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TOWARD MUTUAL RECOGNITION: *AN INVESTIGATION OF ORAL TRADITION EVIDENCE IN THE UNITED STATES AND CANADA*

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ABSTRACT

United States ("U.S.") courts have long failed to recognize the value of oral traditional evidence ("OTE") in the law. Yet, for Indigenous peoples, OTE forms the basis of many of their claims to place, property, and political power. In Canada, courts must examine Indigenous OTE on "equal footing" with other forms of admissable evidence. While legal scholars have suggested applying Canadian precedent to U.S. law regarding OTE, scholarship has generally failed to

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critically examine the underlying ethos of settler courts as a barrier to OTE admission and usefulness. This essay uses the work of political philosopher, James Tully, to examine OTE not just as evidence, but as an exersize of Indigenous self-determination. By recognizing the inherent political nature of OTE, U.S. courts may expand on Canadian law to build a "just relationship" with Indigenous peoples.

INTRODUCTION

> *In the days of the animal people, the Columbia River used to flow through the Grand Coulee. Coyote had a big steamboat then . . . Coyote cut a hole through the place where Coulee Dam is now, which caused the river to leave its old channel and flow through its present one. Coyote's steamboat was left in the dry channel. Jack Rabbit laughed at Coyote and was turned into a rock. You can see him sitting there today, at the left of Steamboat Rock.*[1]

In the United States ("U.S."), Indigenous stories introduced as evidence in courts are considered oral tradition evidence. Oral tradition evidence includes both "oral histories" and "oral traditions."[2] Oral histories are stories which were told, occurred, or reflected observations, within the lifetime of the listener.[3] For example, an elder's account of a tribe's perspective during treaty signing is oral history. Oral traditions are stories passed down through many generations, often to the extent that the original storyteller is unknown.[4] Origin stories, like those of Coyote in the days of the animal people, are considered oral traditions. Legal scholars use the term "oral tradition evidence" ("OTE") as an umbrella term to encompass "all oral sources unique to non-literate societies."[5] This essay adopts this umbrella definition of "oral tradition evidence" and refers to "oral histories" or "oral traditions" specifically when needed.

This essay compares the U.S. courts' treatment of OTE with the Canadian Supreme Court's treatment of OTE in *Delgamuukw v. British*

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[1] Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1153 n.61 (D.Or. 2002), *aff'd and remanded*, 357 F.3d 962 (9th Cir. 2004), *opinion amended and superseded on denial of reh'g*, 367 F.3d 864 (9th Cir. 2004).
[2] Rachel Awan, *Native American Oral Traditional Evidence in American Courts: Reliable Evidence or Useless Myth?*, 118 PENN ST. L. REV. 697, 700 (2014).
[3] *Id.*
[4] *See id.*
[5] *Id.*

Columbia[6]. The U.S. legal system has long failed to recognize the value of OTE brought by Indigenous claimants. Even under the Native American Graves Protection and Repatriation Act ("NAGPRA")—where Congress commanded courts to consider OTE introduced for claims involving repatriation of Indigenous human remains and funerary objects—courts have struggled to recognize OTE as legitimate and reliable. This hostile ethos towards OTE amongst U.S. courts is salient in the two U.S. court cases, *Bonnichsen v U.S.*[7] and *Pueblo of Jemez* v. *U.S.*[8] On the other hand, in *Delgamuukw*, the Supreme Court of Canada held that OTE offered by Indigenous claimants to establish aboriginal title claims must be weighed equally with other evidence.[9]

In this essay, I draw on Indigenous and non-Indigenous scholars to investigate the benefits and concerns of adopting the *Delgamuukw* ruling to U.S. jurisprudence. Primarily, I consider the work of political philosopher James Tully, who argues that a "just relationship" between Indigenous and non-Indigenous peoples requires mutual recognition and a renewal of the treaty relationship.[10] Tully's dialogical method provides a useful lens for assessing the treatment of OTE in the U.S. against the treatment of OTE under *Delgamuukw*. I argue that applying *Delgamuukw*'s ruling to courts in the U.S. would move the U.S. legal system toward a more just relationship with Indigenous peoples. However, mutual recognition of OTE requires looking beyond the ruling in *Delgamuukw*.

This essay has three parts. In Part I, I provide a general overview of OTE in the U.S. courts, spotlighting OTE law under *Pueblo of Jemez*, NAGPRA, and *Bonnichsen*. In Part II, I provide an overview of *Delgamuukw*, including the origins of the case, the types of OTE introduced at trial, and the overall ruling regarding admissibility, reliability, and weight to be given to OTE. Finally, in Part III, I compare *Delgamuukw*'s ruling to U.S. cases and examine how legitimate recognition of OTE supports the decolonization of settler-court systems.

I. ORAL TRADITION EVIDENCE IN THE UNITED STATES

[6] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (Can.).
[7] Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).
[8] Pueblo of Jemez v. United States, 366 F. Supp. 3d 1234 (D.N.M. 2018).
[9] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 87 (Can.).
[10] JAMES TULLY, A JUST RELATIONSHIP BETWEEN ABORIGINAL AND NON-ABORIGINAL PEOPLES OF CANADA, IN
ABORIGINAL RIGHTS AND SELF-GOVERNMENT: THE CANADIAN AND MEXICAN EXPERIENCE IN NORTH AMERICAN PERSPECTIVE 39-71 (Curtis Cook & Juan D. Lindau eds., 2000).

Courts in the U.S. give little weight to OTE, even when statutes require the courts to hear the evidence. OTE is viewed as prohibited by the rule against hearsay because oral traditions are out-of-court statements that are offered for the truth of the matter asserted but which cannot be tested for reliability through cross-examination. If the OTE is admitted, it usually carries little weight on its own, and Indigenous claimants must bolster the evidence with corroborating evidence or present the evidence in another form. Under some statutes, like NAGPRA, courts are required to hear OTE and afford the evidence weight. However, cases interpreting NAGPRA hold that OTE may be given little weight, regardless of clear statutory language and intent.

A. *Fundamentals of Oral Tradition Evidence in United States Law*

First and foremost, admissibility of OTE clashes directly with the rule against hearsay. Hearsay is a statement used to prove the truth of the matter asserted in the statement.[11] The Federal Rules of Evidence provide that "hearsay is not admissible unless any of the following provides otherwise: a federal statute; [evidence] rules; or other rules prescribed by the Supreme Court."[12] The following cases illustrate how the rule against hearsay generally bars the admission of OTE in U.S. courts, with some narrow exceptions.

In *Pueblo of Jemez*, Jemez Pueblo filed suit under the Quiet Title Act, 28 U.S.C. § 2409a, seeking a judgement for Aboriginal Indian title.[13] Jemez Pueblo argued that they held the exclusive right to use, occupy, and possess a 99,300-acre parcel of lands located within the Valles Caldera National Preserve. Jemez Pueblo relied on OTE to establish their claim.[14] For example, Jemez Pueblo Tribal Council member, Paul Tosa, gave extensive testimony about historical activity in and around the Valles Caldera: "in the fall it was time to collect [medicinal herbs,] that's what grandpa told us[,] that the obsidian valley[,] the campsite at the entrance to the gate[,] that's where that big area was."[15] The U.S. argued that what Tosa learned "at his grandfather's knee" was inadmissible hearsay.[16] In response, Jemez Pueblo argued that OTE introduced by a lay witness was generally admissible, and

[11] FED. R. EVID. 801(C).
[12] FED. R. EVID. 802.
[13] *Pueblo of Jemez*, 366 F.Supp. 3d at 1238.
[14] *Id*.
[15] *Id*.
[16] *Id*.

alternatively, that OTE was admissible under several hearsay exceptions.[17]

The District Court found generally that OTE introduced by lay witnesses was inadmissible hearsay.[18] Additionally, OTE could only be introduced through specific hearsay exceptions pursuant to each enumerated exception's limited scope.[19] For example, the Court considered Rule 803(20), which permits hearsay to prove both historic property boundaries and general history matters when the matter is of "general interest" to the community.[20] The requirement of "general interest" meant that the oral tradition "reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality."[21] This condition is obviously difficult to establish for oral traditions held closely within clans or families. The Court found Rule 803(20) could not be used to introduce the majority of Jemez Pueblo's OTE because OTE was mostly legend and myth.[22]

More importantly, the Court ruled that Indigenous claimants could not use the 807 "Residual Hearsay" exception to admit OTE.[23] Rule 807 allows hearsay in "exceptional circumstances" if the statements are sufficiently trustworthy, offered as material fact, more probative than other evidence, and in the best interest of justice.[24] Thus, by categorically denying OTE under the residual hearsay exception, the Court severely limited the method by which claimants could admit OTE into the court record.

In its reasoning, the Court also broadly criticized the reliability and utility of Indigenous OTE: "The Court need not and should not shoehorn to get the oral history evidence in. *It is not worth much* (emphasis added). It is often legend or myth that defies scientific proof, or it is self-serving testimony that does little more than state Jemez Pueblo's position." [25] While *Pueblo of Jemez* does not reflect the views of all the U.S. courts on the value of OTE, this case neatly summarizes a

[17] *Id*. at 1240-47.
[18] *Id*. at 1258.
[19] *Id*. at 1266.
[20] *Id*. at 1244-45.
[21] *Id*. at 1245 (quoting 5 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §1598 (Chadbourn rev. 1974)).
[22] *Id*. at 1267.
[23] *Id*. at 1268.
[24] *Id*. at 1247-48. *See also* FED. R. EVID. 807.
[25] *Id*. at 1269.

prevailing pattern that casts OTE in an inferior light to evidence that is written, archeological, geological, or historical.

Even when Indigenous claimants can overcome the rule against hearsay, OTE is still given little weight in U.S. courts. In a foundational case, *Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States*, Indigenous claimants sought to use OTE to establish Indian title to their traditional lands.[26] The court held that OTE was "insufficient on its own to carry [the Tribe's] . . . burden of proof." [27] Moreover, the court reasoned that oral testimony detailing "facts and traditions" could not overcome other "documented and historical" evidence.[28] Courts in the U.S. continue to afford little weight to OTE unless the OTE is corroborated with other documented and historic evidence.[29] Thus, Indigenous litigants have also attempted to admit OTE into the courts' record by utilizing expert testimony or published documentation.

Indigenous claimants have found varying degrees of success by employing several of these strategies together. In the landmark case *United States v. Washington*, Judge Boldt relied heavily on the expert testimony of the late Dr. Barbara Lane.[30] Dr. Lane was a renowned anthropologist and Native fisheries advocate who participated as an expert witness in over forty tribal cases.[31]The Court not only relied on Dr. Lane's answers on the stand, but also relied on Dr. Lane's published works.[32] Based on her testimony, Judge Boldt ultimately ruled that the Tribes' "usual and accustomed" fishing grounds were protected by treaty.[33] Courts in the Ninth Circuit continue to recognize the importance of Dr. Lane's testimony in Judge Boldt's decision.[34] The *Washington* case shows how Indigenous claimants can find success with OTE when the witness corroborates their expert testimony with published reports.

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[26] Coos Bay, Lower Umpqua & Siuslaw Indian Tribes v. United States, 87 Ct. Cl. 143 (Ct. Cl. 1938).
[27] *Id.*at 153.
[28] *Id.* at 151. The "other documented evidence" was presented through *The Bureau of Ethnology's Handbook on American Indians*. I draw attention here to the Court's reliance on white anthropologists, while recognizing that the scope of this essay goes beyond comprehensive criticism of Western anthropology in the 1930s.
[29] *See* Pueblo of Jemez v. United States, 366 F. Supp. 3d 1234, 1255-56 (D.N.M. 2018) (summarizing several cases which required corroborating evidence to substantiate oral traditions).
[30] United States v. State of Wash., 384 F. Supp. 312, 350 (W.D. Wash. 1974).
[31] Mathew L.M. Fletcher, *Barbara Lane Walks On*, TURTLETALK (Jan. 21, 2014). https://turtletalk.blog/2014/01/21/barbara-lane-walks-on/.
[32] United States v. Washington, No. 19-01 RSM, 2021 WL 4264340, 6, n.11 (W.D. Wash. 2021).
[33] *Id.*at 1.
[34] *Id.* at 6.

In another case, *Zuni Tribe of New Mexico v. United States*, Zuni claimants successfully used OTE to establish Indian title over the land in Arizona and New Mexico.[35] The claimants used Zuni religious traditions to describe their ancient migration to their current homeland and proved their longstanding presence in the region.[36] The Court afforded much weight to OTE regarding Zuni history and religion because OTE was taken in context with other "objective evidence" like "expert testimony."[37] Moreover, expert testimony from Zuni Elders withstood objections by the defense that the expert opinions required corroborating evidence.[38] Legal scholars argue that the Zuni succeeded because they presented the OTE in a way that was palatable to the court.[39] The tribe introduced oral traditions alongside 1,300 pages of depositions and made sure every piece of OTE was valid, reliable, and consistent.[40]

Although *Washington* and *Zuni Tribe of New Mexico* are successful stories for the Indigenous litigants involved in the cases, these cases are outliers. The litigants in *Washington* succeeded due to the masterfully articulated testimony of Dr. Lane, and the litigants in *Zuni Tribe of New Mexico* succeeded because their OTE testimony was corroborated with thousands of pages of documentation. Not all Indigenous claimants can likewise gather sufficient evidence to present a corroborated and consistent body of evidence. When courts do admit OTE, the courts generally choose to discredit the evidence.[41] Thus, in surveying the overall terrain of OTE, it is important to recognize *Washington* and *Zuni Tribe of New Mexico* as unique exceptions to the overall body of law regarding the admissibility of OTE and the weight courts accord to OTE.

B. *Oral Tradition Evidence Under NAGPRA*

NAGPRA provides statutory authority for Indigenous peoples to use oral tradition evidence when making claims to repatriate human remains and funerary objects. The language, legislative history, and

[35] Zuni Tribe of New Mexico v. United States, 12 Ct. Cl. 607 (Ct. C. 1987).
[36] *Id.* at 616-17.
[37] *Id.* at 616, n.12.
[38] *Id.* at 608, n.1.
[39] Awan, *supra*, note 2, at 712-14.
[40] *Id. See also* Cathay Y. N. Smith, *Oral Tradition and the Kennewick Man*, 126 YALE L.J. FORUM 216, 224-27 (2016) (defining (1) validity as conformity with other documented evidence in the record, (2) reliability as internal conformity with the declarant's prior statements, and (3) consistency as conformity with other experts' testimony).
[41] *See* Pueblo of Jemez v. United States, 366 F. Supp. 3d 1234, 1252-55 (D.N.M. 2018).

procedural infrastructure of NAGPRA all support the admissibility and reliability of OTE.

Under NAGPRA, federal agencies and museums must return human remains and funerary objects to Native American tribes and Native Hawaiian organizations if the tribe or organization can establish a cultural affiliation with the remains.[42] In Section 3005, the drafters clarify how claimants can establish cultural affiliation: "Human remains and funerary objects shall be expeditiously returned where the request[or] case show[s] cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, *oral traditional*, historical, or other relevant information (emphasis added) . . ." [43]Textually, the NAGPRA drafters explicitly listed the use of OTE randomly amongst scientific and written forms of evidence. This signifies that courts should weigh OTE equally alongside other forms of evidence.

This reading of NAGPRA is supported by the Act's legislative history. In the Senate, the Select Committee on Indian Affairs emphasized that the cultural affiliation requirement was there "to ensure that the claimant [had] a reasonable connection with the materials," to recognize how "extremely difficult, unfair, or even impossible" it would be for claimants to establish "absolute continuity" with remains and funerary objects.[44] Moreover, prehistoric remains should not be denied repatriation because of "reasonable gaps" in the record, if the "totality of the circumstances and evidence" supported a finding of cultural affiliation.[45]

The process for review under NAGPRA also supports the use of OTE. When an issue regarding repatriation arises between parties, agencies, museums, and claimants rely on a neutral advisory review committee[46] to determine the best outcome for the remains or funerary objects.[47] Committee members serve without pay.[48] Furthermore, while the review committee is advisory, agencies that decline to follow committee recommendations must give a "cogent explanation" for their

[42] 25 U.S.C. § 3005(a)(1).
[43] 25 U.S. Code § 3005 (a)(4).
[44] S. Rep. No. 101-473, at 6 (1990).
[45] *Id*.
[46] 25 U.S. Code § 3006 (b)(1).
[47] *Id.* § 3006 (c).
[48] *Id*. § 3006 (b)(4).

decision to avoid arbitrary and capricious review.[49] Thus, the committee's fair review of Indigenous OTE for NAGPRA claims at least imposes a duty to explain for potential future decisions contradicting the committee's fact findings. Many Indigenous claimants have used OTE under NAGPRA to successfully repatriate Indigenous remains and associated funerary objects.[50]

NAGPRA's treatment of OTE is not perfect. There are still over 116,000 non-affiliated human remains possessed by federal agencies and museums[51] and museums rely less on OTE than agencies or Indigenous litigants do to determine affiliation.[52] The Department of the Interior and Indigenous community leaders are currently drafting regulatory updates to specify that oral traditions are as "equally relevant" as other forms of evidence, and to clarify the NAGPRA process for establishing cultural affiliation.[53]

C. *Oral Tradition Evidence in Bonnichsen v. United States*

In *Bonnichsen* v. *United States*, the Ninth Circuit reviewed the reliability of OTE in the NAGPRA context. Despite NAGPRA's clear language and intent, *Bonnichsen* proved that NAGPRA cases were not immune from the U.S. courts' hostile ethos towards OTE.

In July 1996, passersby discovered a skull and other scattered bones in shallow waters near the Columbia River in Kennewick, Washington.[54] The remains were found on federal lands managed by the Army Corps of Engineers (the "Corps") and were promptly removed for

[49] *See generally* Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management, 455 F.Supp.2d 1207 (2006) (finding that the Bureau of Land Management's decision to deny repatriation of ancient prehistoric remains to the tribe was arbitrary and capricious because the Bureau didn't explain why it ruled against the decision of the review committee).

[50] NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE, ANNUAL REPORT TO CONGRESS (2020) (noting that as of 2020, Indigenous claimants have repatriated 62,000 human remains and over 1.5 million funerary objects under NAGPRA).

[51] *Id.*

[52] Jason Corcoran Roberts, *Unwinding Non-Native Control over Native America's Past: A Statistical Analysis of the Decisions to Return Native American Human Remains and Funerary Objects Under the Native American Graves Protection and Repatriation A,* 38 U. HAW. L. REV. 337, 401 (2016).

[53] Native American Graves Protection and Repatriation Regulations, Draft 43 C.F.R. §10 (proposed Jul. 8, 2021) (to be codified at 43 D.F.R. §10.3).

[54] Bonnichsen v. United States, 367 217 F.Supp.2d 1116, 1120 (D.Or. 2002).

examination.[55] Local anthropologists initially believed that the remains belonged to an early European settler, but subsequent radiocarbon dating found the bones to be between 8340 and 9200 years old.[56] The completeness and age of the "The Kennewick Man" attracted scientists, who began making arrangements to transfer the remains to the Smithsonian Museum for further study.[57] In response, a coalition of Tribes[58] ("the Tribes") voiced their concern for the desecration of "The Ancient One".[59] The Tribes demanded immediate reburial of "The Ancient One," who they believed to be their ancestor, and requested the Corps to repatriate the remains under NAGPRA.[60] After "minimal investigation," the Corps gave the remains to the Tribes and published a "Notice of Intent to Repatriate" pursuant to NAGPRA.[61]

The Plaintiffs, scientists led by Robert Bonnichsen, challenged the Corps' decision that the Tribes could not meet the statutory requirements to claim the Ancient One's remains.[62] In response to litigation, the Secretary of the Interior appointed an expert witness, Dr. Boxberger, to produce reports on the OTE of the tribal claimants.[63] The report included tribal narratives about how Coyote had altered the flow of the Columbia River from the Grand Coulee to its present course.[64] Other narratives discussed taking refuge on mountain tops during the great floods.[65] Dr. Boxberger corroborated these narratives with geological records establishing that the Tribes were present in the area when floods regularly inundated the region over 10,000 years ago.[66] However, the Court found that such narratives could not establish "shared group identity" between the Tribes and the people who lived there 10,000 years ago.[67]

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[55] *Id*.
[56] *Id*.
[57] *Id*. at 1121.
[58] *Id.* at 1121, n.8. (the tribes were the Confederated Tribes & Bands of the Yakama Indian Nation ("Yakama"), the Nez Perce Tribe of Idaho ("Nez Perce"), the Confederated Tribes of the Umatilla Indian Reservation ("Umatilla"),the Confederated Tribes of the Colville Reservation ("Colville"), and the Wanapam Band ("Wanapam")).
[59] *Id*. at 1121.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 1122.
[63] *Id*. 1151.
[64] *Id*. at 1153 n.61.
[65] *Id*. at 1154.
[66] *Id*. at 1153-54.
[67] *Id.* at 1154.

The Ninth Circuit, affirmed the ruling of the District Court and ruled in favor of the Plaintiffs.[68] The Ninth Circuit's ruling regarding oral tradition is worth quoting in full:

> The oral traditions relied upon by the Secretary's expert . . . entail some published accounts of Native American folk narratives from the Columbia Plateau region, and statements from individual tribal members. But we conclude that these accounts are just *not specific* . . . *reliable* . . . *or relevant* enough to show a significant relationship of the Tribal Claimants with Kennewick Man. Because oral accounts have been *inevitably changed* in context of transmission, because the traditions include *myths that cannot be considered as if factual histories*, because the *value of such accounts is limited* by *concerns of authenticity, reliability, and accuracy*, and because the record as a whole *does not show where historical fact ends and mythic tale begins*, we do not think that the oral traditions . . . were adequate to show the required significant relationship of the Kennewick Man's remains to the Tribal Claimants. As the district court observed, 8340 to 9200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions (emphasis added). [69]

The passage above reads as dicta because the holding in the case depended on whether the Tribes could prove cultural affiliation, not whether OTE was admissible. However, the Court was required to consider OTE to explain the reasoning for its holding. This reasoning flowed from the Court's ethos and has been perpetuated by more recent court rulings.[70]

The Ninth Circuit in *Bonnichsen* received "considerable help" from an *amicus curiae* brief submitted by white anthropologist, Dr. Andrei Simic.[71] Dr. Simic also submitted a brief to the court in *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management*.[72] Dr.

[68] Bonnichsen v. United States, 367 F.3d 864, 882 (9th Cir. 2004).
[69] *Id*. at 881-82.
[70] *See* discussion *supra* p. 58. of *Pueblo of Jemez*.
[71] *Bonnichsen*, 367 F.3d at 882, n.23. The late Dr. Simic was well versed in many areas of anthropology, but his expertise was the Balkans and Eastern Europe. *See In memoriam: anthropology professor Andrei Simic, 87*, USC NEWS (Feb. 16, 2018), https://news.usc.edu/136776/memoriam-anthropology-professor-andrei-simic-87/.
[72] *Fallon Paiute-Shoshone Tribe*, 455 F.Supp.2d 1207, 1209 (2006).

Simic's *amicus* brief from *Bonnichsen* is not in the public record,[73] but his brief from *Fallon Paiute-Shoshone Tribe* is in the public record. In his brief for *Fallon Paiute-Shoshone Tribe*, Dr. Simic equated oral traditions to myth, constantly in flux,[74] and argued that oral traditions may be useful for moral arguments, but that they are not useful for establishing historical fact.[75] While this may hold true for oral traditions generally, the same is not always true about Indigenous oral traditions.[76] In response to Dr. Simic's brief in *Bonichsenn,* the Haudenosaunee Tribe also submitted an *amicus curiae* brief.[77] The Haudenosaunee brief cited cases that held that oral traditions were credible as a valid historical tool.[78] The brief also described how NAGPRA's design does not require a strict burden of proving cultural affiliation and reiterated NAGPRA's pragmatic approach which accounts for gaps in the record. However, the Court ultimately excluded any mention of the Haudenosaunee brief in their holding.[79]

In 2015, DNA testing confirmed that the Ancient One was genetically "closely related" to contemporary Native Americans,[80] and in 2017, after more than 20 years of Tribal struggle, the Tribes laid the Ancient One to rest.[81]

The *Bonnichsen* case impacted the utility of OTE cases in several ways. First, the ruling shifted NAGPRA's lower OTE standard for proving cultural affiliation toward the more stringent standard which discounts the value of OTE in the face of other forms of evidence.

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[73] I searched both Westlaw and LexisNexis databases and could not access those files. Since *Bonnichsen* came before *Fallon Paiute-Shoshone Tribe*, and both briefs discuss the purported uselessness of oral tradition evidence, this essay assumes that the Court in *Bonnichsen* relied on a brief very similar to the one submitted in *Fallon Paiute-Shoshone Tribe*.

[74] Brief for Custred and Simic as Amicus Curiae at 1-6, *Fallon Paiute-Shoshone Tribe*, 455 F.Supp.2d 1207 (No. 3:04-cv-00466).

[75] *Id.* at 4.

[76] *See generally*, Patrick D. Nunn & Nicholas J. Reid, *Aboriginal Memories of Inundation of the Australian Coast Dating from More than 7000 Years Ago*, 47.1 AUSTL. GEOGRAPHER 11 (2016) (finding that Indigenous oral traditions have accurately been told for hundreds of generations spanning as much as 7,000 years).

[77] Brief of Amicus Curiae Haudenosaunee Standing Committee, *Bonnichsen*, 367 F.3d 864 (Nos. 02-35994, 02-35996), 2003 WL 22593879.

[78] *Id.* at 16 n.9.

[79] *Id.* at 10-14.

[80] Carl Zimmer, *New DNA Results Show Kennewick Man Was Native American*, N.Y. TIMES (Jun. 18, 2015), http://www.nytimes.com/2015/06/19/science/new-dna-results-show-kennewick-man-was-native-american.html.

[81] Kristi Paulus, *Kennewick Man Finally Buried By Local Tribes*, KEPR (Feb. 20, 2017), https://keprtv.com/news/local/kennewick-man-finally-buried-by-local-tribes.

Second, and relatedly, the ruling exposed court biases favoring the reliability of white, western methodologies over Indigenous methodologies. The Ninth Circuit awarded much weight to Dr. Simic's brief but failed to mention the Haudenosaunee Tribe's brief or discuss NAGPRA's cultural affiliation standard in their opinion. The Ninth Circuit's approach was problematic, suppressive, and inherently racist. Third, the *Bonnichsen* holding confuses future litigants. Like *Zuni Tribe of New Mexico*, the Tribal litigants in *Bonnichsen* presented evidence through expert testimony and corroborated OTE with geological and historical records. Additionally, like *Fallon Paiute-Shoshone Tribe*, the trial court in *Bonnichsen* gave deference to the NAGPRA review committee and agency's decision. Yet, the Tribes in *Bonnichsen* did not prevail. Indigenous claimants cannot prepare for cases involving OTE if they cannot predict how a court will weigh the evidence.

Bonnichsen stands as a bookend to U.S. courts' treatment of OTE. While NAGPRA sought to expand the utility of OTE, *Bonnichsen* demonstrated that U.S. courts will sustain a hostile ethos toward OTE. This ethos appears engrained in the traditions and worldviews of the practitioners of the courts, rather than something that is structural. The NAGPRA context illustrates how courts can utilize this ethos to narrow and limit statutory language and congressional intent to produce an outcome that suppresses Indigenous OTE and interests.

II. ORAL TRADITION EVIDENCE UNDER *DELGAMUUKW*

The hostile ethos toward Indigenous OTE is not unique to U.S. courts. Thus, it is valuable to examine how other nations have weighed OTE in their courts of law. In *Delgamuukw* v. *British Columbia*,[82] the Canadian Supreme Court examined OTE presented by Canada's Aboriginal peoples. The court in *Delgamuukw* explicitly recognized the role of OTE in Aboriginal cultures and carved out an exception to the general exclusion of OTE in Canadian law. On the other hand, OTE's utility under *Delgamuukw* is still limited, and the claims of the case remain unresolved. Thus, *Delgamuukw* stands as an analytical boundary for examining how far other courts are willing to go to recognize and rely on Indigenous OTE.

Delgamuukw followed a series of cases interpreting §35(1) of the Constitution Act of 1982. Under the Act, the Canadian government established that "the existing aboriginal and treaty rights of the aboriginal

[82] Delgamuukw v. British Columbia, [1997] S.C.R. 1010 (Can.).

peoples of Canada [were] hereby recognized and affirmed."[83] But what did "recognize" and "affirm" mean? Canadian courts began unpacking the Act's broad language with *R. v. Sparrow*,[84] followed by the *Van der Peet* Trilogy.[85] *Delgamuukw* built on these cases to further define the rights of Aboriginal peoples as they related to land claims and OTE.

The *Delgamuukw* case commenced when Gitksan and Wet'suwet'en hereditary chiefs claimed separate portions of 58,000 square kilometers of land in British Columbia under §35(1) of the Constitutional Act.[86] The claims originated as claims of "ownership" over territory to assert jurisdiction but transformed into claims for "aboriginal title."[87] In response, the province of British Columbia counterclaimed that the Gitksan and Wet'suwet'en had no right or interest in the land, and that any surviving interest in the land should result in compensation[88]. The trial court noted that, for the Gitksan and Wet'suwet'en to make claims for aboriginal rights over their territories, they needed to show that: (1) they and their ancestors were members of an organized society, (2) their society occupied the specific territory in question, (3) the occupation was exclusive, and (4) the occupation existed at the time sovereignty was asserted by England.[89]

At trial, the claimants introduced OTE to establish their continued occupation of their traditional lands.[90] The court heard evidence in the form of oral history, legends, genealogy, linguistics, archeology, anthropology, and geography over the course of 374 days.[91] Evidence also included physical indicators such as totem poles, House crests, regalia, and feast halls.[92] Of this evidence, the Court noted that feast halls were the "most significant evidence of spiritual connection between the Houses and their territory" because they were places where Houses would gather to (re)tell their stories of their "sacred connection" to their territories and make important decisions.[93]

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[83] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).
[84] R. v. Sparrow, [1990] S.C.R. 1075 (Can.).
[85] R. v. Van der Peet, [1996] S.C.R. 507 (Can.); R. v. N.T.C. Smokehouse Ltd., [1996] S.C.R. 672 (Can.); R. v. Gladstone, [1996] S.C.R. 723 (Can.).
[86] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 7 (Can.).
[87] *Id.*
[88] *Id.*
[89] *Id.* para. 21.
[90] *Id.* para. 13.
[91] *Id.* para. 5.
[92] *Id.* para.13-14.
[93] *Id.* para. 14.The trial court also recognized Canada's criminalization of feast hall gatherings which lasted until 1951.

As further proof of continued occupation, the Gitksan Houses introduced into evidence an *adaawk*—"a collection of sacred oral tradition about their ancestors, histories, and territories"—and the Wet'suwet'en Houses introduced a *kungax*—"a spiritual song or dance or performance which ties them to their land."[94] The *adaawk* was offered to prove the Gitksan's "historical use and occupation" of the land, and the *kungax* was offered to prove the "central significance" of the claimed lands to the Wet'suwet'en.[95] While the "form and content" of the *adaawk* and *kungax* differed, the court in *Delgamuukw* found that the differences were "not legally relevant" for the purpose of determining the utility of OTE at trial.[96] Further examination of the *adaawk* specifically provides insight into the OTE presented by the claimants.

The *adaawk*s encapsulate Gitksan political worldviews and are more than a mere collection of stories.[97] At the Feast Hall, the Chief of the host House recounts the *adaawk*, which may include the actions of ancestors, the relationships among different Houses, and the stories of spirits and animals relating to a House's territory.[98] The *adaawk* could involve the use of implements such as crests, which appear on poles, robes, regalia, and other cultural objects.[99] Furthermore, guest Houses may present their own *adaawk* to supplement the host House's *adaawk*.[100] Taken in context, the *adaawk* establishes the source of the Houses' political and cultural power. Scholars have characterized the *adaawk* as legal precedent which informs a House's later conduct.[101]

At the *Delgamuukw* trial, House leaders offered modified and shortened versions of their Houses' *adaawk*.[102] Additionally, the attorneys for the Gitksan and Wet'suwet'en led the story tellers through the testimony so they could translate to the court the role of the *adaawk*, the lessons it imparted on the listener, and the reasons their recounting established their House's connection to their traditional lands.[103] The attorneys urged the court to consider the historic and symbolic truths inlaid in the OTE.[104] Illustrating this point, one story involved the

[94] *Id.* para.13.
[95] *Id.* para. 94.
[96] *Id.* para. 93.
[97] Val Napoleon, *Delgamuukw: A Legal Straightjacket For Oral Histories,* 20 CAN. J. OF L. & SOC'Y 123, 126-28 (2005).
[98] *Id.*
[99] *Id.* at 127.
[100] *Id.* at 126-27.
[101] *Id.* at 128.
[102] *Id.* at 139.
[103] *Id.* at 137-49.
[104] *Id.* at 149-150.

destruction of a village by a large "supernatural" bear.[105] While the court would not have believed that a supernatural bear destroyed a village, the court could consider that the village was in fact destroyed.[106]

The trial judge afforded little weight to the *adaawk* and *kungax*, and ultimately ruled that the Gitksan and Wet'suwet'en could not establish a claim to the territories in question.[107] At the core of his ruling, the trial judge reasoned that it was impossible for the court to distinguish between the historic truths and mythologies of these oral histories.[108] Legal scholars have critisized this mutually exclusive approach, articulating that "truths" are a "cultural prejudice," which must be examined in light of their "context and nuance."[109] Oral cultures give strong weight to the spoken word, whereas settler courts do not, relying instead on the written word.[110] Additionally, truths articulated in the *adaawk* and *kungax* are powerful within the political context of the Houses recounting their *adaawk* or *kungax*. However, examined by an external system, the truth loses its intrinsic value.[111]

On appeal, the Supreme Court of Canada disapproved the trial judge's treatment of OTE. Typically, the trial judge is afforded deference in fact finding, even when the judge misapprehends the law which applies to the facts.[112] However, in *Delgamuukw*, the Supreme Court found that the trial court overlooked OTE as material evidence under the legal standard in *R. v. Van der Peet*.[113] Due to the factual complexities of the claims, the Supreme Court ordered the trial judge to conduct a new trial consistent with the Court's prior ruling in *Van der Peet.*[114]

In *Van der Peet*, the Supreme Court of Canada held the following:

> In determining whether an Aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the

[105] *Id.*
[106] *Id.*
[107] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 96 (Can.).
[108] *Id.* para. 97.
[109] Celia Haig-Brown, 16 *Creating Spaces: Testimonio, Impossible Knowledge, and Academe,* INT'L J. QUALITATIVE STUD. EDUC. 415, 417 (2003).
[110] *Id.*
[111] *Id.*
[112] *Delgamuukw*, 3 SCR 1010 para. 91.
[113] *Id.* para. 107.
[114] *Id.* para 108.

> special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in for example, a private law torts case.[115]

The Court in *Delgamuukw* found that consideration of OTE under *Van der Peet* had two general principles. First, "trial courts must approach the rules of evidence in light of the evidentiary difficulties [of litigating] aboriginal [rights issues]."[116] This principle is procedurally practical and allows Aboriginal claimants to introduce OTE into evidence. Aboriginal societies did not keep written records, and it would be "exceedingly difficult" for Aboriginal litigants to produce conclusive evidence of their traditions, customs, and practices without the use of OTE.[117] Second, "trial courts must interpret [OTE] in the same spirit" as other forms of evidence.[118] This second principle is substantive, forcing the courts to afford "due weight" to OTE introduced in court.[119] Specifically, the Supreme Court required trial courts to place OTE on "equal footing" with the types of historical evidence courts are familiar with, like historical documents.[120]

As a limiting principle, the *Delgamuukw* Court held that accommodating OTE "must be done in a manner which does not strain "the Canadian legal and constitutional structure.'"[121] The Supreme Court in *Delgamuukw* emphasized the new Canadian policy of reconciliation through the bridging of Aboriginal and non-Aboriginal cultures.[122] The Court proposed that "true reconciliation" places equal weight on both the perspectives of Aboriginal peoples and the perspectives of the common law.[123] While "reconciliation" on its face purports to bridge the political divide between Aboriginal peoples and the Canadian government, Aboriginal peoples remain leery of the term. Indigenous scholar, Larry

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[115] R. v. Van der Peet, [1996] S.C.R. 507 para. 68 (Can.).
[116] *Delgamuukw*, 3 SCR 1010 para. 82.
[117] *Id.* para. 83.
[118] *Id.* para 82.
[119] *Id.* para 84.
[120] *Id.* para. 87.
[121] *Id.* para. 82 (quoting R. v. Van der Peet, [1996] S.C.R. 507 para. 49 (Can.)).
[122] *Id.* para. 81 (*Van der Peet*, 2 S.C.R. 507 at para. 42).
[123] *Id.* para 81.

Chartrand, explains that "reconciliation" could be framed and applied to Aboriginal communities robustly, but Canadian courts have consistently construed and employed the term to limit the breadth of Aboriginal claims.[124]

Notwithstanding this limiting principle, the Court in *Delgamuukw* agreed that oral traditions have a far broader societal role in Aboriginal society tangential to the trial court's role of fact-finding.[125] OTE used to establish Aboriginal title are not only "repositories of historical knowledge" but also "expressions of values and morals . . . woven with history, legend, politics, and moral obligation."[126] Thus, while many features of OTE count against admissability under the traditional rules of evidence, the Court found that the laws of evidence should be adopted to accomidate Aboriginal OTE.[127]

While the Supreme Court of Canada ordered a new trial requiring a fresh review of the OTE admitted by the Gitksan and Wet'suwet'en, a second trial never came. Today, 25 years later, the case remains unresolved.[128] Critics have argued that the decision hardened the position of the federal and provincial governments instead of fostering fruitful negotiations with the First Nations.[129] Moreover, the Court in *Delgamuukw* framed the definition of "Aboriginal rights" too broadly, and never compelled the Canadian governments to change their positions.[130] The Canadian government has implemented interim economic measures and consultation procedures for development activities which take place on contested lands, but First Nations remain frustrated with the outcome.[131]

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[124] *See generally*, Larry Chartrand, *Mapping the Meaning of Reconciliation in Canada: Implications for Métis- Canada Memoranda of Understanding on Reconciliation Negotiations, in* JOHN BORROWS ET AL. BRAIDING LEGAL ORDERS: IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 83, 83-91(Ctr. for Int'l Governance Innovation, 2006).

[125] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 85 (Can.) (quoting *Report of the Royal Commission on Aboriginal Peoples*,1 [Looking Forward, Looking Back], [journal start page], 33. (1996), vol. 1 (*Looking Forward, Looking Back*) at p. 33).

[126] *Id.* para. 86 (Can.) (quoting Dickson J. In Kruger v. The Queen, 1 S.C.R. 104, 109 (1978)).

[127] *Id.* para. 86-87 (Can.).

[128] BRUCE ZIFF ET AL, A PROPERTY LAW READER: CASES, QUESTIONS, & COMMENTARY 415 (Toronto: Thomas Reuters, 4th ed. 2016).

[129] *See generally*, Gurston Dacks, *British Columbia after the Delgamuukw Decision: Land Claims and Other Processes*, 28 CANADIAN PUB. POL'Y, 239–55 (2002).

[130] *Id.*

[131] *Id.*

III. COMPARATIVE ANALYSIS OF ORAL TRADITION EVIDENCE IN THE UNITED STATES AND CANADA

Equipped with a summary of OTE under U.S. and Canadian jurisprudence, I turn here to investigate how applying the *Delgamuukw*'s ruling in the U.S. would foster a "just relationship" between Indigenous peoples and U.S. legal institutions. To conduct this investigation, I first define "just relationship" by relying on scholarship by Canadian political philosopher, James Tully. Among other factors, a just relationship requires "mutual recognition" between Indigenous peoples and the settler government. Next, I examine how applying *Delgamuukw* to *Bonnichsen* would have likely resulted in a different outcome: moving the U.S. Indigenous-settler relationship toward a more just and equal relationship. Finally, I assess the legal limits of *Delgamuukw* as a barrier that impedes the development of a more just and equal relationship between Indigenous people and U.S. legal institutions.

A. *Mutual Recognition: Equality, Coexistence, and Self-Governance*

In his essay, *A Just Relationship Between Aboriginal and Non-Aboriginal People in Canada*, Tully argued that there have been two types of relationships between Indigenous peoples and settler societies in the Americas. The first is a treaty relationship: this political relationship shaped Indigenous-settler relations at the time of first contact and has evolved over time. Generally, in a treaty relationship, Indigenous and non-indigenous people recognize each other as equal, coexisting, and self-governing. [132] The second is a colonial relationship: the colonial relationship emerged as settler populations expanded into Indigenous territory and has since dominated the Indigenous-settler relationship. The colonial relationship treats Indigenous peoples as inferior to settler governments.[133] Tully argued that a just relationship between Indigenous people and settler governments requires a renewal of the treaty relationship.[134]

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[132] JAMES TULLY, A JUST RELATIONSHIP BETWEEN ABORIGINAL AND NON-ABORIGINAL PEOPLES OF CANADA, IN ABORIGINAL RIGHTS AND SELF-GOVERNMENT: THE CANADIAN AND MEXICAN EXPERIENCE IN NORTH AMERICAN PERSPECTIVE 41 (Curtis Cook & Juan D. Lindau eds., McGill-Queen's Univ. Press 2000).
[133] *Id.* at 41-42.
[134] *Id.* at 43.

A treaty relationship begins with "mutual recognition".[135] Tully explains that typically, recognition of the other is habitual and unreasoned. In the Indigenous-settler context, settlers have recognized Indigenous peoples in an inferior and subordinate light against the backdrop of colonial histories. Alternatively, mutual recognition requires us to free ourselves from deep-seeded prejudices to recognize Indigenous peoples and settler societies as (1) equal, (2) coexisting, and (3) self-governing.[136]

Equality, Tully emphasizes, is exemplified in the Canadian constitution's efforts to recognize women as equal to men after centuries of subjugation. Similarly, Indigenous peoples cannot be viewed as lower and subordinate to non-Indigenous peoples, but rather as contemporary and equal.[137] Additionally, coexistence seeks to abandon efforts to assimilate and erase Indigenous peoples. Coexistence promotes and maintains the cultural and political differences of Indigenous and settler societies.[138]

Self-governance, the final element of Tully's mutual recognition, recognizes Indigenous peoples' ability to manage their own affairs within the Indigenous-settler relationship. [139] Recognition of an inherent right to self-govern cultivates a nation-to-nation relationship.[140] Settler societies struggle with this notion because settlers have perceived fostering a nation-to-nation relationship with Indigenous societies as a threat to their legitimacy. Consequently, settler governments negotiate land claims and self-governance as a "package of minority rights" which flows from the dominant settler government.[141] This perspective must change, so that Indigenous peoples are viewed as being in a relationship *with* rather than *within* the federal-provincial or federal-state confederation.[142]

B. *Investigating Mutual Recognition and Delgamuukw as Alternatives to Bonnichsen.*

Tully's elements of "mutual recognition" can be used to analyze how *U.S.* v. *Bonnichsen* would have fared if the Ninth Circuit applied

[135] *Id.* at 44.
[136] *Id.*
[137] *Id.* at 43.
[138] *Id.* at 45-47.
[139] *Id.* at 46-47.
[140] *Id.* at 50.
[141] *Id.* at 52.
[142] *Id.* at 53.

Delgamuukw's holding instead. The first principle of the *Van der Peet* analysis—equiring courts to approach evidence rules considering OTE—would not have affected *Bonnichsen*. In *Bonnichsen*, NAGPRA permitted the claimants to admit OTE.[143] In non-NAGPRA cases however, this standard would benefit claimants by allowing them to by-pass the hearsay rule.

Conversely, the second principle of *Van der Peet*—requiring courts to weigh oral tradition evidence in the "same spirit" as other forms of evidence—would have likely changed the outcome in *Bonnichsen*. The "same spirit" principle would have required the Ninth Circuit to consider the Tribes' OTE on "equal footing" with the other evidence in the record. The court in *Bonnichsen* expressly labeled the Tribes oral traditions as mythical, non-factual, and lacking authenticity, reliability, and accuracy. Moreover, the court relied heavily on the *amicus curiae* briefs of white anthropologists while ignoring the Tribe's brief. This approach placed the OTE on unequal footing with other forms of evidence, and ultimately persuaded the court that a cultural affiliation did not exist between the Tribes and The Ancient One. Applying a "same spirit" principle would have forced the court to wrestle with the analytical gap between their opinion and the common law requirement, perhaps pushing the court to reflect on their own deep seeded prejudices. Thus, the court could have reached a different conclusion.

Through Tully's lens of mutual recognition, applying *Delgamuukw* to *Bonnichsen* would still have failed to foster Indigenous self-governance. Even under *Delgamuukw*, Indigenous litigants must pluck their oral traditions from their traditional contexts and expose their oral traditions to the scrutiny of settler courts. The *Delgamuukw* holding's tension with a nation-to-nation form of Indigenous self-government is not circumstantial. The court expressly stated that accommodating OTE under the *Van der Peet* principles "must be done in a manner which does not strain the Canadian legal and constitutional structure."[144] By denying aboriginal litigants the opportunity to investigate the foundations of Canada's political autonomy, which was built on a colonial relationship, the Canadian Supreme Court avoided the difficult analysis necessary for fostering a just relationship.

For example, consider the Gitksan and Wet'suwet'en's sharing of their *adaawk* and *kungax* with the Court. In the feast halls, these oral traditions laid the political and historical foundations for the different Houses to guide ensuing relations. In contrast, in the settler court, the

[143] *See* discussion *supra* Part I.C.
[144] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 para. 82 (Can.).

adaawk and *kungax* were relegated to simple tools for fact-finding. A similar demotion occurred when the Tribes in *Bonnichsen* shared their stories of Coyote to advance their claim to the Ancient One. Thus, while the court in *Delgamuukw* expressed the need to consider OTE within its cultural and political contexts, the court still stripped the oral traditions of their political roles and powers.

That said, the *Gitksan* and *Wet'suwet'en* chose to share their oral traditions with the court. This was a reflected and deliberate choice. Indigenous legal scholar, John Borrows, reframed the presentation of the *adaawk* in *Delgamuukw* through a self-governance lens:

> "Imagine . . . here is someone (referring to Chief Antgulilibix's (Ms. Mary Johnson) recounting of her House's *adaawk*) who's robes are as old or older than the common law robes of the judge who is sitting there with his symbols and the ceremony he's presiding over. So, there is a sort of bi-juridical happening."[145]

Borrow's reflection of Indigenous oral traditions provides a snapshot of a nation-to-nation relationship by describing the encounter between House leaders and court judges and administrators in a neutral space, rather than in a court room. In this space, the judges bring their symbols such as their robes and gavel, while the Chiefs have their robes and House crests. The encounter invokes an image of treaty negotiation. Furthermore, the encounter need not be limited by an irrational fear of straining Canada's legal and constitutional foundations. Oral traditions can fulfill their usual role within Indigenous traditions, and negotiations can ensue with a mutual recognition of the political autonomy of each party.

I believe that this bi-judiciary approach to oral traditions can be actualized and justified through both Indigenous and settler lenses. Scholars have argued that sharing OTE can strengthen the field of comparative political theory.[146] In the legal context, this means that Courts should value participating in, rather than scrutinizing, the practice of sharing oral traditions. Thus, the U.S. judiciary can adopt mutual recognition to foster critical and sincere conversations with Indigenous litigants.

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[145] John Borrows, Lecture 7: Aboriginal Title – Delgamuukw, YOUTUBE, (Oct. 5, 2015), https://www.youtube.com/watch?v=uks0XS1l51o.

[146] *See generally*, Toby Rollo, *Back to the Rough Ground; Textual, oral and enactive meaning in comparative political theory*, 20(3) EUROPEAN J. OF POL. THEORY, 379–397 (2021) (arguing that contemporary political theory is the practice of viewing politics through intercultural dialog between diverse systems of political thought).

CONCLUSION

Indigenous peoples continue to utilize oral traditions and oral histories within their cultural contexts, but OTE's utility in U.S. and Canadian courts remains minimal. The Canadian Supreme Court's holding in *Delgamuukw* provides a framework for expanded recognition of OTE, but even the Canadian framework falls far short from a genuine legal pluralism. Indigenous peoples must use their own oral traditions and stories to (re)imagine strategies to convey OTE to non-Indigenous courts. In this way, OTE can maintain its inherent political and cultural value while also fostering cross-cultural dialog towards mutual recognition.