HISTORICAL CONTEXT AND THE SURVIVAL OF THE JAY TREATY FREE PASSAGE RIGHT: A RESPONSE TO MARCIA YABLON-ZUG

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> "In the face of these vast changes in the scheme of life [since the passage of the Jay Treaty a century and a half ago], the right of free passage guaranteed to the Indians has persevered. Perhaps the survival of this privilege is an anachronism, but to the Indian tribes it represents one of the last remaining jewels of a lost treasure."
>
> - L, Paul Winings, General Counsel,
> Immigration & Naturalization Services[2]

I. INTRODUCTION

Crossing from Canada into the United States by land or inland waterway became tougher on June 1, 2009.[3] As of that date, in accordance with the Western Hemisphere Travel Initiative,[4] all nonimmigrant aliens arriving from Canada must present a valid passport to gain entry into the United States.[5] This new rule did

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2. Marian L. Smith, *The INS and the Singular Status of North American Indians*, 21 AM. INDIAN CULTURE & RESEARCH J. 131, 146 (1997) (*quoting* Memorandum from L. Paul Winings, General Counsel, Immigration & Naturalization Service, to Commissioner Ugo Carusi (July 14, 1945)) [hereinafter Winings Memorandum].

3. *See generally* Documents Required for Travelers Departing from or Arriving in the United States at Sea and Land Ports-of-Entry from within the Western Hemisphere, Final Rule and Notice, 73 Fed. Reg. 18,384 (Apr. 3, 2008) [hereinafter WHTI Regs].

4. The WHTI is "a joint Department of Homeland Security (DHS) and Department of State (DOS) plan . . . to implement section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004 . . . ." *Id.* at 18,385 (citing Pub. L. 108-458, as amended, 118 Stat. 3638 (Dec. 17, 2004)).

5. *Id.* at 18,385.

not sit well in Indian[6] Country.[7] Nearly two dozen tribes argued in comments to the U.S. Department of Homeland Security and Department of State that the new restrictions would violate their right "to unrestricted passage across the U.S.-Canadian border."[8] Soon after the ruling, Seneca Nation of Indians President Barry Snyder, Sr. said his tribe would work to protect its right to pass freely into Canada and back, as was promised to it long ago.[9]

The right to which President Snyder and others refer is the so-called "Indian free passage right," which has its roots in a 1794 treaty between the United States and Great Britain,[10] commonly known as the Jay Treaty.[11] Although no tribes were party to the treaty, its drafters saw fit to secure the rights of Indian tribes along the border to cross between the United States and Great Britain's remaining North American territories.[12]

Almost from the beginning, this Indian free passage right has been a subject of controversy. An explanatory article was added to the treaty in 1796[13] to clear up British concerns that subsequent treaties between the United States and Indian tribes required that British traders seek permission to enter Indian lands.[14] After the War of 1812, the United States and Great Britain agreed to restore to the Indians any rights under the treaty that had been abrogated during the war.[15] In the Twentieth and Twenty-First Centuries, the Indian free passage right has taken

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6. The terms "American Indian" and "Indian" will be used in this article when referring generally to the indigenous people and tribes of North America. Although the terms "Native American" and "Native" are commonly used in the United States, and the preferred term in Canada is "First Nations," most of the treaty, statutory, and regulatory law concerning this particular issue uses "American Indian" or "Indian."

7. For purposes of this article, the phrase "Indian Country" takes on its colloquial meaning, and is not limited to those lands described in 18 U.S.C. § 1151 (2006).

8. WHTI Regs, *supra* note 3, at 18,397.

9. Mark Scheer, *Border: Native American Leaders Seek to Protect Border Rights under New Security Rules,* NIAGARA GAZETTE, June 16, 2009, *available at* http://niagara-gazette.com/local/x681346160/BORDER-Native-American-leaders-seek-to-protect-border-rights-under-new-security-rules.

10. Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate, U.S.-G.B., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty].

11. The Jay Treaty also guaranteed free passage to non-Indian citizens and subjects of both nations. *Id.* at art. III. Because this Note concerns the right of Indians to cross the border, unless otherwise noted, references to the free passage right should be read as concerning the Indian free passage right.

12. *Id.* at art. III.

13. Additional Article, U.S.-G.B., May 4, 1796, 8 Stat. 130 [hereinafter Explanatory Article].

14. Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 318–19 (1984).

15. A Treaty of Peace and Amity, Between his Britannic Majesty and the United States of America, U.S.-G.B., Dec. 24, 1814, 8 Stat. 218 (hereinafter Treaty of Ghent).

on a life of its own, as the subject of Indian activism,[16] congressional debate,[17] and court scrutiny.[18]

The Jay Treaty's Indian free passage right also has been the subject of a great deal of scholarship.[19] In perhaps the most provocative of these articles, Professor Marcia Yablon-Zug[20] wrote in the *Queens Law Journal* in 2008 that a free passage right does indeed exist, but that "the right is no longer based on the Jay Treaty" and exists now only as a matter of statutory law.[21] Moreover, she argues that "treating the right as anything other than statutory is misguided, potentially harmful and ignores the multitude of benefits that could only come from the recognition of the statutory basis of this right."[22] She even goes so far as to contend that the belief in a treaty basis for the free passage right can encourage criminal activity.[23]

Professor Yablon-Zug's article is provocative for two reasons. First, she maintains that the Jay Treaty itself has no force because it was rendered moot long ago by war[24] and jurisprudence,[25] and that statutes provide the only source of the modern free passage right.[26] Second, and even more provocatively, she argues that Indians should let go of the treaty argument because a statutory right is

16. *See* Scheer, *supra* note 9; *see also* Smith, *supra* note 2, at 136–37, 140–41, 143.

17. *See infra* Part II.C.

18. *See infra* Part III.

19. *See*, *e.g.*, O'Brien, *supra* note 14; Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N. DAK. L. REV. 301 (2009) [hereinafter Spruhan, *Last Stronghold*]; Yablon-Zug, *supra* note 1; Bryan Nickels, Note, *Native American Free Passage Rights under the 1794 Jay Treaty: Survival under United States Statutory Law and Canadian Common Law*, 24 B.C. INT'L & COMP. L. REV. 313 (2001); Joshua J. Tonra, Note, *The Threat of Border Security on Indigenous Free Passage Rights in North America*, 34 SYRACUSE J. INT'L L. & COM. 221 (2006); *see also* Leah Castella, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191 (2000); John C. Mohawk, *Echoes of a Native Revitalization Movement in Recent Indian Law Cases in New York State*, 46 BUFF. L. REV. 1061 (1998); Richard Osburn, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471 (2000); Paul Spruhan, *Indian as Race / Indian as Political Status: Implementation of the Half-Blood Requirement Under the Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27 (2006); William R. Di Iorio, Note, *Mending Fences: The Fractured Relationship Between Native American Tribes and the Federal Government and its Negative Impact on Border Security*, 57 SYRACUSE L. REV. 407 (2007).

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21. Yablon-Zug, *supra* note 1, at 569.

22. *Id.*

23. *Id.*

24. *Id.* at 572–75.

25. *Id.* at 587–90.

26. *Id.* at 569.

actually superior to a treaty right.[27]

Upon consideration of other documents in the historical record, this Note concludes otherwise. Professor Yablon-Zug is correct that the Jay Treaty was nullified by the War of 1812.[28] She also is correct that the modern free passage right is defined in statute.[29] Aside from those arguments, however, this Note disagrees with Professor Yablon-Zug in many respects. For example, this Note maintains that the Jay Treaty free passage right *was* restored after the War of 1812 by the Treaty of Ghent.[30] In fact, that same right exists today, as it has been reaffirmed in, and modified by, statute and regulation.[31] Moreover, a statutory right is not preferable to a treaty right; considering the American[32] constitutional framework, the two rights are not even mutually exclusive.[33]

This Note argues that the Jay Treaty is, indeed, the basis of the right that was codified in the Immigration and Naturalization Act and, therefore, is the basis for the right of Canadian Indians to pass freely into the United States.[34] Part II reviews the history of the free passage right in treaties–not only the Jay Treaty and the Treaty of Ghent, but also contemporaneous treaties between the United States and many Indian tribes. There, this Note argues that the Treaty of Ghent restored the Indian free passage right that was terminated by the War of 1812, a conclusion reinforced with evidence from contemporaneous Indian treaties. Part III then considers the statutory and regulatory provisions that define the parameters of this right today. Drawing on both the legislative and regulatory histories, this Note demonstrates that these treaties were never far from the minds of those in Congress who drafted the subsequent statutes, and those in the Executive Branch called upon to administer the law. In fact, federal administrative materials demonstrate that the Executive Branch has long believed that court decisions striking down two other Jay Treaty rights—Indians' right to bring goods across the border without paying customs, and duty-free and free passage rights for non-Indians—are easily distinguished from the Indian free passage rights jurisprudence. Part IV illustrates how the jurisprudence concerning the Indian free passage right confirms the idea that the right originates in the Jay Treaty and the Treaty of Ghent. Part V challenges Professor Yablon-Zug's assertion that a statutory right is better for Indians than a treaty right. Treaties, like statutes, can

27. Yablon-Zug, *supra* note 1, at 596–608.

28. *See infra* Part II.B.

29. *See infra* Part III.

30. *See infra* Part II.

31. *See infra* Part III.

32. Use of the term "American" to refer to things related to the United States is seen by some as ethnocentric. However, no other word serves as effectively, both as a noun and as an adjective. Although I acknowledge the concerns of the word's opponents, simplicity and efficiency require that I use it.

33. *See infra* Part II.B.1.

34. This article will not address the extent to which Canada has, or has not, lived up to its obligations under the Jay Treaty and its successors.

be interpreted broadly for the benefit of Indians. In addition, courts that have considered the Jay Treaty free passage right have, indeed, read it broadly and for the benefit of Indians. Finally, this Note concludes that no paradigm shift in Indian law is necessary. Instead, a proper reading of the Jay Treaty and other treaties, in their historical context, can provide every bit as much benefit for Indians as a statutory right.

This Note advances the scholarship in three ways. First, this Note examines the Jay Treaty and the Treaty of Ghent not in isolation or merely in relation to each other, but instead *alongside* dozens of U.S. Indian treaties negotiated and ratified during roughly the same time and for largely the same purposes. In so doing, this Note places those treaties and their Indian provisions in their proper historical context. Second, through the use of federal agency materials, this Note illuminates the jurisprudence surrounding the Indian free passage right by shedding light on why courts continue to uphold the right, even while they hold that other Jay Treaty rights have been nullified. Finally, by exploring the literature on treaty interpretation, this Note challenges Professor Yablon-Zug's assertion that a statutory right is superior to a treaty right, and demonstrates how a free passage right that traces its roots to a treaty provision *can* be read liberally, *should* be read liberally, and indeed *has* been read liberally for the benefit of Indians, in the same way that a statute is open to liberal construction.

II. THE FREE PASSAGE RIGHT IN TREATIES

Long before the European powers established colonies in North America, the continent was populated by American Indians, whose territory was divided by mountains, rivers, and other natural barriers.[35] The arrival of Europe's colonial powers, with their penchant for dividing the world along neat lines, naturally disrupted Indians' social, political, and economic patterns.[36] The Paris Peace Treaty of 1783,[37] which ended the American Revolution and defined the border between the new United States of America and the remaining British colonies,[38] was no different.[39] While the treaty ended the war, it did not end the confusion on

35. Castella, *supra* note 19, at 191.

36. *Id.* at 191–92.

37. Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-G.B., Sept. 3, 1783, 8 Stat. 80.

38. *Id.* at art. II.

39. Garrett v. Asst. Sec'y for Indian Affairs, 91 Interior Dec. 262, 13 IBIA 8 (1984) (citing case law to show that the early boundary line between the United States and British colonies in North America "passed through the territories of several Indian tribes; e.g., the Micmac, Maliseet, Penobscot, and Passamaquoddy Indian Tribes of Maine and New Brunswick, the Iroquois Nation of New York and Ontario, and the Sioux of Montana and Saskatchewan" (citations omitted)); *see also* O'Brien, *supra* note 14, at 315–16 ("More

a continent where boundaries and allegiances remained very much in flux.[40] The new United States immediately set out to secure its borders by signing treaties with its neighbors, both colonial and Indian.[41] Between the end of the American Revolution and the completion of the Jay Treaty in 1794, the United States executed a dozen treaties with Indian tribes.[42] It is against this backdrop that free passage rights begin to appear in U.S. treaties. The United States secured a free passage right for its military in its very first Indian treaty, the Treaty of Fort Pitt.[43]

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than thirty tribes on the northern border are affected, including members of the Wabanaki and Iroquois Confederacies, the Ojibwe, Ottawa, Lakota, Salish, Colville, several tribes of western Washington, and the Haida, Tlingit, and Tsimshian of Alaska and Canada."); *see generally* Castella, *supra* note 19; Osburn, *supra* note 19.

40. *See generally* DONALD R. HICKEY, THE WAR OF 1812: A FORGOTTEN CONFLICT 5–28 (1989).

41. *See, e.g.*, Articles Concluded at Fort Stanwix, Oct. 22, 1784, 7 Stat. 15 at art. III (defining boundary line between United States, Six Nations) [hereinafter Treaty of Fort Stanwix].

42. Treaties were concluded with a dozen or more tribes (herein spelled as their name appears in the respective treaty), including: the Cherokee (Treaty with the Cherokees, Nov. 28, 1785, 7 Stat. 18; Treaty of Peace and Friendship Made and Concluded Between the President of the United States of America, on the Part and Behalf of the Said States, and the Undersigned Chiefs and Warriors of the Cherokee Nation of Indians, on the Part and Behalf of the Nation, July 2, 1791, 7 Stat. 39 [hereinafter Cherokee Treaty of 1791]; Additional Article To the Treaty Made Between the United States and the Cherokees on the Second Day of July, One Thousand Seven Hundred and Ninety-one, Feb. 17, 1792, 7 Stat. 42; Treaty with the Cherokee Indians, June 26, 1794, 7 Stat. 43); the Chickasaw (Articles of a Treaty Concluded at Hopewell, Jan. 10, 1786, 7 Stat. 24); the Choctaw (Articles of a Treaty Concluded at Hopewell, Jan. 3, 1786, 7 Stat. 21); the Creek (A Treaty of Peace and Friendship Made and Concluded Between the President of the United States of America, on the Part and Behalf of the said States, and the undersigned Kings, Chiefs and Warriors of the Creek Nation of Indians, on the Part and Behalf of the said Nation, Aug. 7, 1790, 7 Stat. 35); the Iroquois Confederacy or Six Nations (Treaty of Fort Stanwix, *supra* note 41; Articles of a Treaty Made at Fort Harmar, Jan. 9, 1789, 7 Stat. 33; A Treaty Between the United States of America and the Tribes of Indians Called the Six Nations, Nov. 11, 1794, 7 Stat. 44 [hereinafter Treaty of Canandaigua]); the Shawnee (Articles of a Treaty Concluded at the Mouth of the Great Miami, Jan. 31, 1786, 7 Stat. 26); and the Wiandot, Delaware, Chippewa, and Ottawa (Articles of a Treaty Concluded at Fort M'Intosh, Jan. 21, 1785, 7 Stat. 16), later joined by the Pottawatima and Sac (Articles of a Treaty Made at Fort Harmar, Jan. 9, 1789, 7 Stat. 28).

43. Articles of Agreement and Confederation Made and entered into by Andrew and Thomas Lewis, Esquires, Commissioners for, and in Behalf of the United States of North America of the One Part, and Capt. White Eyes, Capt. John Kill Buck, Junior, and Capt. Pipe, Deputies and Chief Men of the Delaware Nation of the Other Part, Sept. 17, 1778, 7 Stat. 13 [hereinafter the Treaty of Fort Pitt]. The treaty called for the Delaware to give "free passage through their country" to United States soldiers en route to British towns and forts. *Id.* at art. III.

Before the Jay Treaty was signed, the United States would twice again secure the right of its citizens to pass through Indian lands along its borders.[44] It is against this backdrop that The Jay Treaty should be viewed in light of these groups of treaties—one group signed contemporaneously with the Jay Treaty, a second group signed contemporaneously with the Treaty of Ghent—because they provide the best evidence of what the early Congress intended.

A. The Jay Treaty

The ratification of the Treaty of Paris hardly ended the hostilities between Great Britain and its former colonies, but it did not take long for tensions to flare up again between the colonizer and the once-colonized. In fact, by the spring of 1794, many Americans believed that another war with Britain was "imminent and inevitable."[45] Great Britain was at war again with France, a U.S. ally, and some historians suggest that the Jay Treaty was Britain's attempt to prevent the United States from joining the war.[46] Others suggest that American concern over the threat of British aggression brought the two nations to the table.[47]

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44. Treaty of Canandaigua, *supra* note 42, at art. V.

> The Seneka nation, and all others of the Six Nations concurring, cede to the United States the right of making a waggon road from Fort Schlosser to Lake Erie, as far south as Buffaloe Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow the people of the United States a free passage through their lands, and the free use of the harbours and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

Id. Cherokee Treaty of 1791, *supra* note 42, at art. V ("It is stipulated and agreed, that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and the navigation of the Tennessee River."). The Mero district was in central Tennessee, and included the site of present-day Nashville. VICKI ROZEMA, FOOTSTEPS OF THE CHEROKEE: A GUIDE TO THE EASTERN HOMELANDS OF THE CHEROKEE NATION 78 (2d ed., 2007).

45. WALTER STAHR, JOHN JAY: FOUNDING FATHER 313 (2005).

46. SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY 221–23 (1st ed., 1924).

47. STAHR, *supra* note 45, at 313:

> The war scare started with reports that British warships were seizing American merchant vessels in the West Indies. The British were forcing the ships into British ports, condemning them there on the basis

In either case, American and British concerns about the Indians were a major factor.[48] Americans were alarmed at reports that Great Britain's Governor for Canada, in a February 10, 1794, speech to an Indian delegation, predicted war and suggested that the conflict might result in a more favorable drawing of the border.[49] John Jay, the Chief Justice of the U.S. Supreme Court and a former Secretary of Foreign Affairs, was sent to England to negotiate a truce.[50]

The resulting Jay Treaty has little to say about Indians. Great Britain agreed to remove its remaining troops from U.S. territory,[51] and both sides agreed to compensate citizens and subjects they had captured.[52] The treaty established free trade between the United States and Great Britain,[53] and imposed regulations on trade in the East Indies[54] and West Indies.[55] The Mississippi River would

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> of a previously secret November order against *any* trade with the French West Indies, and leaving the American seamen without means to support themselves or return home. It seemed to many Americans, as Madison put it in a letter to Jefferson, that Britain "meditates a formal war as soon as she shall have crippled our marine resources."

48. There is, as well, some evidence that the British had a genuine concern for the welfare of their Indian allies in America:

> Twenty-five nations of Indians made over to the United States, mourned the earl of Carlisle in the House of Lords, "[and in return] not even that solitary stipulation which our hono[]r should have made us insist upon, . . . a place of refuge for those miserable persons . . ., some haven for those shattered barks to have been laid up in quiet."

23 PARLIAMENTARY HISTORY OF ENGLAND 453 (1806-20), *quoted in* JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS 4 (1970). Combs also cites A.L. Burt for the proposition that Britain, in the years between the Treaty of Paris and the Jay Treaty, kept its frontier posts in part "because of an hono[]rable desire to protect its Indian allies from American rapacity . . . ." COMBS, *supra*, at 191 (citing A.L. BURT, THE UNITED STATES, GREAT BRITAIN AND BRITISH NORTH AMERICA (1961)). While Combs does not dismiss these concerns, ultimately he concludes that Britain's primary interest was in maintaining the economies, both at home and in the colonies, that had built up around the fur trade. *Id.* at 192.

49. BEMIS, *supra* note 46, at 239–40; COMBS, *supra* note 48, at 121; STAHR, *supra* note 45, at 313. Lord Dorchester was sharply reprimanded for his inflammatory speech, and resigned under pressure. BEMIS, *supra* note 46, at 320.

50. BEMIS, *supra* note 46, at 318–19.

51. Jay Treaty, *supra* note 10, at art. II.

52. *Id.* art. VII.

53. *Id.* art. XIV.

54. *Id.* art. XIII.

55. *Id.* art. XII.

remain open to both nations,[56] and a survey would be made of the river.[57] Jay was unsuccessful in his attempts to persuade the British to forswear all future interference with Indian tribes in the U.S.[58] Further, the British would not forswear using Indian allies in any future conflict with the U.S.[59] As a result, the only small section that concerns Indians reads:

> It is agreed that *it shall at all times be free* to his Majesty's subjects, and also to the citizens of the United States, and *to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof*, and to freely carry on trade and commerce with each other.[60]

Although no Indian tribe was a party to the Treaty, it is consistent with the rights secured in early treaties between the United States and Indian tribes.[61] This right, "freely to pass and repass" between the United States and what is now Canada, lies at the heart of Professor Yablon-Zug's article, and of this Note.

B. The Treaty of Ghent

Just as the Treaty of Paris did not end the mistrust between the United States and Great Britain, "[t]he Jay Treaty and the Explanatory Article did not end the suspicion and competition between the two nations."[62] As a result, the two nations again went to war, beginning in 1812.[63] Scholars have cited a variety of motives as potential causes for the War of 1812: Britain's continued maritime

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56. *Id.* at art. III.
57. *Id.* at art. IV.
58. BEMIS, *supra* note 46, at 261–63.
59. *Id.* at 359.
60. Jay Treaty, *supra* note 10, at art. III (emphasis added). After the British objected to language in a 1795 treaty between the United States and several Indian tribes ("the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Potawatimies, Miamis, Eel-River, Weeas, Kickapoos, Piankashaws and Kaskaskias") that limited the presence of traders within the lands of those tribes, the United States and Great Britain signed an Explanatory Article reaffirming the commitment of both nations to the free passage right of British subjects, U.S. citizens, and Indians dwelling on either side of the boundary line. Explanatory Article, *supra* note 13.
61. *See supra* Part II.A and accompanying notes.
62. O'Brien, *supra* note 14, at 319.
63. *See generally* HICKEY, *supra* note 40, at 29–51.

offenses, America's domestic political and ideological issues, even America's "desire to conquer Canada . . . or to put an end to British influence over American Indians."[64] The Treaty of Ghent, which ended the war, offers few clues;[65] the parties merely agreed to return to the state of affairs that existed before the outbreak of war.[66]

For purposes of this Note, Article IX is the most important aspect of the Treaty of Ghent. It states that the United States and Great Britain were not the only parties to be returned to their pre-war state:

> The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all of the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: *Provided always*, That such tribes or nations shall agree to desist from all hostilities, against the United States of America, their citizens and subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly.[67]

Although the Treaty of Ghent purported to return U.S.-Indian relations to their pre-war state, there is disagreement over whether the Indian free passage right was restored. Most courts and scholars agree that the War of 1812 abrogated all or parts of the Jay Treaty.[68] The question, then, is whether Article IX of the

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64. *Id.* at 1–2.

65. *See* Treaty of Ghent, *supra* note 15.

66. HICKEY, *supra* note 40, at 2.

67. Treaty of Ghent, *supra* note 15, at art. IX (also requiring Great Britain to seek peace with the Indians) (emphasis in original).

68. Karnuth v. United States, 279 U.S. 231, 241 (1929) (holding that the War of 1812 abrogated the non-Indian free passage right for British subjects and United States citizens, contained in Art. III of the Jay Treaty); *see also* Eileen Luna-Firebaugh, *Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples: "Att Hascu "Am O "I-oi? What Direction Should We Take?: The Desert People's Approach to the Militarization of the Border*, 19 WASH. U. J.L. & POL'Y 339, 342 (2005) (stating that the Jay Treaty free passage right had "eroded due to the War of 1812"); Tonra, *supra* note 19, at 224 (stating that the War of 1812 "created an issue of whether the terms of the Jay Treaty were still viable"); Yablon-Zug, *supra* note 1, at 572–75. *Contra* McCandless v. United States *ex rel.* Diabo, 25 F.2d 71, 73 (3d Cir. 1928) [hereinafter *McCandless II*]:

> [W]e think the rights of the Indians under the Jay Treaty were not annihilated by the subsequent War of 1812.
> . . .

Treaty of Ghent restored to the Indians the free passage right. Here is where Professor Yablon-Zug first distinguishes herself[69] from the rest of the scholarship.[70]

Professor Yablon-Zug argues the Treaty of Ghent did not restore the Jay Treaty crossing right for two reasons. First, she contends that the Jay Treaty was not a self-enacting treaty; therefore, any rights contained in Article IX never were extended to Indians because there was no subsequent legislation to enact the treaty.[71] Second, she argues that the Indians had no legal rights under those treaties because they were not parties to either the Jay Treaty or the Treaty of Ghent.[72] Both arguments are unpersuasive.

1. Self-Enacting Treaties and the U.S. Constitution

Professor Yablon-Zug argues that the Treaty of Ghent alone, without separate Congressional action, could not have restored any rights to the Indians because it was not a "self-executing" treaty.[73] She looks to *United States v.*

> If, therefore, the independence of the United States and the fixing of its boundaries as provided by treaty was not affected by its subsequent entry into war, on how much stronger ground and reason can it be contended that the independence of the Indian to pass the boundary line passing through his own tribal territory was not affected when Great Britain and America entered the War of 1812.

69. Yablon-Zug, *supra* note 1, at 573–76 (arguing that the Jay Treaty was abrogated by the War of 1812, and that the Treaty of Ghent did not revive the right absent implementing legislation).

70. *See, e.g.*, Megan S. Austin, *A Culture Divided by the United States-Mexico Border: The Tohono O'odham Claim for Border Crossing Rights*, 8 ARIZ. J. INT'L & COMP. L. 97, 103 (1991); Castella, *supra* note 19, at 207–12 (arguing that the United States is bound by the Jay Treaty and Treaty of Ghent to recognize the free passage right); Luna-Firebaugh, *supra* note 68, at 342 (arguing that the Treaty of Ghent "restored" the Jay Treaty free passage right); Osburn, *supra* note 19, at 475-80 (arguing Treaty of Ghent restored the Jay Treaty free passage right); Tonra, *supra* note 19, at 224–25 (arguing that "[a]ny questions concerning the applicability of the Jay Treaty after the War of 1812 were answered by the Treaty of Ghent . . . . Presumably [Article IX] would have guaranteed the rights of free passage for . . . Native Americans, in Article III of the Jay Treaty . . . "); *see also* Nickels, *supra* note 19, at 315 n.18, 338 (arguing that the United States and Canada should fully recognize the Jay Treaty free passage right).

71. Yablon-Zug, *supra* note 1, at 575–76.

72. *Id.* at 580–83.

73. *Id.* at 575 ("Although the Treaty of Ghent purports to restore these Jay Treaty rights, the Treaty of Ghent could not do so because it was not self-executing.").

Garrow,[74] a case in which the Court of Customs and Patent Appeals considered a different right secured to Indians in the Jay Treaty, the right to carry their goods with them across the border without paying duties.[75] The *Garrow* court concluded that this right was not restored by the Treaty of Ghent, because the Treaty of Ghent was not self-executing.[76] Professor Yablon-Zug, following the *Garrow* court, concludes that some enacting legislation would be necessary in order to effectuate the Treaty of Ghent's restoration of rights.[77]

Professor Yablon-Zug's reliance on *Garrow* is misplaced, however, because that court was mistaken in its characterization of the Treaty of Ghent as "not self-executing."[78] There is a presumption in international law that "[a] treaty is primarily an agreement or contract between two or more nations or sovereigns."[79] However, the U.S. Constitution states that treaties, like statutes, are the "supreme law of the land."[80] Chief Justice Marshall recognized that such language established the alternative presumption that a treaty is presumed to be like a statute *unless* it has particular characteristics of a contract:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the

74. 88 F.2d 318 (C.C.P.A. 1937), *cert. denied* 302 U.S. 695 (1937).

75. Jay Treaty, *supra* note 10, art. III ("[N]or shall the Indians passing and repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging to bona fide Indians.").

76. *Garrow*, 88 F.2d at 323.

77. Yablon-Zug, *supra* note 1, at 575–76.

78. *Garrow*, 88 F.2d at 323.

79. 74 AM. JUR. 2D *Treaties* § 2 (2008).

80. U.S. CONST. art. VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

> stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute a contract before it can become a rule for the Court.[81]

When is a treaty or some provision within a treaty to be viewed as "the law of the land," and when it is merely a contract that must be executed? In *Edye v. Robertson*,[82] the Court concluded that "[a] treaty . . . is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."[83]

Under the *Edye* rule, which remains good law, the Treaty of Ghent clearly was a self-enacting treaty, at least as it pertained to the restoration of Indian rights in Article IX. Unlike those articles that required each side to return archives and records to the other,[84] or to restore prisoners of war,[85] or to appoint commissioners to resolve border disputes,[86] no affirmative action is required for either party to "restore such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to" in 1811.[87] Even if such legislative action was required, the many treaties the United States executed *with Indian tribes themselves*, treaties that expressly called for the restoration of rights enjoyed by the tribes before the outbreak of war, can be seen as the enactment of the Treaty of Ghent.[88]

2. Third-Party Beneficiaries, or Parties to Contemporaneous Treaties?

Professor Yablon-Zug also argues that Indians cannot find enforceable rights under either the Jay Treaty or the Treaty of Ghent, because no Indian tribes were party to those treaties.[89] In *McCandless v. United States ex rel. Diabo*, one of the first cases to address the question, the Third Circuit concluded that the

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81. Foster v. Neilson, 27 U.S. 253, 314 (1829), *overruled on other grounds*, United States v. Perchman, 32 U.S. 51 (1833).

82. 112 U.S. 580 (1884).

83. *Id.* at 598–99.

84. Treaty of Ghent, *supra* note 15, at art. I.

85. *Id.* at art. III.

86. *Id.* at art. IV.

87. *Id.* at art. IX. Arguably, there was no need to "enact" the Indian free passage right because there were no barriers to Indians' passage. After all, the United States did not begin to limit immigration until the late 19th Century, and did nothing to prevent Canadian Indians from entering until 1924. *See infra* Part III.

88. *See infra* Part II.B.2.

89. Yablon-Zug, *supra* note 1, at 580–83.

Indians did, indeed, have an enforceable right against the United States.[90] Professor Yablon-Zug rebuts the Third Circuit's conclusion in *McCandless II*,[91] and contends that the circuit's reasoning was based on a third-party beneficiary theory.[92] She argues that such a theory cannot stand because modern international law recognizes few instances in which a third party can be held to benefit from a treaty.[93] She argues further that no such theory even existed when the Jay Treaty and the Treaty of Ghent were ratified.[94]

Professor Yablon-Zug somewhat overstates the case. For example, Professor Jonathan I. Charney, while recognizing that "[s]ituations of third state remedies have . . . been the exception to the general behavior of states,"[95] finds the threads underlying such third-party remedies as far back as Hugo Grotius.[96] Some scholars trace the idea back even further[97]—some 200 years before the Jay Treaty or the Treaty of Ghent.

However, one need not rummage through centuries-old theories of international law to find support for the idea that tribes have a vested right in the return of their pre-war rights and privileges, including their right to free passage. One need only read the Treaty of Ghent in conjunction with the treaties between the United States and Indian tribes in the years following the War of 1812.[98]

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90. 25 F.2d 71, 72–73 (3d Cir. 1928). This case is discussed in greater depth in Part IV, *infra*, which examines the case law.

91. 25 F.2d at 71.

92. Yablon-Zug, *supra* note 1, at 581.

93. *Id.* at 581–82.

94. *Id.* at 582–83.

95. Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 61 (1989).

96. *Id.* Grotius (1583–1645) is sometimes called the father of natural law, and is a giant in philosophy and political theory. *See* Jon Miller, *Hugo Grotius*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2005), http://plato.stanford.edu/entries/grotius/.

97. Theodor Meron, Comment, *Common Rights for Mankind in Gentili, Grotius and Suarez*, 85 AM. J. INT'L L. 110 (1991) (finding the roots of the concept *erga omnes* in the work of Gentili, an Italian jurist who lived from 1552–1608).

98. Treaties were signed with tribes all along the United States' western border, including (herein spelled as the tribe's name is spelled in the treaty; unless otherwise noted, the treaty was recorded as A Treaty of Peace and Friendship): the Fox (Sept. 14, 1815, 7 Stat 135); the Ioway (Sept. 16, 1815, 7 Stat. 136) [hereinafter Ioway Treaty]; the Kanzas (Oct. 28, 1815, 7 Stat. 137); the Kickapoo (Sept. 2, 1815, 7 Stat 130); the Mahas (July 20, 1815, 7 Stat. 129); the Great and Little Osage (Sept. 12, 1815, 7 Stat. 133); the Piankishaw (July 18, 1815, 7 Stat. 124); the Poutawatamie (July 18, 1815, 7 Stat. 123); the Sacs of the Rock River (May 13, 1816, 7 Stat. 141); the Siouxs of the Lakes (July 19, 1815, 7 Stat. 126); the Siouxs of the Pine Tops (June 1, 1816, 7 Stat. 143); the Siouxs of the River St. Peter's (July 19, 1815, 7 Stat. 127); the Teeton (July 18, 1815, 7 Stat. 125); the Wyandot, Delaware, Shawanoe, Miami, Chippewa, Ottawa, and Potawatimie (A Treaty, Sept. 8,

Although there were minor variations in the language of some treaties, most declared both parties to be "desirous of re-establishing peace and friendship . . . and of being placed in all things, and in every respect, on the same footing upon which they stood before the war . . . ."[99] Notably, as this language tracks that in the Treaty of Ghent,[100] one can logically conclude that the drafters of these pacts sought, by that language, to achieve the same thing.

Strangely, the recent scholarship makes little, if any, mention of these treaties. In fact, even the scholars who argue that the Treaty of Ghent fully restored the Jay Treaty's Indian free passage right do not use these treaties as contemporaneous evidence.[101] It is worth noting that many tribes, including many of the Algonquian and Iroquoian tribes that lived along the border between the United States and Great Britain, did not sign such treaties with the United States during this era.[102] It is also worth noting, however, that the United States had fought against at least some of the tribes to which it promised a return to pre-war conditions.[103] Whether one reads those treaties as the statutory enactments of the Treaty of Ghent, or as contemporaneous treaties to which the Indians were primary parties, reading these treaties with the Treaty of Ghent clearly demonstrates the intention of the United States to restore to the Indians those

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1815, 7 Stat. 131 [hereinafter Treaty of Spring Well]); the Yancton (July 19, 1815, 7 Stat. 128).

99. *See, e.g.*, Ioway Treaty, *supra* note 98, at pmbl.

100. Treaty of Ghent, *supra* note 15, at art. IX ("The United States of America engage . . . forthwith to restore to such [Indian] tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities . . . .").

101. O'Brien made note of the Treaty of Spring Well, and characterized it as fulfilling America's promise to restore rights to the Indians; however, she did not mention that this was just a part of a comprehensive effort to negotiate peace with, and restore pre-war status to, the Indians. O'Brien, *supra* note 14, at 320–21. Yablon-Zug, too, mentions the Treaty of Spring Well in a footnote. Yablon-Zug, *supra* note 1, at 584 n.87. However, she wrongly dismisses the treaty as "a specific treaty that dealt with the rights of tribes that were hostile during the war," and maintains that the treaty was not self-enacting. *Id.*

102. This might not matter, if one accepts Professor Monette's belief in an equal footing doctrine for tribes. Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Indian Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994). Monette even suggests that Congress enacted just such an equal footing doctrine in 1994, *id.* at 661 n.294 (citing Act of May 31, 1994, Pub. L. No. 102-263, § 5(b), 108 Stat. 707, 709 (1994)). Under this theory, it would not matter whether an individual tribe signed a treaty with the United States restoring its pre-war rights; instead, the mere fact that the United States agreed to restore those rights would extend equally to all tribes with which the United States had dealings.

103. *See, e.g.*, Treaty of Spring Well, *supra* note 98, at art. III (pardoning the Wyandot, Delaware, Seneca, Shawanoe and Miami tribes for their hostilities against the United States).

rights—including the free passage right—that they enjoyed before the outbreak of war.

III. THE JAY TREATY'S INDIAN FREE PASSAGE RIGHT IN STATUTE AND REGULATION

Canadian Indians experienced few, if any, problems entering the United States for decades after the Jay Treaty and the Treaty of Ghent were ratified.[104] Most Indians crossed the border either by land or inland waterways,[105] as allowed in the Jay Treaty.[106] More importantly, the United States had no general immigration law.[107] Although Congress had repeatedly codified and modified the requirements for naturalized citizenship, and had legislated some specific exclusions,[108] the first general immigration statute was not passed until 1891.[109] The Immigration Act of 1891 restricted only those arriving at U.S. ports, however, and had little effect on Canadian Indians, who "seldom passed through official ports of entry."[110] Marian L. Smith, who has conducted extensive archival research as an agency historian for the U.S. Immigration & Naturalization Service (INS)[111] and the Bureau of Citizenship and Immigration Services (CIS),[112] discovered documents from as early as 1903 that instructed border inspectors not only to admit American Indians, but also to exempt them from the head tax as they would exempt Canadian citizens.[113]

American Indians were first mentioned in U.S. immigration law in the Immigration Act of 1917,[114] which specified that "Indians of the United States not taxed" were not to be considered "aliens" under the law.[115] At least three Canadian Indians who did not meet the new Immigration Act's literacy requirement were denied entry into the United States.[116] However, the 1917 Act

104. Smith, *supra* note 2, at 132.

105. *Id.*

106. Jay Treaty, *supra* note 10, at art. III (specifically allowing passage by land or inland waterway).

107. *See* Smith, *supra* note 2, at 132 ("The Immigration Act of March 3, 1891 provided the first general immigration law applying to all aliens entering the United States and established the U.S. Immigration Service.").

108. *See*, *e.g.*, Chinese Exclusion Act, 57 Stat. 600 (1882).

109. Immigration Act of 1891, 26 Stat. 1084.

110. Smith, *supra* note 2, at 132.

111. *Id.* at 131.

112. E-mail from Marian L. Smith, Senior Historian, U.S. Citizenship & Immigration Services, to Dan Lewrenz (May 21, 2009, 9:11 a.m. EST) (on file with author).

113. Smith, *supra* note 2, at 131, 150 n.5.

114. 39 Stat. 874.

115. *Id.*

116. Smith, *supra* note 2, at 132–33.

still did not constitute a serious limitation of the free passage right that originated with the Jay Treaty and was restored by the Treaty of Ghent and contemporaneous Indian treaties. Its successor, however, enacted seven years later, would prove problematic.

A. The Immigration Act of 1924

The Immigration Act of 1924,[117] and its quotas based on nationality,[118] finally created serious problems for Canadian Indians seeking to enter the United States. Only those eligible for U.S. citizenship could be admitted under the terms of the Act.[119] Because Canadian Indians were ineligible for U.S. citizenship, the INS determined that Canadian Indians were ineligible for entry, just like Chinese and Japanese nationals.[120] The determination sparked protests, not only from Indians on both sides of the border,[121] but also from farmers who depended on Canadian Indian migrant workers.[122] Even Great Britain made formal complaints to the U.S. State Department concerning what it saw as a violation of the Jay Treaty,[123] some 135 years after they had pushed for Indian rights to be included in the Jay Treaty in the first place.[124] As a result of these protests, the INS and U.S. Labor Department issued regulations that allowed Canadian Indians to enter the country as temporary workers.[125] The agencies then tried to reassure Congress, farmers, and railroad companies that Canadian Indians actually *would* be allowed in as temporary visitors,[126] but still maintained that Canadian Indians *could* be barred from entry if they were ineligible for naturalized citizenship.[127] This interpretation of the statute, and the Labor Department's enforcement efforts, created the first serious interruption of the Indian free passage right since the War of 1812.

The interruption ended in 1928 when Representative Clarence MacGregor, a Republican from upstate New York,[128] took it upon himself to

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117. 43 Stat. 153.

118. Smith, *supra* note 2, at 135.

119. *Id.*

120. *Id.* at 136.

121. *Id.* at 136–37.

122. *Id.* at 136.

123. *Id.* The British government's position is curious, considering that "[t]he British Government took the position shortly after the War of 1812 that all treaties between the two countries, including the Jay treaty [sic], had been terminated by the war . . . ." H.R. REP. NO. 70-2401, at 3 (Feb. 7, 1929).

124. *See supra* note 49.

125. Smith, *supra* note 2, at 136.

126. *Id.*

127. *Id.*

128. *MacGregor, Clarence, (1872-1952)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000009.

restore the Indian free passage right. On April 2, 1928, Congress amended the Immigration and Naturalization Act to make clear that Canadian Indians were not to be excluded:

> *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That the Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States; *Provided*, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.[129]

One question raised by this legislation is whether Congress believed it was merely affirming a right protected by the Jay Treaty and the Treaty of Ghent, or instead was creating a new crossing right where none existed. Professor Yablon-Zug, in support of her position that the Indian free passage right is now a purely statutory right, argues that "Congress's refusal to describe the right as treaty-based indicated its concern about recognizing Jay Treaty free passage rights."[130] However, the legislative record provides ample reason to question this conclusion.

There is no evidence that Congress "refus[ed] to describe the right as treaty-based." Instead, the Jay Treaty and the Treaty of Ghent likely guided Congress in adopting the statute. For example, Representative MacGregor invoked both the Jay Treaty[131] and the Treaty of Ghent[132] as justification for the statute. Professor Yablon-Zug points to an exchange on the House floor to suggest[133] that Congress had embraced an aboriginal-rights view.[134] Specifically,

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129. Act of Apr. 2, 1928, ch. 308, 45 Stat. 401, *codified at* 8 U.S.C. § 226a (1928) (*replaced by* 8 U.S.C. § 1359 (2006)).

130. Yablon-Zug, *supra* note 1, at 586.

131. 69 CONG. REC. 5581, 5582 (daily ed. Mar. 29, 1928) (statements of Representative MacGregor); H.R. REP. NO. 70-1017, at 2 (1928).

132. H.R. REP. NO. 70-1017, at 2.

133. Yablon-Zug, *supra* note 1, at 586.

134. Under this framework, indigenous peoples are seen to retain an inherent right to cross international borders to maintain traditional practices. *See*, *e.g.*, U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at art. 36, A/RES/61/295 (Sept. 13, 2007) (1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.).

she cites a colloquy in which Minnesota Representative William Leighton Carss[135] describes Indians as "the original inhabitants of the United States," and New York Representative Emanuel Celler[136] asks whether the statute is even necessary.[137] However, an examination of the entire colloquy reveals a semantic reason for Representative Celler's concern: The Immigration Act of 1924 barred from entry any *alien* ineligible for citizenship,[138] and Congress had stated previously that Indians were not to be considered aliens.[139] The critical issue, which is documented in the following colloquy, became how Canadian Indians came to be considered aliens:

> MR. MACGREGOR. Mr. Speaker and Members of the House, this bill permits Indians born in Canada to pass and repass the borders of the United States. It is supported by the Department of Labor.
>
> Under the Immigration Act of 1924, Indians are not permitted to cross the borders because they are ineligible to citizenship. Under the Jay treaty [sic] of 1794 between the United States and Great Britain, the Indians were permitted to pass and repass the borders of the country, and it was not until quite recently the Department of Labor discovered that they were ineligible to citizenship. Therefore they were not permitted to visit their relatives in this country and pass to and from the reservations on each side of the line.
>
> MR. CELLER. Will the gentleman yield for a question?
>
> MR. MACGREGOR. Certainly.
>
> MR. CELLER. *What body determined that the Indian was an alien?*
>
> MR. MACGREGOR. They are not eligible to citizenship.
>
> MR. CELLER. I know; *but what body determined that an Indian is an alien?*
>
> MR. MACGREGOR. What body?
>
> MR. CELLER. *Was it a court or the Committee of the House on Immigration? What body vested itself with the authority to determine that the Indian is an alien?*
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> MR. MACGREGOR. I see the gentleman's point.
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> MR. CELLER. Can the gentleman answer the question?

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135. *Carss, William Leighton, (1865-1931)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000194.

136. *Celler, Emanuel, (1888-1981)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000264.

137. Yablon-Zug, *supra* note 1, at 586.

138. Smith, *supra* note 2, at 135.

139. Act of Apr. 2, 1928, ch. 308, 45 Stat. 401, *codified at* 8 U.S.C. § 226a (1928) (*replaced by* 8 U.S.C. § 1359 (2006)).

> MR. CARSS. They were the original inhabitants of the United States.
>
> MR. MACGREGOR. We took the land away from the Indians and now we are not permitting them to even go to and fro on the land which they originally possessed.
>
> MR. CELLER. Does not the gentleman think this act is absolutely unnecessary?
>
> MR. MACGREGOR. I think so myself, *but the Department of Labor will not admit them*.
>
> MR. CELLER. Have not the courts decreed that the Indian is not an alien?
>
> MR. MACGREGOR. That question was passed upon in a case which arose in the district court in Philadelphia—
>
> . . .
>
> MR. MACGREGOR. The court decided in this case that the Indians are entitled to admission irrespective of the immigration act [sic] of 1924 or the Jay treaty [sic] or anything else, *but the department does not recognize decisions of the United States district courts.*[140]

Read in its entirety, the colloquy between Representatives Celler and MacGregor does not suggest that Congress had "concern[s] about recognizing Jay Treaty free passage rights."[141] In fact, the opposite appears to be true: Congress, which had recognized an Indian free passage right scarcely a decade earlier by declaring that Indians were not aliens, was trying to determine how the law had come to change.

A close look at both Representative MacGregor's choice of words and the text of the amending statute reveals even more evidence that Congress thought it was reaffirming the Jay Treaty's Indian free passage right.[142] MacGregor twice described the right using the phrase "pass and repass"[143] the border, the same phrase used in the Jay Treaty itself.[144] Meanwhile, the statute describes the right it protects as the right to "pass the border."[145] The repeated invocations of the Jay Treaty and the Treaty of Ghent, the repeated use of the phrase "pass and repass," and the clear indications that Congress thought it was restoring an existing right instead of creating a new right, all point to the conclusion that the 1928 Congress

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140. 69 CONG. REC. at 5582 (emphasis added).

141. Yablon-Zug, *supra* note 1, at 586.

142. Federal courts also have read the bill's language this way. *See, e.g.*, Akins v. Saxbe, 380 F. Supp. 1210, 1219 (D. Me. 1974) ("Implicit in the statutory language is the recognition of an outstanding right . . . .").

143. 69 CONG. REC. at 5582.

144. Jay Treaty, *supra* note 10, at art. III.

145. Act of Apr. 2, 1928, ch. 308, 45 Stat. 401, *codified at* 8 U.S.C. § 226a (1928) (*replaced by* 8 U.S.C. § 1359 (2006)).

thought it was extending the Jay Treaty right through statute, not creating a new statutory right.

B. Administrative Readings of the Indian Free Passage Right

For more than 100 years—long before Congress reaffirmed the Indian free passage right in statute—United States administrative agencies have treated the Indian free passage right as if it was established law. As early as 1903, immigration officials were instructed not to charge Canadian Indians the standard "head tax" that was levied on other Canadian immigrations.[146] Then, in 1928, just months after Congress reaffirmed the Indian free passage right, the Secretary of Labor opined that the Treaty of Ghent restored the Indian free passage right, while failing to restore the non-Indian free passage right.[147] Notably, the enactment of a statute affirming the Indian free passage right did not stop agencies that were arguably the most familiar with the law, such as the Bureau of Indian Affairs and the INS, from referring to the right as a Jay Treaty right. For example, in 1944, the Superintendent of the Tulalip Indian Agency of the Bureau of Indian Affairs recognized the Jay Treaty as the basis for the Indian free passage right.[148] A year later, INS General Counsel L. Paul Winings specifically referred to the Jay Treaty when calling the Indian free passage right "an anachronism, but to the Indian tribes . . . one of the last remaining jewels of a lost treasure."[149] A 1947 article by the INS's District Director in Seattle described Canadian Indians' special status as "aris[ing] out of the provisions of the Jay Treaty,"[150] and Marian Smith's scholarship is replete with instances of immigration officials taking note of Indians' treaty rights.[151]

Similar sentiments are reflected in modern executive agencies' approaches to the Indian free passage right. The State Department has long held

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146. *See supra* note 113 and accompanying text.

147. Letter from James J. Davis, Secretary of Labor, to Albert Johnson, Chairman, House Committee on Immigration and Naturalization (Nov. 26, 1928), *reprinted in* H.R. REP. NO. 70-2401, at 8.

148. "[F]ull-blood Indians [are] denied the right to purchase liquor in this country by the same Department of Justice which, as to immigration, rules that they are not Indians under Jay's Treaty." Letter from O.C. Upchurch, Superintendent, Tulalip Agency, to Commissioner of Indian Affairs (March 3, 1944), *quoted in* Smith, *supra* note 2, at 145.

149. Winings Memorandum, *supra* note 2, *quoted in* Smith, *supra* note 2, at 146.

150. Raphael P. Bonham, *North American Indians*, 4 INS MONTHLY REV. 105, 108 (1947).

151. *See generally* Marian Smith, *The Immigration and Naturalization Service (INS) at the U.S.-Canadian Border, 1893-1993: An Overview of Issues and Topics*, 26 MICH. HIST. REV. 127, 129–32 (2000) (discussing American attempts to enforce immigration restrictions at Canadian border); Smith, *supra* note 2.

that the statutory Indian free passage right is merely an implementation of the Jay Treaty,[152] and lists the Jay Treaty, the Explanatory Article, and the Treaty of Ghent in its catalog of treaties in force, noting specifically that the Indian free passage right remains in force.[153] The U.S. Embassy in Canada also cites the Jay Treaty, along with the statute,[154] as the basis for the Indian free passage right.[155]

Finally, administrative agencies have routinely invoked the Jay Treaty and the Treaty of Ghent when they consider the Indian free passage right in their quasi-judicial roles. A review of such administrative decisions shows that the Board of Immigration Appeals has consistently traced the Indian free passage right to the Jay Treaty.[156] In *In re S.*, the Board cited an Immigration Solicitor's opinion:

> the right of American Indians born in Canada to pass the borders of the United States *means the rights secured to Indians by article III of the Jay Treaty of 1794 between the United States and Great Britain*, which rights either survived the War of 1812 or, if they did not survive the War of 1812 were restored to 'the tribes or nations of Indians' by article IX of the Treaty of Ghent of July 1, 1814.[157]

A few years later, another Board panel found in federal jurisprudence evidence that "the right of Indians under the Jay Treaty of 1794, authorizing passage across the Canadian boundary, was not abrogated by the War of 1812, but rather the Treaty of Ghent recognized and restored the Indian status of the Jay Treaty."[158] Whether interpreting the law or implementing the law, United States

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152. U.S. Department of State, *Travel Documents Issued by Native American Tribes or Nations or Private Organizations*, 7 FOREIGN AFF. MANUAL 1300 app. O (2008), *available at* http://www.state.gov/documents/organization/94670.pdf.

153. U.S. DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2009, 36, 279 (2009), *available at* http://www.state.gov/documents/organization/123747.pdf.

154. Act of Apr. 2, 1928, ch. 308, 45 Stat. 401, *codified at* 8 U.S.C. § 226a (1928) (*replaced by* 8 U.S.C. § 1359 (2006)).

155. First Nations and Native Americans Born in Canada, Consular Services Canada, United States Embassy, http://www.consular.canada.usembassy.gov/first_nations_canada.asp (last visited Dec. 17, 2009).

156. *See, e.g.*, *In re* S., 1 I. & N. Dec. 309 (B.I.A. 1942); *In re* B., 3 I. & N. Dec. 191, 192 (B.I.A. 1948); *In re* Yellowquill, 16 I. & N. Dec. 576, 577 (B.I.A. 1978).

157. 1 I. & N. Dec. at 310–11 (citations omitted and emphasis added).

158. *In re* B., 3 I. & N. Dec. at 192 (BIA 1948) (citing *U.S. ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660 (W.D.N.Y. 1947)); *see also Yellowquill*, 16 I. & N. Dec. at 577 ("The right of American Indians to move freely between what is now the Dominion of Canada and the United States was first recognized by our Government in the Jay Treaty of 1794 and was reiterated in the Treaty of Ghent." (citations omitted)).

administrative agencies have consistently held that the Indian free passage right is grounded in the early American treaties, and it was only reaffirmed by statute.

These legislative and administrative materials, many of them previously unreported in the scholarly literature, paint a picture of a treaty-based Indian free passage right. Lawmakers referenced such a right when discussing whether a statutory protection was even necessary. The executive branch began developing instructions for the administration of such a right decades before the statute was passed, and have continued to do so through the present day. All of these facts work together to show that the Jay Treaty remains the basis of the Indian free passage right.

IV. THE FREE PASSAGE RIGHT IN U.S. COURTS: A RIGHT STILL UPHELD

The jurisprudence concerning Article III of the Jay Treaty is, at first glance, confusing. Every court that has considered the Jay Treaty's Indian free passage right has upheld it.[159] Meanwhile, other rights arising from Article III, such as the free passage right for non-Indians and the Indian duty free right, have been roundly rejected.[160] In isolation, these decisions seem inconsistent and potentially confusing. However, when read in light of the treaty, legislative, and administrative histories discussed above, it is clear that the case law simply reflects the following reality: courts accept the Jay Treaty's Indian free passage right because it has been reaffirmed continuously by subsequent treaties[161] and statutes;[162] courts do not accept the other Article III rights because they have not been reaffirmed.

A. *McCandless*, Aboriginal Rights, and the Continuing Relevance of the Treaties

The few courts that have considered the Indian free passage right have unanimously affirmed it, although their rationales have differed.[163] However, a review of these cases in light of general principles of Indian law and

159. *See infra* Part IV.A.

160. *See infra* Part IV.B.

161. *See supra* Part II.

162. *See supra* Part III.

163. *See* Akins v. Saxbe, 380 F. Supp. 1120 (D. Me. 1974); United States *ex rel.* Goodwin v. Karnuth, 74 F. Supp. 660 (W.D.N.Y. 1947); *McCandless II*, *supra* note 68; United States *ex rel.* Diabo v. McCandless, 18 F.2d 282 (E.D. Pa. 1927) [hereinafter *McCandless I*].

contemporary Supreme Court immigration law jurisprudence reveals that these cases are more consistent than they first appear.

McCandless I at first glance appears to be based on an aboriginal rights theory, as the District Court concluded that even the Jay Treaty was irrelevant.[164] The court wrote that "Indians residing on either side" of the border "should be unaffected in their right to pass this line at will," and that this right "was wholly unaffected by the [Jay] treaty."[165] However, the Court's intentions are not entirely clear, as the decision fails to cite a single authority.[166] Professor Yablon-Zug writes that Dickinson "upheld the Indian free passage right based solely on a theory of aboriginal rights,"[167] and notes that aboriginal rights have not been favored by American courts.[168]

A closer reading of *McCandless I* shows it to be nearer to the mainstream of federal Indian law than Professor Yablon-Zug suggests. Toward the end of the decision, the Court noted that the critical question was not whether Indians *have* such a right, but *whether the United States has recognized* that the Indians have such a right.[169] The Court answered in the affirmative, pointing to the Jay Treaty.[170] Once it is clear that the United States has recognized that right, the Court wrote, the right "will not be taken to have [been] denied . . . unless the clear intention so to do appear[s]. We do not find such denial in any of the cited exclusion acts of Congress."[171] Read in this light, *McCandless I* appears to be consistent with contemporary understandings of Indian law, Indian treaty rights,[172] and the Immigration Act of 1924.[173] In fact, the Interior Department has cited *McCandless I* for the proposition that treaty rights can only be abrogated by an express act of Congress.[174] Therefore, *McCandless I*, when read in the tradition of federal Indian law and alongside a contemporaneous immigration law holding, may be less about aboriginal rights than about whether the Immigration Act actually amended the terms of the Jay Treaty.

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164. *McCandless I*, *supra* note 163, at 283.

165. *Id.*

166. *Id.* at 282–83.

167. Yablon-Zug, *supra* note 1, at 577.

168. *Id.* at 579–80.

169. *McCandless I*, *supra* note 163, at 283.

170. *Id.*

171. *Id.*

172. *See* Elk v. Wilkins, 112 U.S. 94, 100 (1884) (holding that general acts of Congress do not apply to Indians unless Congress has manifested an intent to include them).

173. *See* Cheung Sum Shee v. Nagle, 268 U.S. 336, 345–46 (1925) (holding that the Immigration Act of 1924 "must be construed with the view to preserve treaty rights unless clearly annulled").

174. Applicability of the Wholesome Meat Act of 1967 on Indian Reservations, 78 Interior Dec. 18, 19 (1971).

On appeal, in *McCandless II*, the Third Circuit took a different tack, holding that "the rights of these Indians under the Jay Treaty were not annihilated by the subsequent War of 1812."[175] The Third Circuit looked to *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*,[176] in which the Supreme Court delineated which treaty provisions survived the outbreak of war and which did not.[177] In *New Haven*, the Court concluded that the Jay Treaty's protections for property rights did indeed survive the war.[178] Likewise, the *McCandless II* court stated that the Treaty of Ghent would have revived the Indian free passage right had the Jay Treaty been abrogated.[179] However, because the *McCandless II* court concluded that the Jay Treaty had not been abrogated, this statement amounts to *dictum*. *McCandless II* was never appealed to the U.S. Supreme Court because the statutory affirmation of an Indian free passage right made the matter moot.[180]

The question of the Indian free passage right next reached the court in *United State ex rel. Goodwin v. Karnuth*.[181] There, the question was whether a Canadian woman of Indian descent remained an Indian for purposes of the free passage right when, under Canadian law, she lost her Indian status when she married a white man.[182] In concluding that the woman did qualify as an Indian under the Indian free passage statute,[183] the District Court relied heavily on the Jay Treaty and the Treaty of Ghent.[184] The government also appeared to agree that the Treaty of Ghent remained a viable basis for the Indian free passage right by agreeing that the rights originated in treaties, but arguing that those rights extended only to those who had status as Canadian Indians.[185] *Goodwin*, then,

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175. *McCandless II*, *supra* note 68, at 73.
176. 21 U.S. 464 (1823).
177. *Id.* at 492–95.
178. *Id.* at 493–94:

> [W]e are not inclined to admit the doctrine urged at the bar that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. . . . There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, . . . it would be against every principle of interpretation to hold them extinguished by the event of war.

179. *McCandless II*, *supra* note 68, at 73.
180. Letter from James J. Davis, *supra* note 147, at 8.
181. 74 F. Supp. 660 (W.D.N.Y. 1947).
182. For a detailed discussion of the racial aspects of this chapter in immigration history, see generally Spruhan, *Last Stronghold*, *supra* note 19.
183. *Goodwin*, 74 F. Supp. at 663.
184. *Id.* at 662.
185. *Id.*

does nothing to challenge the conclusion of previous courts that the Indian free passage right has a basis in treaties.

The most recent case, *Akins v. Saxbe*,[186] seems to illustrate convincingly that the statutory Indian free passage right is grounded in the treaties. After reviewing the *McCandless* decisions, the *Saxbe* court pointed to the legislative history as evidence that Congress was merely reinforcing the Jay Treaty's Indian free passage right.[187] After noting the Act's use of language drawn from the Jay Treaty, the court concluded that "*irrespective of the present status of the Jay Treaty*, it is reasonable to assume that Congress's purpose in using the Jay Treaty language in the 1928 Act was to recognize and secure the right of free passage as it had been guaranteed by that Treaty . . . ."[188] Thus, while the court did not rule on the validity of the Jay Treaty itself, it clearly tied the existing free passage right to the right's Jay Treaty roots.

Each of these cases confirms that the Jay Treaty and the Treaty of Ghent serve as the basis for the modern Indian free passage right. More important, neither the U.S. Supreme Court's decision regarding the non-Indian free passage right, nor lower courts' decisions concerning the Indian duty free right, undercuts this conclusion.

B. The Irrelevance of *Karnuth* and the Duty-Free Cases

Article III of the Jay Treaty created at least three rights that have been litigated in the Twentieth Century: the Indian free passage right, the non-Indian free passage right, and the Indian duty free right.[189] Professor Yablon-Zug cites the United States Supreme Court's decision in *Karnuth v. United States*[190] as one of two reasons, along with the passage of Representative MacGregor's bill,[191] that *McCandless II* was rendered moot shortly after the Third Circuit handed the decision down.[192] However, just as the legislative and administrative histories show that MacGregor's bill was intended to reaffirm the Jay Treaty right,[193] those same legislative and administrative histories also show that neither *Karnuth* nor the duty-free cases undermine the Indian free passage right.

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186. 380 F. Supp. 1120 (D. Me. 1974).

187. *Id.* at 1220 ("The Congressional debates indicate that he purpose of the 1928 legislation was to correct by statute the Department of Labor's erroneous application of the 1924 Act to American Indians and to reaffirm the right of these Indians to free mobility into and within the United States . . . .").

188. *Id.* at 1221 (emphasis in original).

189. Jay Treaty, *supra* note 10, at art. III.

190. 279 U.S. 231 (1929).

191. Act of Apr. 2, 1928, ch. 308, 45 Stat. 401, *codified at* 8 U.S.C. § 226a (1928) (*replaced by* 8 U.S.C. § 1359 (1982)).

192. Yablon-Zug, *supra* note 1, at 580–85.

193. *See supra* Part III.A.

1. *Karnuth*

In 1929, the U.S. Supreme Court held in *Karnuth v. United States* that non-Indian British subjects crossing from Canada into the United States were bound by U.S. immigration law.[194] The ruling reversed a decision out of the Second Circuit, which had held that British subjects retained a free passage right that they had been guaranteed in the Jay Treaty.[195] The Supreme Court held that the right of British subjects to pass the border had been abrogated by the War of 1812.[196] Professor Yablon-Zug contends that, in *Karnuth*, the Supreme Court effectively reversed not just the Second Circuit but also *McCandless II*.[197]

Professor Yablon-Zug's conclusion ignores the historical differences—manifested in treaties, statutes, and administrative decisions—between the Indian and non-Indian free passage rights. First, Professor Yablon-Zug states that "the Court found that the free passage right had not been revived by the Treaty of Ghent."[198] Yet the *Karnuth* court made no comment whatsoever about the Treaty of Ghent.[199] The reason is simple: the Treaty of Ghent expressly restored to Indians the rights they enjoyed before the outbreak of war,[200] but did not reflect an agreement to restore pre-war rights to non-Indian U.S. citizens or British subjects.[201] Therefore, by its silence, the Treaty of Ghent did not restore the free passage right of non-Indians, while its plain language restored that right for Indians. Secretary of Labor James J. Davis noted this distinction in a letter to the Chairman of the House Committee on Immigration and Naturalization shortly before the Supreme Court heard *Karnuth*:

> The only case cited which might be in [*sic*] point is *McCandless v. United States ex rel. Diabo*, . . . which held that North American Indians had a right under the treaty to cross the Canadian border into the United States. A review of that case by the Supreme Court was not sought as the question became moot with respect to Indians by reason of the passage of special legislation on April 2, 1928, which recognized that right. While

194. 279 U.S. 231.

195. United States *ex rel.* Cook v. Karnuth, 24 F.2d 649 (2d Cir. 1928) (citing the Jay Treaty, *supra* note 10, at art. III).

196. *Karnuth*, 279 U.S. at 242.

197. Yablon-Zug, *supra* note 1, at 588.

198. *Id.*

199. *Karnuth*, 279 U.S. 231.

200. Treaty of Ghent, *supra* note 15, at art. IX. For further evidence that Congress intended to restore these rights to Indians, *see supra* Parts II.B.1–2.

201. *See* Treaty of Ghent, *supra* note 15 (containing no reference to the restoration of crossing rights to British subjects).

> the . . . Second Circuit in the case referred only to the Jay Treaty of 1794, it is a fact that subsequent to that treaty and the War of 1812, the Treaty of Ghent of 1814, in Article IX, . . . "restored" to the Indians the right which they had prior to the war, *but this treaty did not "restore" any rights to other British subjects in Canada*.[202]

Clearly, then, the Supreme Court's finding that the *non-Indian* free passage right died in no way compels any finding regarding the *Indian* free passage right.

The legislative and administrative records also provide evidence that these Indian and non-Indian free passage rights should be considered separately. As noted, Congress began enacting general restrictions on immigration in the late nineteenth century, and eventually imposed a head tax on Canadian immigrants,[203] while simultaneously exempting Canadian Indians.[204] Furthermore, Congress explicitly stated that Indians were not "aliens" for purposes of immigration law.[205] These distinctions show that, going back as far as the Treaty of Ghent and continuing through the development of twentieth century immigration law, Congress never intended to treat Canadian Indians and non-Indians equally. A court decision declaring that non-Indians coming from Canada were subject to the Immigration Act of 1924 does nothing, then, to inform whether Canadian Indians are subject to the law.

2. The Duty-Free Cases

As the courts have consistently upheld the Indian free passage right, they have consistently rejected the Indian duty free right found in the same article of the Jay Treaty. In *United States v. Garrow*,[206] a Mohawk Indian from Canada sought to avoid paying duties on twenty-four ash baskets that she brought into the United States.[207] The Court of Customs and Patent Appeals cited *Karnuth* for the proposition that the War of 1812 abrogated Article III of the Jay Treaty,[208] and it rejected the argument that the court should read the Jay Treaty differently as it relates to Indians and non-Indians.[209] Some forty years later, another panel of the Court of Customs and Patent Appeals embraced the same rationale.[210]

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202. Letter from James J. Davis, *supra* note 147, at 8 (emphasis added); *see also* Bonham, *supra* note 150, at 106.

203. *See supra* note 113 and accompanying text.

204. *Id.*

205. *Supra* notes 114–15 and accompanying text.

206. 88 F.2d 318 (C.C.P.A. 1937), *cert. denied* 302 U.S. 695 (1937).

207. *Id.* at 318.

208. *Id.* at 321–23.

209. *Id.* at 323.

210. Akins v. United States, 551 F.2d 1222 (C.C.P.A. 1977).

The *Garrow* court also provided another, more compelling, rationale for rejecting the Indian duty-free right that is informed by historical context and consistent with the continuing Indian free passage right. The court noted that as early as 1799, shortly after the ratification of the Jay Treaty, Congress wrote an Indian exemption into tariff statutes that provided for the collection of duties on imports.[211] The exemption was repeated in the statutes through much of the nineteenth century.[212] However, an 1897 tariff revision deleted the exemption from the statute.[213] Since it is an accepted principle of law that a treaty may be modified or abrogated by a subsequent statute,[214] the tariff laws can be read to have affirmed, then later to have discarded, the Indian duty free right. Therefore, the Indian duty free right no longer has force. There has been a similar statutory affirmation of the Indian free passage right,[215] but no similar statutory rejection. Therefore, the Jay Treaty's Indian free passage right survives.

The case law affirming the Indian free passage right has never been overturned. Meanwhile, the case law striking down the non-Indian free passage right and the Indian duty free right can be easily distinguished because of their historical context. Therefore, the courts' rejections of those rights should not pose a threat to the Indian free passage right.

V. THE RELATIVE BENEFITS OF STATUTORY VS. TREATY RIGHTS

Perhaps the most controversial aspect of Professor Yablon-Zug's article is her assertion that Indians are better off with a statutory free passage right than with such a right guaranteed by treaty.[216] She writes that many Indians misunderstand the nature of the existing free passage right, with some thinking they also still have a duty free right.[217] She also contends that a statutory right is more nimble, allowing greater flexibility for the law to benefit Indians.[218] Neither argument is convincing.

First, Professor Yablon-Zug overstates the harm of Indians misunderstanding the law. Professor Yablon-Zug cites repeated incidents of Indians being cited for trying to avoid duties on the Mohawk-Akwesasne

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211. *Garrow*, 88 F.2d at 321.

212. *Id.* at 320–21.

213. *Id.* at 321.

214. Breard v. Greene, 523 U.S. 371, 376 (1998) ("[A]n Act of Congress . . . is on full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." (ellipses in original)).

215. Act of Apr. 2, 1928, ch. 308, 45 Stat. 401, *codified at* 8 U.S.C. § 226a (1928) (*replaced by* 8 U.S.C. § 1359 (1982)).

216. Yablon-Zug, *supra* note 1, at 596–608.

217. *Id.* at 596–97.

218. *Id.* at 604–08.

reservations along the U.S.-Canadian border.[219] But she does not acknowledge that these incidents have occurred for decades and that the activists know full well that the American and Canadian governments consider the Jay Treaty's duty free right to have been nullified.[220] Furthermore, Professor Yablon-Zug writes that American Indians' trust in government is undermined by a belief that treaties are not honored;[221] she even goes so far as to suggest that the kind of violence that occurred during the heyday of the American Indian Movement[222] might repeat itself.[223] This is a dramatic overstatement because the Jay Treaty is but one of many broken treaties,[224] and the worst days of the American Indian movement were influenced by an historical context that makes a recurrence unlikely today.[225] Finally, Professor Yablon-Zug suggests that the kidnapping of an Onondaga Indian child by the child's father was based on the father's belief in the continued validity of the Jay Treaty free passage right.[226] In *Diabo v. Delisle*, the father, his family, and his tribe argued that an international child custody treaty should not apply because, for them, there was no international border.[227] It is hard to take their argument seriously. Professor Yablon-Zug's argument works only if the father thought the Jay Treaty not only gave him the right to cross the border, but also gave him the right to kidnap his child. Even assuming that the father believed he had a treaty right to cross the border, it strains credulity to think he did not know that the *kidnapping* would be illegal, regardless of where he took the child.

Furthermore, although Professor Yablon-Zug cites many instances in which the statute has been read liberally in order to confer a benefit on Indians,[228] she wrongly assumes that a treaty provision cannot be read equally liberally. In truth, "[l]iberality is one of the foremost of the rules of treaty interpretation."[229] In fact, even Professor Yablon-Zug demonstrates how broadly the treaty language can be read for the benefit of Indians in the last section of her article. After first noting that Canadian Indians are not covered by the Indian Child Welfare Act

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219. Yablon-Zug, *supra* note 1, at 596–97.

220. *See generally* William Finnegan, *Barren's End*, 85 VA. Q. REV. 97 (2009).

221. Yablon-Zug, *supra* note 1, at 596–97.

222. *Id.* at 597.

223. *Id.* at 597 n.159 ("The culmination of this treaty-based movement . . . was the siege at Wounded Knee which resulted in two dead, 15 wounded and more than 500 arrested. During this period of resistance, 69 persons affiliated with the American Indian movement were killed and more than 300 were physically assaulted.").

224. *See generally* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974).

225. *See generally* PAUL CHAAT SMITH AND ROBERT ALLEN WARRIOR, LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE (1996).

226. Yablon-Zug, *supra* note 1, at 567–68 (citing Diabo v. Delisle, 500 F. Supp. 2d 159 (N.D.N.Y. 2007)).

227. 500 F. Supp. 2d 159 (N.D.N.Y. 2007).

228. Yablon-Zug, *supra* note 1, at 604–08.

229. 74 AM. JUR. 2D *Treaties* § 22 (2008).

(ICWA),[230] she then cites a case in which the Family Court of New York drew from the Jay Treaty's Indian free passage right and concluded that a Canadian Indian can receive the benefits of the ICWA.[231]

As a matter of law, there is no difference in the United States between a treaty and a statute, because both carry the same force as the "supreme law of the land."[232] Therefore, an Indian free passage right anchored in statute has no inherent benefit over such a right anchored in treaties.

VI. CONCLUSIONS

The Jay Treaty is not a document frozen in time. Like all other laws, it affects, and is effected by, the other laws that operate in its sphere. Although Indian tribes were not signatories to the Jay Treaty, contemporary treaties with Indian tribes confirmed the federal government's interest in assuring free passage across the land. The Jay Treaty most likely (albeit briefly) was abrogated by the War of 1812, yet the rights of Indians were restored by the Treaty of Ghent and by more than a dozen contemporaneous treaties with Indian tribes. The Treaty of Ghent did not restore the free passage right of non-Indians. And, although Congress eventually abrogated the Indian duty free provision, it continued to uphold the Indian free passage right, and even reaffirmed the right by statute after Executive Branch officials began to exclude Canadian Indians. Since then, the Executive Branch has consistently held that the Jay Treaty is, indeed, the source of the Indian free passage right, and the courts support that holding. In 1947, Raphael Bonham wrote: "The American Indian born in Canada has long enjoyed special considerations under our immigration laws. These considerations arise out of the provisions of the Jay Treaty more than a century ago, and special provisions of statute indicating the desire of Congress that such privileges should remain unabridged."[233] As the treaty, legislative, and administrative records make clear, Bonham's words remain true to this day.

230. Yablon-Zug, *supra* note 1, at 609.

231. *Id.* at 615–16 (*citing In re* Linda J.W., 682 N.Y.S.2d 565, 567–68 (1998)).

232. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

233. Bonham, *supra* note 150, at 108.