, in *Historical Records of New Zealand*, vol. 1, ed. Robert McNab (Wellington: Government Printer, 1908), 739-40.
- ⁴⁵ George J. Pennington to James Stephen, 22 June 1839, in *Great Britain Parliamentary Papers*, vol. 3 (Shannon: Irish University Press, 1970), 85-90; Treasury Minute, 19 July 1839, in *Great Britain Parliamentary Papers*, vol. 3, (Shannon: Irish University Press, 1970), 34-35.
- ⁴⁶ Kenneth J. Keith, "The Treaty of Waitangi in the Courts," *New Zealand Universities Law Review* 14 (June 1990): 39.

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- ⁴⁷ For this section, the source of Normanby's instructions is Normanby to William Hobson, 14 August 1839, in *Great Britain Parliamentary Papers*, vol. 3 (Shannon: Irish University Press, 1970), 85-90, although the orders were written by James Stephen, the permanent Undersecretary of the Colonial Office. See David V. Williams, *'Te Kooti Tango Whenua': The Native Land Court 1864-1909* (Wellington: Huia Publishing, 1999), 360.
- ⁴⁸ To the extent that the Waitangi Tribunal suggested that the Instructions and the Treaty be read together. See Waitangi Tribunal, *Muriwhenua Land Report 1997* (Wellington: GP Publications, 1997), 11.
- ⁴⁹ Mark Hickford, "Interpreting the Treaty: Questions of Native Title, Territorial Government and Searching for Constitutional Histories," in *After the Treaty*, ed. Patterson, Hill and Patterson, 92-131, at 96-102.
- ⁵⁰ William Swainson to James Stephen, 27 December 1842, in Edward Sweetman, *The Unsigned Treaty* (Melbourne: Arrow Printery, 1939), 190-91.
- ⁵¹ Wurman, "The Original Understanding of Constitutional Legitimacy," 819.
- ⁵² This is detailed in Paul Moon, "The Influence of 'Benthamite' Philosophies on British Colonial Policy on New Zealand in the Era of the Treaty of Waitangi," *The Journal of Imperial and Commonwealth History* 43 (2015): 367-86. See Jeremy Bentham, *Leading Principles of a Constitutional Code for Any State*, London, 1823, in *Bentham's Political Thought*, ed. Bhikhu Parekh (New York: Barnes and Noble, 1973), 203.
- ⁵³ John S. Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (New York: New York University Press, 1956), 28; John M. Ward, *Colonial Self-Government: The British Experience, 1759-1856* (London: Macmillan, 1976), 108.
- ⁵⁴ John G. A. Pocock, "The Treaty Between Histories," in *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary*, ed. Andrew Sharp and Paul McHugh (Wellington: Bridget Williams Books, 2001), 79-81, 84, 89; David Williams, "Myths, National Origins, Common Law and the Waitangi Tribunal," *Murdoch University Electronic Journal of Law* 11, no. 4 (2004): n.p.; Merete Borch, "Rethinking the Origins of Terra Nullius," in *Australian Historical Studies* 32, no. 117 (2001): 222-39; Paul G. McHugh, "Law, History and the Treaty of Waitangi," *New Zealand Journal of History* 31, no. 1 (1997): 38-57; Paul G. McHugh, "The Aboriginal Rights of the New Zealand Maori at Common Law" (PhD thesis, University of Cambridge, Cambridge, 1988), 40-61.
- ⁵⁵ Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 2010), 24-44.
- ⁵⁶ William Hobson to Normanby, 17 February 1840, in *Great Britain Parliamentary Papers*, vol. 3 (Shannon: Irish University Press, 1970), 11.
- ⁵⁷ William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington: George Didsbury, 1890), 17.
- ⁵⁸ Esbeck, "Uses and Abuses of Textualism," 490; Solum, "What is Originalism," 12, 23.
- ⁵⁹ Normanby to William Hobson, 14 August 1839, 85-90.
- ⁶⁰ For statements of opposition, see Dandeson Coates, *The New Zealanders and their Lands* (London: Hatchards, 1844), 20; for statements of support, see Colenso, *The Authentic and Genuine History*, 26.
- ⁶¹ Recovering the original meaning of the document is of course the goal of originalism: see Whittington, "The New Originalism," 610.
- ⁶² Gates and Phelps, "Intentionalism in Constitutional Opinions," 245; Wurman, "The Original Understanding of Constitutional Legitimacy," 819.
- ⁶³ Richard S. Hill, *Maori and the State: Crown-Maori Relations in New Zealand/Aotearoa, 1950-2000* (Wellington: Victoria University Press, 2009), 237-40; Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (Wellington: Department of Justice, 1989) 1-16.