SOVEREIGNTY MATTERS

Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination

EDITED BY

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John Brown Childs, "Crossroads: Toward a Transcommunal Black History Month." In *Annales du Monde Anglophone: Écritures de l'Histoire Africaine Amèricaine*, ed. Hélène Le Dantec-Lowry and Arlette Frund (Paris: Institut du Monde Anglophone de la Sorbonne Nouvelle and Éditions L'Harmattan, 2003).

J. Kehaulani Kauanui, "The Politics of Blood and Sovereignty in *Rice v. Cayetano*." *Political and Legal Anthropology Review* 25, no. 1 (2002): 110–28.

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For Whom Sovereignty Matters

As a category of scholarship, activism, governance, and cultural work, sovereignty matters in consequential ways to understanding the political agendas, strategies, and cultural perspectives of indigenous peoples in the Americas and the Pacific. This is not to suggest that all indigenous peoples within these diverse regions share the same understanding of what sovereignty is or how it matters, nor that all of their concerns and labor can be reduced to sovereignty as a kind of raison d'être. Rather, following World War II, sovereignty emerged not as a new but as a particularly valued term within indigenous discourses to signify a multiplicity of legal and social rights to political, economic, and cultural self-determination. It was a term around which social movements formed and political agendas for decolonization and social justice were articulated. It has come to mark the complexities of global indigenous efforts to reverse ongoing experiences of colonialism as well as to signify local efforts at the reclamation of specific territories, resources, governments, and cultural knowledge and practices.

At the same time and owing much to its proliferation, sovereignty has become notoriously generalized to stand in for all of the inherent rights of indigenous peoples. Certainly many take for granted what sovereignty means and how it is important. As a result sovereignty can be both confused and confusing, especially as its normalization masks its own ideological origins in colonial legal-religious discourses as well as the heterogeneity of its contemporary histories, meanings, and identities for indigenous peoples.

Origins

In "Self-Determination and the Concept of Sovereignty," Lakota scholar Vine Deloria, Jr., writes that sovereignty originated as a theological term within early east Asian and European discourses: "Sovereignty is an ancient idea, once

used to describe both the power and arbitrary nature of the deity by peoples in the Near East. Although originally a theological term it was appropriated by European political thinkers in the centuries following the Reformation to characterize the person of the King as head of the state."[1] The king, or the sovereign, was thought to have inherited the authority to rule from God. This "divine right" was understood to be absolute, a power that was accountable only to the god from whom it originated.[2] The power was manifested specifically within the authority of the king to make war and govern domestic affairs (frequently in the name of God).[3]

The Protestant and Catholic churches, however, were also important governing powers during the early uses of sovereignty and consequently church doctrine impacted its meaning. The churches understood their roles as both the translators of the laws of God to the people and as governing the people's adherence to those laws, work sometimes interfered with or undermined by the king. Competing claims of legitimacy and sanction to speak for God and to rule over God's subjects between the church and the king, and between Protestants and Catholics, characterized the early politico-theological debates over sovereignty and who was sovereign. The church maintained that only God was the true sovereign and the church was the medium of God's will on earth, while the king claimed to be a sovereign who inherited from God the right to rule. While both understood sovereignty as an absolute power to govern, the views were diametrically opposed as to its revelation and exercise.

The powers of the church and the king slowly gave way through various political revolutions against the tyrannies of dogma and kingdoms to the ideologies and structures of the nation. The nation reorganized concepts of social status and responsibility from the obligations of subjects either of the church or of the kingdom to notions of citizenship, civil society, and democracy. In some of the early debates, it was argued that sovereignty emanated from individuals (citizens).[4] Individuals possessed rights to personal freedoms that informed their collective rights to rule themselves as nations. In other debates, sovereignty was linked to the "law of nations." Therein nations were based on the collective rights of individuals to civil society, life, happiness, property, justice, and defense; nations held rights to be free, independent, and respected as equals in the pursuit of securing the collective rights of their citizens.[5] In both kinds of debates, sovereignty was about figuring out the relationship between the rights and obligations of individuals (citizens) and the rights and obligations of nations (states). Sovereignty seemed to belong to nations but was then understood to originate either from the people who made up those nations or as a character of the nation itself (nationhood).[6] The

former assertion has defined the work of contemporary indigenous scholars and activists, who have argued that sovereignty emanates from the unique identity and culture of peoples and is therefore an inherent and inalienable right of peoples to the qualities customarily associated with nations.[7] The latter assertion has dominated legal debates over how nations exercise their sovereignty in relation to one another.[8]

In time the nation would be characterized by rights to "exclusive jurisdiction, territorial integrity, and nonintervention in domestic affairs," and these rights would be correlated to concepts of sovereignty.[9] The rights to jurisdiction and territory were modeled on concepts of individual personal freedom and linked to both secular and Christian ideologies about civilization.[10] Unaffiliated individuals, or individuals in kin groups, were believed to live in baser states of nature according to the demands of survival and dictates of instinct. They merely roamed upon the lands to acquire the material goods needed to survive. Social groups emerged as individuals or kin groups recognized their need for help and took on the responsibilities of aiding one another toward achieving their mutual goals for survival. Nations formed when social groups developed higher aspirations for civil society and government. Depending on the theorist, civility was evidenced by the existence of reason, social contract, agriculture, property, technology, Christianity, monogamy, and/or the structures and operations of statehood. These aspects of society or civilization were associated with the possession of sovereignty. Nations possessed the full measure of sovereignty because they were the highest form of civilization; individuals roaming uncultivated lands did not possess either civilization or sovereignty.[11]

In Christian ideology the dichotomy was not between the uncivil and civil but between the unbelieving and believing, though it would be false to suggest that these terms were mutually exclusive. The uncivil was equated with the unbelieving, the civil with the believing.[12] These associations were grounded in the projects of colonization and the congruous objectives of the nation and the church to civilize/christianize the uncivil/nonbelieving world in the name of God and the manifest destiny of the nation. In fact missionaries often went before and worked within the processes of establishing trade routes and military bases with national militaries in the name of extending God's kingdom on earth.[13] While some individual missionaries were highly critical of the colonial project and the church's complicity with the genocide and enslavement of indigenous peoples, the church as a sociopolitical institution consistently advanced and acted upon the notion of the rights of believers over those of nonbelievers, both to lands and resources and to existence as peoples.

The church even helped to sort through rival national interests over the rights to "discover" specific territories and exploit indigenous labor located therein. In many instances it is impossible to talk about a difference between the interests of the church and of the nation.[14] Many have argued, in fact, that the claim to the separation of church and state is ideologically and politically hypocritical.[15]

Out of the political and theological debates about what constituted the nation, debates deeply embedded within the ideologies and activities of colonialism, modern international law was defined as such. The two primary vehicles that served for the articulation of international legal precepts about nationhood, and so of the sovereignty with which such a character was defined, were the national constitution and the treaty. The constitution functioned as a document of nation formation and was used by colonists, rebellions, and commonwealths to assert territorial boundaries and the authority and terms of the nation-so-formed to govern within them. Yet the declarative status of the constitution disguised the fact that the nation so defined was contingent upon it being recognized as legitimate by other already recognized nations. Therefore custom within international law emerged around the treaty as a mechanism for both the exercise of nationhood and the recognition of national sovereignty. Treaties required that they be honored as legally binding compacts or agreements between nations, as the terms would be understood by the signatories. Nations recognized each other's status as nations by entering into treaties with each other. Territorial boundaries and jurisdiction dominated the specific articles of treaties throughout the colonial period. So too did peace, rights of passage, alliance in instances when other nations breached boundaries or interfered with government operations (i.e., broken treaties), and the like. The integrity of the exercise of nationhood and the recognition of sovereignty by treaty depended, of course, on the nation's honoring of the treaties into which it entered. However, because nationhood and sovereignty were interlocked through the entire discursive apparatus of treaty making, the recognition of one implied the recognition of the other.[16]

Inflections

Nations certainly put sovereignty to work during the colonization of the Americas and the Pacific to justify—by explanation or denial—the dispossession, enslavement, and genocide of indigenous peoples. In Australia, it was inflected through the doctrine of discovery to justify the complete dispossession of Aborigines from their lands and the outright refusal by the colonists to

enter into treaties with them. In Canada sovereignty was invoked to defend the use of military force, such as happened in the territories of Newfoundland and Nova Scotia, where most indigenous peoples were massacred by colonists during early conflicts over territorial rights.[17] In the southwestern region of the United States and northern parts of Mexico, it informed the efforts of the church to have the enslavement and conversion of nonbelievers supported by the military—first by Spain, then by Mexico, and later by an emergent immigrant class that would reform themselves as a state of the union.[18] In each instance the concept of sovereignty served the colonists in negating indigenous territorial rights and humanity while justifying the right of conquest by claims to national superiority.

The question that follows is whether the sovereignty of indigenous peoples was ever really recognized within international customary or documentary law. England, France, Canada, New Zealand, and the United States certainly negotiated, signed, and ratified treaties with indigenous peoples. Many have noted, however, that such efforts were less about the recognition and provision for the *sovereignty* of indigenous peoples than they were about the assertion of the respective nations' status as the more powerful sovereign within a given territory, against other European powers and over indigenous peoples.[19] Given the fact that every single treaty signed with indigenous peoples in the Americas and the Pacific was broken, it would seem to be so. England, France, Canada, New Zealand, and the United States used the treaty-making process to neutralize the political force of allied and individual indigenous groups and then deployed specific articles of signed treaties to secure the right over and against other European countries to relate with, trade, and govern with those groups as a matter of domestic policy. They understood perfectly well the precedence within international law that defined sovereignty through the attributes of territorial integrity and jurisdiction, and they were hardly likely ever to acquiesce these principles to indigenous peoples, by treaty or otherwise.

Yet the fact remains that indigenous peoples were recognized by England, France, Canada, New Zealand, and the United States as constituting nations that possessed rights to sovereignty—by treaty, by constitution, by legislative action, and by court ruling. Even U.S. Chief Justice John Marshall conceded that terms like *nation*, *sovereign*, and *treaty* had been used in colonial and U.S. law in reference to American Indian tribes and that the U.S. Supreme Court was therefore obligated to adhere to the internationally accepted definitions of those terms in relating to the tribes as independent sovereigns.[20] This is remarkable given the ideological force of theories of civilization and Christian theology that worked against the acknowledgment that indigenous peoples

possessed any such rights on the grounds that they lacked proper civility or belief in God. Still, adherence to the tenets of international law and Christian theology demanded that particular steps be taken in securing desired territories and claiming jurisdiction therein. European nations were required to treat with indigenous peoples in order to secure lands by cession and purchase; treaties resulted.

The contradictions within recognition-by-treaty histories are not in the moments of alleged adherence to international law by the nations of Europe and North America, who had to follow customary practices by entering into treaties with indigenous peoples in order that their territorial claims in the colonies be respected by one another. The blatant contradictions are between the recognition of the sovereignty of indigenous peoples through the entire apparatus of treaty making and the unmitigated negation of indigenous peoples' status and rights by national legislation, military action, and judicial decision.

The "Marshall trilogy"—*Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832)—is probably one of the most important instances of these incongruities.[21] The trilogy provided the first substantive definition of sovereignty for American Indians by the U.S. judiciary and subsequently served to establish precedence for the trust relationship between the U.S. federal government and American Indian tribes (and, since 1972, Alaskan Native villages and, since 1920, Native Hawaiians). The way that the trilogy was taken up by England's Colonial Office in directing relations with indigenous peoples in Canada, New Zealand, and Australia signifies much about the international exchange of ideas regarding the character and rights of sovereignty for the nations of Europe and North America as well as the attempt to justify the denial of that status and rights for indigenous peoples.[22] The subjugation of indigenous peoples to U.S. plenary power through Marshall's fictionalized accounting of the doctrine of discovery provided the Colonial Office with the legal precedence it needed to justify its colonization of North America and the Pacific.

Johnson v. McIntosh involved competing claims to a single parcel of land in the state of Illinois between Johnson, who had acquired a deed to the land from the Piankeshaw, and McIntosh, who had acquired a deed to the land from the United States. It was determined that the Piankeshaw were in possession of the land when they issued the deed, as evidenced by two treaties that had been signed with the Illinois and Piankeshaw tribes in 1773 and 1775 over the lands in question. It was also determined that the U.S. had acquired title to those lands by those same treaties and subsequently had sold the parcel to McIntosh

(there was a dispute in the case over whether the parcel was located within the ceded area, but it was ruled that it had been).

The immediate question before the Supreme Court, as Marshall framed it in his opinion, was what kind of title the Piankeshaw had in the lands. Obviously it was a title that they could treat upon. Within the customs of international law, treaties implied nationhood and so sovereignty and so inherent territorial rights. While not missing the import of such links, Marshall sided with the defendant, whose argument he summarized as follows:

> The uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations. All the treaties and negotiations between the civilized powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers. Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states.[23]

Effectively, Marshall rewrote treaty history by ruling that the treaties signed between American Indians and European powers functioned in a way contrary to the precepts of existing international law. Instead of recognizing the sovereignty of Indians, Marshall argued that the treaties had "disregarded" Indian land rights and so the status of Indians as "sovereign, independent states." Marshall's evidence for this "disregard" was not located within the fact or provision of the treaties but by the doctrine of discovery.

According to Marshall, the doctrine established that American Indians were not the full sovereigns of the lands that they possessed but were rather the users of the lands that they roamed and wandered over for purposes of shelter and sustenance. This distinction was informed by European worldviews, particularly the theories of English philosopher John Locke, who argued that hunter-gatherer societies "might have property in what they found or captured . . . but not in the land over which they traveled in its pursuit."[24]

While it was accepted that Indians maintained particular rights associated with their status as the original inhabitants of the land, the exclusive rights of

property in the land belonged to the nation who discovered the lands. Discovery was demonstrated by the appropriation of the lands for agriculture, which in turn secured the rights of the discovering nation to claim full sovereignty within the lands and against all other claims:

> Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives. The sovereignty and eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits. The subjects of the discovering nation must necessarily be bound by the declared sense of their own government, as to the extent of this sovereignty, and the domain acquired with it. Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state. The same treaties and negotiations, before referred to, show their dependent condition.[25]

From the Lockean hunter-gatherer/agriculturalist dichotomy, and with the correlation in international law between sovereignty, jurisdiction, and territorial rights in hand, it followed in Marshall's reasoning that by virtue of their relationship to the land as hunter-gatherers, Indians had been made "subject to the sovereignty of the United States."[26] These were well-established facts, Marshall contended, of colonial law, which had treated Indians "as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government" on the basis that they were not in full possession of the lands upon which they roamed and wandered.[27]

In lieu of full title to or property in the lands, Marshall offered "aboriginal title" as the legal definition for the kinds of rights that Indians had in the lands. This title presupposed their relationship to the lands as hunters-gatherers. It was "a mere right of usufruct and habitation, without power of alienation."[28] All "civilized nations" were "founded on this principle" and distinction.[29] No civilized person, Marshall went on, would expect those who had appropriated the lands for agriculture, and thereby acquired full title to the lands by right of discovery, to give up the lands to "natives" who merely wandered over them in search of materials to satisfy their immediate needs for clothing, shelter, and sustenance:

> By the law of nature, [Indians] had not acquired a fixed property capable of being transferred. The measure of property acquired by occupancy is determined, according to the law of nature, by the extent

> of men's wants, and their capacity of using it to supply them. It is a violation of the rights of others to exclude them from the use of what we do not want, and they have an occasion for. Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over; and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive. According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle. The right derived from discovery and conquest, can rest on no other basis; and all existing titles depend on the fundamental title of the crown by discovery.[30]

Marshall's "aboriginal title" was directly at odds with the treaty-making efforts of the United States at the time. The treaty most certainly did recognize a title in the land that could be negotiated as well as the authority of the signatories to function as representatives of their governments. Under the precepts of international law, the 371 treaties ratified between the United States and indigenous peoples between 1778 and 1871 provided for the clear recognition of indigenous peoples as nations who could enter into treaties and, therefore, as nations who possessed jurisdiction and territorial rights. Yet Marshall's ruling in *Johnson v. McIntosh* maintained that indigenous peoples did not possess the kind of title in the lands that they could be and were negotiating by treaty.[31]

In 1830 the state of Georgia passed "an act to prevent the exercise of assumed and arbitrary power by all persons under pretext of authority from the Cherokee Indians, &c." The act sectioned Indian lands into state county districts, set up a process for state citizens to acquire individual parcels by lottery, required non-Indians to possess state permits to reside on Indian lands, declared all Indian laws null and void, outlawed public gatherings of Indians, and forbade the testimony of Indians against whites in court. The immediate impetus for the act was the discovery of gold on Cherokee lands in 1828, but the more foundational purpose was Georgia's aim, quickly followed by Alabama and Mississippi, to gain jurisdictional controls over Indian lands and to dissolve the political and economic clout of the powerful Cherokee.

With the support of their own multilingual lawyers educated in eastern U.S. universities, and diplomatic teams in Washington DC and London, the Cherokee sought an injunction against Georgia to stop it from applying laws that were obviously intended to "annihilate the Cherokee as a political society and to seize for the use of Georgia the lands of the nation which have been assured to them by the United States in solemn treaties."[32] The request for the injunction went before the Supreme Court.

In their arguments the lawyers for the Cherokee maintained that the Cherokee were a sovereign nation and that, as such, Georgia's laws could not be unilaterally enforced upon them. They based their arguments on the fact that the Cherokee had entered into treaty relations with the United States and so were a sovereign nation under the precepts of international law as well as according to the specific provisions of the treaties that provided for the protection of Cherokee rights by the U.S. government because of the Cherokee's demonstrated status as sovereigns.

The Supreme Court did not miss the implications of the Cherokee argument. Negating the significance of U.S. treaties signed with the Cherokee that suggested they possessed a sovereignty akin to that of the United States or European nations under the customs of international law, Marshall turned instead to article 1, section 8, paragraph 3 of the U.S. Constitution to render his opinion. The article provides that the federal branch of the U.S. government has the sole right and responsibility "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Marshall argued that the clause intended to show a legal distinction between the categories of sovereigns that it employed—foreign nations, state governments, and Indian tribes. The task before the Court was to enumerate the distinction of "Indians tribes."

Assuming that "Indian tribes" were not foreign nations or state governments, Marshall posited that they were instead "domestic dependent nations" whose relationship to the U.S. federal government, as the juridical power charged with regulating commerce and collateral issues with them, was like that "of a ward to a guardian." These two enumerations—domestic dependent nationhood and the ward/guardian analogy—would set the legal precedence for defining relations between the United States and indigenous peoples.

Translated in subsequent court decisions and legislative action as the plenary power doctrine and trust or protectorate relationship, Marshall's concepts sought to secure U.S. interests in controlling indigenous peoples and their lands by defining their relationship to the United States as wholly subjected and conquered. Removed from the realm of the "foreign," "Indian tribes" were

likewise removed from the realm of international law, breaking any implied link between treaties, nationhood, sovereignty, territorial integrity, and jurisdiction that the United States would be obligated to recognize in Indians. Indian tribes were to be related to as "domestic" political entities whose specific rights to territorial integrity and jurisdiction were under the sole guardianship of the U.S. government. This allowed the United States to assume authority for representing tribal interests in matters of international law as well as to control the terms of the exercise of tribal sovereignty in the realm of domestic politics. Marshall effectively "passed [the Indian tribes] under" the governing authority of the United States and so made them "dependent" on U.S. protection from foreign and state interests.

Since under the U.S. Constitution only foreign nations can sue state governments before the Supreme Court, Marshall unsurprisingly denied the Cherokee request for an injunction against Georgia's laws on the basis that they were not a "foreign nation." Concerned about the legal implications of the decision, the Cherokee strategized a case that would force the Supreme Court to some accounting for the fact of U.S. treaty history with the Cherokee as a sovereign nation.

Missionaries Samuel A. Worcester, Elizur Butler, James Trott, Samuel Mays, Surry Eaton, Austin Copeland, and Edward D. Losure broke Georgia's newly passed law requiring that non-Indians possess a state license in order to reside on Indian lands. They were tried in state court and sentenced to four years of hard labor. Worcester appealed to the Supreme Court.

The same counsel from *Cherokee Nation v. Georgia* argued in *Worcester v. Georgia* that Worcester had entered Cherokee territory as a missionary under the authority of the U.S. president and with the approval of the Cherokee. They claimed that "the State of Georgia ought not to maintain the prosecution, as several treaties had been entered into by the United States with the Cherokee Nation by which that Nation was acknowledged to be a sovereign nation, and by which the territory occupied by them was guaranteed to them by the United States."[33] They further claimed that "the laws of Georgia under which the plaintiff in error was indicted are repugnant to the treaties, and unconstitutional and void, and also that they are repugnant to the Act of Congress of March, 1802, entitled 'An act to regulate trade and intercourse with the Indian Tribes.'"[34]

The Court recognized that the arguments made by the plaintiffs called into question not only the validity of Georgia's laws but "the validity of the treaties made by the United States with the Cherokee Indians."[35] The Court also acknowledged that the case raised questions about the jurisdictional authority

of the Cherokee within their own territories and in relationship to Georgia as provided for by U.S. treaty and federal statute. Did states have jurisdiction over Indian tribes? Could states make laws regulating the status and rights of Indian tribes over and against federal law? The Cherokee argued that they could not. They contended that they enjoyed a special relationship to the U.S. federal government because they were a sovereign nation, proven by the fact that since 1785 they had entered into twelve treaties with the government that would constitute the United States.[36]

To render the Court's opinion, Marshall returned to the doctrine of discovery to establish that the United States possessed full title in the lands and, by implication, over the peoples residing within them. As in *Johnson v. McIntosh*, he traced the passage of title from the colonists to England to the United States in order to demonstrate U.S. property in the lands and commensurate plenary power over the lands (again representing the Cherokee as "roaming" and "wandering" over the lands and not as agriculturalists with established rights of property in the soil—a representation in direct contradiction with the known history and culture of the Cherokee as agriculturalists).

Marshall then turned to the Treaty of Hopewell, signed in 1785 with the Cherokee, to prove that the Cherokee acknowledged not only that they were "under the protection of the United States of America, and of no other power" but that they had benefited directly from said protections as evidenced by the subsequent treaties they signed with the United States.[37] (In other words, that the Cherokee kept signing treaties with the United States proved to Marshall that they not only benefited from said relations but were acknowledging the United States as the more powerful sovereign in the territory.) Consequently, Marshall purported, the Cherokee were not a sovereign equal in political status and rights to the United States, as might be suggested by the conventions of international law regarding the relationship between signatories. Rather, the Cherokee were a sovereign possessing partial or limited powers as dependent wards under the more supreme governing authority that it had recognized and benefited from in the United States.

Next Marshall addressed the matter of the Cherokee's relationship to Georgia as a state of the union. He argued that Georgia, as all states, recognized by their own statutes that it was the federal government that held exclusive rights and responsibilities to regulate relations with the Indian tribes "with which no state could interfere" by virtue of the U.S. Constitution's commerce clause. He concluded: "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right

to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States."[38]

The Court ruled that Georgia's 1830 act interfered with relations between the United States and the Cherokee, "the regulation of which, according to the settled principles of our Constitution, is committed exclusively to the Government of the Union." Marshall declared that Georgia's act was "in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognise the pre-existing power of the Nation to govern itself." Georgia's act was found to be "in equal hostility with the acts of Congress for regulating this intercourse and giving effect to the treaties." Marshall concluded that Georgia's laws were "unconstitutional and void" and granted Worcester a full pardon.[39]

Many have noted that U.S. president Andrew Jackson, who was instrumental in the passage of the Indian Removal Act of 1830, was so enraged by Marshall's opinion that he uttered something to the effect that Marshall had made his laws, let him enforce them. Jackson refused to send in the troops needed to defend Cherokee territory against Georgia's retaliatory encroachment and instead sent in commissioners to negotiate treaties for Cherokee removal to Indian Territory.[40]

Despite the superficial appearance of conflict in the Supreme Court's opinions in the Marshall trilogy, the decisions were in perfect keeping with the colonial objectives of the U.S. government at the time, a government that aimed to abrogate the means and abilities of Indian tribes to maintain their jurisdiction and territorial rights. The configuration of "Indian tribes" as being under the governing authority of the United States was neither adverse to nor undermining of the ultimate objective to dissolve Indian governments and dispossess Indians of their territories. And it certainly was not unique.

European nations likewise constructed themselves as sovereigns with abject rights to claim jurisdictional authority and territorial rights over indigenous peoples in their colonies throughout the Americas and the Pacific. The specific claims and exercises of their sovereign powers—militarily and otherwise—made almost incestuous use of each other's laws and policies to justify the dispossession, enslavement, and genocide of "their Indians." This is reflected in the opinions of Marshall's trilogy—which claimed that Indians had "passed under" U.S. plenary power, which in turn had a trust responsibility to govern

the Indians as a matter of domestic policy—and in the ways that these rulings were taken up by England's Colonial Office to justify the usurpation of indigenous territorial rights in Canada, Australia, and New Zealand.[41]

Though informed by international debates, no previous legislative or court decision had defined the "doctrine of discovery" as such.[42] Marshall invoked it as though it were a well-founded legal principle of international law. It took on the force of precedence because Marshall invented a legal history that gave it that status. In this history, Marshall defined "aboriginal title," "domestic dependent nations," plenary power, and trust as inevitable evolutionary legal principles of a civilized state. The history constructed indigenous peoples under the civilized governing authority of the United States. In this tale, the United States, as all progressing nations, was charged with the demands of adhering to the principles of international law but also burdened with the responsibilities of civilizing/Christianizing Indians into those more civilized/Christian legal beliefs and practices.

The entire self-fulfilling narrative of legal, moral, and social superiority offered in such claims to doctrine as Marshall's discovery reinvented a sovereignty for indigenous peoples that was void of any of the associated rights to self-government, territorial integrity, and cultural autonomy that would have been affiliated with it in international law at the time.[43] In junction with the fact that the specific story Marshall told affirmed British and then U.S. title to the lands in North America on the basis of the legal precedence of discovery that it fictionalized, it is unsurprising that Marshall's trilogy was taken up by the Colonial Office in England to direct relations with indigenous peoples and its colonists in Canada and the Pacific. As in the United States, these relations were embedded with the ideologies of race, culture, and identity that legitimated the narratives.[44]

In response to the perceived problems with the colonial rebellion in the United States, and settler violence against indigenous peoples in Canada, Australia, New Zealand, and the Cape Colony, the Colonial Office established a firm "rule of law" framework for developing its guidelines for colonization.[45] Colonies were expected to adhere to the letter of the law, not to interpret the law according to their own want or personal interest.[46] However, geographical distance made it virtually impossible for the Colonial Office to oversee, let alone enforce, its guidelines. The result was an incredibly incongruous relationship between England, its colonies, and indigenous peoples.

The primary legal point of reference for the Colonial Office was the British Royal Proclamation of 1763. The Proclamation was issued by King George III after the cession of New France to England by the Treaty of Paris. Basically it

determined English territorial boundaries and the terms for trade and governance within the Americas. In relationship to indigenous peoples, it asserted that the Crown possessed the sole right to acquire indigenous lands and prohibited the purchasing of lands by individuals from indigenous peoples. This directive necessitated that England enter into treaties with indigenous peoples in order to acquire title to desired areas before settlement.[47] Though not a law, the Proclamation was given the force of law by legislative action and court rulings in North America and the Pacific (including Marshall's trilogy).

Despite the Proclamation's directive, lands were occupied by English colonists without the required treaties in place. Violence against indigenous peoples occurred as individual colonies usurped lands from indigenous peoples and/or protected their interests to remain on lands they had illegally seized. The Aborigines in Australia, Maori in New Zealand, Beothuk in Newfoundland, and Tasmanians of Tasmania were some of the groups almost exterminated by colonists ignoring their own policy.[48]

In the 1830s and 1840s, Sir James Stephen was under-secretary of the Colonial Office (he had worked in the office as a legal advisor since the 1810s). Believing that the immediate genocide of Australian Aborigines had been "immoral," he turned to Marshall's opinion in *Johnson v. McIntosh* to help him write guidelines for William Hobson, the British consul in New Zealand, to treat with the Maori.[49]

> It [*Johnson v. McIntosh*] shows that the whole Territory over which those Tribes wandered was to be regarded as the property of the British Crown in right of discovery and conquest—and that the Indians were mere possessors of the soil on suffrance. Such is American Law. The British law in Canada is far more humane, for there the Crown purchases of the Indians before it grants to its own subjects. . . . Besides what is this to the case of New Zealand? The Dutch, not we, discovered it. Nearly a hundred years ago Captain Cook landed there, and claimed the Sovereignty for King George III. Nothing has ever been done to maintain and keep alive that claim. The most solemn Acts have been done in repudiation and disavowal of it. Besides the New Zealanders are not wandering Tribes, but bodies of men, till lately, very populous, who have a settled form of Government, and who have divided and appropriated the whole Territory amongst them. They are not huntsmen, but after their rude fashion, Agriculturalists.[50]

Stephen's invocation of *Johnson v. McIntosh* is based on Marshall's affirmation of the preeminence of English title within North America, as the first

discoverers (agriculturalists), and of the Proclamation as the force of law in determining title. These affirmations were required by Marshall in order to make the claim that the passage of title from England to the United States had established U.S. entitlement to the lands and to jurisdiction over and within them. The rationale served English interests. Far more interesting than the predictably flippant remarks about "American Law" and the superiority of English civility over American barbarity in Stephen's directive is his treatment of the discovery doctrine as a well-established legal precept read back into the Proclamation and out of Marshall's opinion. This history provided Stephen with the legal framework that he needed in order to direct English colonists to treat with the natives as a distinction of English civilization. His directive concludes by ordering Hobson to treat with the Maori.[51] Hobson responded by initiating the negotiations that would result in the Treaty of Waitangi of 1840 (see Fiona Cram, "Backgrounding Maori Views on Genetic Engineering," this volume).[52]

Marshall's trilogy also influenced numerous Canadian court decisions. The discovery doctrine was taken as an extension of the principles set forth in the Proclamation, especially in regard to the notion that the Crown alone enjoyed the right to treat with and purchase lands from First Nation peoples.[53] As in the United States it was decided that title to lands that were unceded or unpurchased by treaty could still be found to have been "extinguished" if settlement within the area had progressed unfettered—a convenient displacement of the impact of overt military aggression and dispossession of indigenous peoples on the progress of said settlements. As in U.S. case history, this logic provided an efficient justification for Canadian nullification of "aboriginal title" by treaty, by purchase, or by the default of colonization.[54]

One of the other legacies of the Marshall trilogy was the configuration of indigenous peoples as welfare beneficiaries.[55] The notion that indigenous peoples are *weaker than*, *wards*, *dependent*, and *limited* in power in relation to their colonial states has perpetuated dominant ideologies of race, culture, and identity. Within these identificatory practices, "indigenous people" are marked as yet another ethnic group within the larger national melting pot, where the goal is to boil out cultural differences and the national jurisdictions and territorial boundaries of indigenous groups by boarding schools, farming programs, citizenship, and adoption.[56]

As I have argued elsewhere, the *making ethnic* or *ethnicization* of indigenous peoples has been a political strategy of the nation-state to erase the sovereign from the indigenous.[57] To the extent that the nation-state can maintain that indigenous peoples are nothing but welfare recipients under its trust, the very

notion that indigenous peoples are members of sovereign political collectivities is made incomprehensible. This incomprehensibility works to collapse indigenous peoples into minority groups that make up the social rainbow of multicultural difference as a means of erasing their unique political status and rights under the precedence of international law.

The erasure of the sovereign is the racialization of the "Indian." These practices have had important consequences in shaping cultural perspectives about the relationship between indigenous identity and sovereignty, not only from the viewpoint of some dominant, privileged position but within indigenous communities as well.

On the one hand are all of the myriad social forces of oppression that have racialized (invented) an Indian identity that can be used to usurp indigenous sovereignty. These forces presuppose the legitimacy of an entire discourse of cultural authenticity, racial purity, and traditional integrity, which in turn legitimates assimilationist ideologies. In this discourse is the real Indian (the mythic full-blood traditionalist born and raised on the reservation in poverty and despair), romanticized as the last vestige of real Indian culture, and the fraud (the mythic mixed-blood urban Indian born and raised without any sense of Indian culture), demonized as the contaminant of all things Indian while serving as testimony to the successes of the colonial project. Nowhere in this discourse are real indigenous peoples permitted or heard to speak for themselves, and when they do, their self-definitions are incomprehensible.[58]

On the other hand are all of the ways that indigenous identity is foundational to the structure, exercise, and character of sovereignty. It is, in other words, impossible to separate Native Hawaiian identity from Native Hawaiian perspectives about and struggles for self-government; Chamorro identity from Chamorro struggles for jurisdictional integrity in Guam; Taíno identity from Taíno land rights; Makah identity from Makah whaling rights; Maori identity from Maori struggles for intellectual property rights. In the historical complexities and cultural richness and diversity of these and all indigenous communities is the truth of the heterogeneity of indigenous identity, not only in how indigenous peoples identify themselves and their cultures but in how their self-definitions inform the character of their unique political perspectives, agendas, and strategies for sovereignty.

Rearticulations

Following World War II *sovereignty* emerged as a particularly valued term within indigenous scholarship and social movements and through the media of cul-

tural production. It was a term around which analyses of indigenous histories and cultures were organized and whereby indigenous activists articulated their agendas for social change. It was also a term through which indigenous artists represented their histories, cultures, and identities, often in opposition to the erasures of their sovereignty by dominant ideologies of race, culture, and nationalism coined in the discourses of eugenics and American patriotism.

This is not to say that the concept of sovereignty was new to indigenous peoples. Certainly by the early 1600s it was a familiar and often belligerent self-descriptive against relentless military invasions and the social forces of colonization. It was employed to claim nationhood status and so collective rights to territorial integrity and governance as well as to define a humanity that was denied by the discourses of missionization. For example, the adoption of the designation Five Civilized Tribes by the Cherokee, Muskogee (Creek), Choctaw, Chickasaw, and Seminole in relations with the United States was an interesting discursive maneuver in this regard.[59] So were the exchanges between the members of the Haudenosaunee Confederacy and early U.S. government leaders about democracy and personal freedom.[60] Paiute writer and activist Sara Hopkins Winnemucca wrote *Life among the Piutes* to make an intellectual intervention against assimilationist ideologies and toward affirming American Indian humanity, cultural vitality, and land rights.[61] These and other self-definitions by the status and rights of sovereignty disrupted the solidity of dominant representations of indigenous peoples as savage heathens.

One of the most important reasons why sovereignty took on renewed currency following World War II was the oppositional perspective it signified toward the racist ideologies of beneficiarism that settled national policies during the preceding assimilationist period. Sovereignty had come to represent a staunch political-juridical identity refuting the dominant notion that indigenous peoples were merely one among many "minority groups" under the administration of state social service and welfare programs. Instead, sovereignty defined indigenous peoples with concrete rights to self-government, territorial integrity, and cultural autonomy under international customary law.[62] By doing so, it served to link indigenous peoples across the territorial borders of nation-states, refuting their position under the domains of domestic policy and reclaiming their status under the conventions and relations of international law.

Again the strategy was learned from previous generations. Since the initiation of conquest, indigenous leaders had assumed the relevance of a legal discourse that was, conventionally speaking, "not their own" as a way of claiming a status, and its associated rights, against the ideologies and prac-

tices of colonialism.[63] Of course, translating indigenous epistemologies about law, governance, and culture through the discursive rubric of sovereignty was and is problematic.[64] Sovereignty as a discourse is unable to capture fully the indigenous meanings, perspectives, and identities about law, governance, and culture, and thus over time it impacts how those epistemologies and perspectives are represented and understood.

Despite the problems of translation, indigenous peoples learned that how they represented themselves in international affairs mattered in consequential ways to how they were related to and what rights they were perceived to be claiming.[65] Refuting minority status was a refutation of the assimilationist ideologies that constructed indigenous peoples as ethnic minorities under the governing authority of the nation-state and a claim of the attributes of sovereignty customarily associated with nations.[66]

These discursive strategies were key as the world community mobilized attention on the rights of minority groups after World War II and in the context of the formation of the United Nations.[67] Within the political forums and policy agreements of the UN, indigenous peoples insisted on being identified as *peoples* (political collectivities) and not as *people* (minorities). The stakes in being so identified originated with the UN Charter, which affiliated the rights of *peoples* to *self-determination*—a legal category that came to be defined by both group and individual rights not to be discriminated against on the basis of race, ethnicity, gender, sexual orientation, or physical or mental ability, and to determine one's own governments, laws, economies, identities, and cultures. By taking on the self-definition of peoples with group and individual rights to self-determination, indigenous leaders were claiming a difference from minorities and a status akin to the status of nations.[68] The UN community has not missed the political importance of such links, as has been true within the signatory process of the *Declaration on the Rights of Indigenous Peoples*.

Written by an international consortium of approximately one hundred indigenous leaders from around the world over a decade's time, the *Declaration* translates human rights principles for indigenous peoples into the specific rights of self-determination, including provision for aspects of tradition, custom, property, language, oral histories, philosophies, writing systems, educational systems, medicines, health practices, resources, lands, and self-definition. Though there are some troubles with the conceptualization of what these particular rights mean, and many feel that the definitions do not go far enough, what remains interesting is how those who participated in the process chose to represent the rights as *indivisible* and *interdependent* aspects of their identities as sovereigns.[69] Human rights for indigenous peoples, in

other words, became translated to mean rights to a self-determination that was indelibly linked to sovereignty. So strong is this conceptualization that it is now virtually impossible to talk about what *sovereignty* means for indigenous peoples without invoking self-determination. As a consequence, sovereignty has been solidified within indigenous discourses as an inherent right that emanates from historically and politically resonant notions of cultural identity and community affiliation: "Sovereignty, in the final instance, can be said to consist more of a continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty."[70] "Sovereignty is inherent; it comes from within a people or culture."[71]

The link of sovereignty to peoples and cultures has been an important contribution to the precepts of human rights within international law by indigenous scholars and activists. The link has opened up debates about theories of humanity, notions of rights, and the authority of the nation-state to determine the legal substance of both. But it is also one of the most misunderstood and misrepresented aspects of how sovereignty matters. It is simultaneously and contradictorily true that many have mistaken an essentialist rhetoric for a politically strategic one, questioning what is perceived to be a gross reduction of everything from land rights to rug designs to sovereignty as a kind of raison d'être for all things indigenous.

The discursive proliferation of sovereignty must be understood in its historical context. The multiple social forces of globalization have reinvented colonial practices from the supposed confines of the nation as empire builder to the elusive networks of decentralized political economies and informatics.[72] These networks have perpetuated the kinds of exploitation of indigenous labor, products, resources, lands, and bodies conventionally ascribed to colonialism proper—that is, Colonialism with a capital C.[73] The almost aggressive self-definition of indigenous peoples by sovereignty is in large part a response to their continued experiences of exploitation and disempowerment under processes of globalization.[74] Fiercely claiming an identity as sovereign, and including multiple sociocultural issues under its rubric, has been a strategy of not merely deflecting globalization's reinvention of colonial processes but of reasserting a politically empowered self-identity within, besides, and against colonization.

It is also true that there is a troubling and troubled essentialism of sovereignty by indigenous scholars, community organizers, and cultural producers, evident in the moments when what it is or how it is important is taken-for-granted. Many find it troubling that indigenous histories and

cultures are often framed through sovereignty without a consideration of the ways in which its ideological origins might predispose a distortion or negation of indigenous epistemologies of law and governance.[75] What this means for the actual decolonization of indigenous cultures is complicated by how those origins impinge upon real revitalization efforts or effective decolonization strategies. Others find the links between sovereignty and particular cultural practices, such as certain aspects of basket weaving or food preparation, to flatten out, distort, or even make light of the legal importance and political substance of sovereignty.

What is important to keep in mind when encountering these myriad discursive practices is that sovereignty is historically contingent. There is no fixed meaning for what *sovereignty* is—what it means by definition, what it implies in public debate, or how it has been conceptualized in international, national, or indigenous law. Sovereignty—and its related histories, perspectives, and identities—is embedded within the specific social relations in which it is invoked and given meaning. How and when it emerges and functions are determined by the "located" political agendas and cultural perspectives of those who rearticulate it into public debate or political document to do a specific work of opposition, invitation, or accommodation. It is no more possible to stabilize what *sovereignty* means and how it matters to those who invoke it than it is to forget the historical and cultural embeddedness of indigenous peoples' multiple and contradictory political perspectives and agendas for empowerment, decolonization, and social justice.[76]

The challenge, then, to understand how and for whom sovereignty matters is to understand the historical circumstances under which it is given meaning. There is nothing inherent about its significance. Therefore it can mean something different during its original uses in the politico-theological discourses of the Catholic church than it did during Marshall's delivery of the Supreme Court's decision in *Worcester v. Georgia*, differing again in its links to concepts of self-determination and human rights and in the contexts of Alaskan Native, Native Hawaiian, or Maori or Aborigine struggles.

Understanding the problems of translating indigenous concepts of law, governance, and culture through the discourses of sovereignty requires unpacking the social forces and historical conditions at each moment when it is invoked as well as the social relations in which it functions. How did those forces cohere? What social conditions were the social actors confronting? What kinds of identities did they have stakes in claiming and asserting? In relationship to what other identities?[77]

Concurrent with associating sovereignty with self-determination has been

its linking to *self-government*.[78] In locating sovereignty within the idea of peoples who are collective political entities with inherent rights to decide their own laws and practice their own cultures, self-government has emerged as an attendant concept to signify rights to determine, practice, and transform multiple forms of social organization—in effect to decolonize social institutions from federal/state paternalism and to reformulate them along the lines of distinctive cultural perspectives. This is evident in everything from efforts to revitalize traditional forms of education and health care to reclamations of legal traditions and practices.

For instance a myriad of First Nation organizations in Canada—such as the Native Women's Association of Canada, Indian Women for Indian Rights, Assembly of First Nations, Native Council of Canada, Inuit Committee on National Issues, Inuit Tapirisat of Canada, Inuit Women's Association, and the Métis National Council—have almost unilaterally (though with important differences among them in political perspectives) made the assumption of band/reserve control over social programs and services like education, health care, child welfare, resource management, and economic development a key aspect of their movements to sovereignty by self-government. They have argued that not only should their unique cultural perspectives regarding education, health care, family, environmentalism, and communalism inform the structure and administration of these various types of social institutions but that sovereignty itself is a vacuous idea for indigenous peoples without providing for and guaranteeing their means and abilities to exercise it.[79]

Similarly, many indigenous peoples have revitalized their laws and legal practices in the contexts of their own juridical epistemologies and justice systems.[80] Several groups in Canada have returned to the model of the talking circle for deciding sentencing terms.[81] The Navajo have introduced the Peacemakers Court for mediation.[82] These efforts have been characterized by serious attention to inherited beliefs, stories, and ceremonies as well as a concern as to how best to entrench these cultural perspectives and practices within "tribal" law.[83]

One of the most powerful examples of these efforts is their implication for reforming nation-state policy, indicated by Australia's high court decision in *Mabo v. Queensland* in 1992. Eddie Koiki Mabo, Sam Passi, David Passi, Celuia Mapo Salee, and James Rice filed a legal claim of ownership to their "preconquest" lands on the island of Mer in the Torres Straight between Australia and Papua New Guinea. Their claim was based on their unique legal customs for naming (singing) territorial occupation, use, and responsibility. They argued that the said customs superseded English title, which had been illegally

asserted without proper treaty or purchase in violation of the principles outlined in England's own Proclamation and wrongly justified on the basis of Marshall's discovery doctrine.[84]

In response to the claim, the high court of Australia required Queensland to determine the facts of the case. However, while the case was still pending, Parliament passed the Torres Strait Islands Coastal Act, which stated that "any rights that Torres Strait Islanders had to land after the claim of sovereignty in 1879 is hereby extinguished without compensation."[85] The challenge to the act was taken to Australia's high court in *Mabo v. Queensland*.[86]

In what would be an unprecedented ruling until Canada's Supreme Court decision in *Delgamuukw v. British Columbia* in 1997, Australia's high court found that indigenous customary law was a valid body of legal precedence for deciding aboriginal title. It held that title existed prior to Captain James Cook's maps of the area and the formal establishment of the neighboring English colony of New South Wales in 1788. The ruling overturned the discovery doctrine on which England had asserted title to indigenous territories in Australia. In recognizing that prior title in the lands existed with the Aborigines, the high court acknowledged that indigenous title still existed in any region where it had not been legally ceded.[87] Following the court's ruling, Parliament passed the Native Title Act in 1993, which provided indigenous peoples with the means to claim territorial rights to unalienated lands. These statutes have not only reversed the precedence for determining aboriginal title through discovery in Australia but have affirmed indigenous customary law as a credible source of precedence in matters of national jurisdiction.[88]

What all of these various political movements indicate is an attempt by indigenous peoples to be recognized as sovereigns and to be related to by their nation-states as forming legitimate governments with rights to direct their own domestic policies and foreign affairs, unmediated by the regional contours of state/provincial politics and corporate interests. Unevenly but steadily, the movements have impacted the direction of national law and policy, as nation-states have been held accountable to the increasing validation of indigenous epistemologies in matters of territorial rights and governance. Corollary terms like *nations within* and *government-to-government* have been deployed by indigenous peoples to position themselves as comprising fully self-determining political entities invested with the power to be related to as sovereigns in matters ranging from treaty to intellectual property rights.[89]

Indigenous opposition to being characterized as minorities by self-defining as peoples with the sovereignty of self-determination and self-government has met the challenge of conservative political interests that deploy the discourses

of reverse racism to contest the terms of indigenous legal status, treaty and land rights, and economic self-sufficiency. The argument goes that indigenous peoples are only receiving these special funds and services on the basis of race and that such funds and services are therefore unconstitutionally discriminating against non-indigenous people.[90]

In the United States these discourses have been profoundly informed by anti–Affirmative Action movements that work to portray federal and state funding and services to indigenous peoples as nothing more than special benefits for a racial/minority group that perpetuates reverse discrimination. Therein anti-gaming, anti-recognition, and anti-sovereignty movements have coalesced by the reracialization of indigenous status and rights. Given their successes in challenging civil rights principles in university admissions and fellowship programs, and in recent Supreme Court decisions such as *Rice v. Cayetano* in 2000, many indigenous peoples in the United States and in U.S. territories such as Puerto Rico, Guam, and Samoa are justifiably concerned about the long-term implications of these efforts for treaty and land rights.[91]

These tensions likewise inform the now twenty-year revision process for the *Declaration on the Rights of Indigenous Peoples*, as member nations of the UN resist including the identification of indigenous groups as *peoples* because of the legal status that this would imply. At the UN meetings on race and human rights in South Africa in 2001, some nations conceded to the use of the term *peoples* as long as it was explicitly stripped of its legal connotations. As a result, indigenous peoples are identified as peoples in the *Declaration* but only as a matter of semantics.[92]

Reverberations

Despite the strategic deployments of sovereignty, many indigenous scholars have criticized its proliferation within indigenous discourses because of its etymological origins within European colonial law and Christian ideologies. In "International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples," Shawnee scholar Glenn T. Morris writes: "Indigenous peoples, as all colonized peoples, have come to realize the importance of semantics in their quest for self-determination."[93] As the ideological forces of colonialism bear down through the etymological origins, meanings, and histories of *sovereignty*, Morris questions "the usefulness of forcing indigenous reality into the forms [semantics] developed by Europeans."[94] Morris even anticipates an emergent field of inquiry within indigenous studies focusing on indigenous epistemologies of law and governance that move past the colonial legacies of concepts like sovereignty and nationhood.

A similar perspective is articulated by Mohawk scholar and activist Taiaiake Alfred in *Peace, Power, Righteousness: An Indigenous Manifesto* (1999) and "Sovereignty" (in this volume):

> But few people have questioned how a European term and idea—sovereignty is certainly not Sioux, Salish, or Iroquoian in origin—came to be so embedded and important to cultures that had their own systems of government since the time before the term *sovereignty* was invented in Europe. Fewer still have questioned the implications of adopting the European notion of power and governance and using it to structure the postcolonial systems that are being negotiated and implemented within indigenous communities today.[95]

For Morris, Alfred, and other indigenous theorists, sovereignty fails to interrogate the ideological bases on which it has emerged and functioned as a category. Accordingly, using it to theorize indigenous histories, governments, and epistemologies is not merely problematical but faulty because such configurations are perceived to distort rather than translate the representation and so understanding of indigenous epistemologies, laws, governments, and cultures. In order to decolonize indigenous peoples, they explain, a return to indigenous epistemologies and languages is required.

Paradoxically, Morris, Alfred, and others anticipate the need for a body of scholarship that has chosen to represent itself as "intellectual sovereignty."[96] What is common among these various writings is the explicit attempt by indigenous scholars to decolonize the theoretical and methodological perspectives used within analyses of indigenous histories, cultures, and identities from the legacies of intellectual colonialism. Fierce criticisms of the exploitative research practices of anthropology (ethnography) and history parallel attempts to revitalize and legitimize indigenous epistemologies as valid bodies of knowledge.[97]

What is interesting about the term "intellectual sovereignty" is its link to ongoing political and cultural movements working to rearticulate the rights of indigenous peoples to sovereignty by self-determination and self-government. While problematical for its occasional invocation of or reliance on racialized notions of cultural integrity and traditionalism, intellectual sovereignty has situated itself as a part of the various sociopolitical movements toward sovereignty, self-determination, and self-government and is understood by its authors to be an integral aspect of the configuration and import of their intellectual work.[98] Given ongoing social forces of intellectual exploitation and appropriation, it is understandable that indigenous scholars would want to

mark their projects as oppositional by situating them as part of a sociopolitical movement for sovereignty.[99]

Conclusion

Sovereignty is historically contingent. What it has meant and what it currently means belong to the political subjects who have deployed and are deploying it to do the work of defining their relationships with one another, their political agendas, and their strategies for decolonization and social justice. Therefore to understand how it matters and for whom, sovereignty must be situated within the historical and cultural relationships in which it is articulated. The specific social conditions that produce its meanings must be considered. This is not to say that etymology is unimportant. Sovereignty carries the horrible stench of colonialism. It is incomplete, inaccurate, and troubled. But it has also been rearticulated to mean altogether different things by indigenous peoples. In its link to concepts of self-determination and self-government, it insists on the recognition of inherent rights to the respect for political affiliations that are historical and located and for the unique cultural identities that continue to find meaning in those histories and relations.

Notes

1. Vine Deloria, Jr., "Self-Determination and the Concept of Sovereignty," in *Economic Development in American Indian Reservations*, ed. Roxanne Dunbar Ortiz (Albuquerque: University of New Mexico Native American Studies, 1979), 22–28, see 22.

2. Kirke Kickingbird, Lynn Kickingbird, Charles J. Chibitty, Curtis Berkey, *Indian Sovereignty*, pamphlet (Washington DC: Institute for the Development of Indian Law, 1977), 64 pp., 1.

3. Deloria, "Self-Determination and the Concept of Sovereignty," 22.

4. S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996), 13–19.

5. Anaya, *Indigenous Peoples in International Law*, 14–15.

6. Anaya, *Indigenous Peoples in International Law*, 13–19.

7. Kickingbird et al., *Indian Sovereignty*.

8. Glenn T. Morris, "International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples," in *The State of Native America: Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 55–86.

9. Anaya, *Indigenous Peoples in International Law*, 15.

10. Anaya, *Indigenous Peoples in International Law*, 15.

11. J. G. A. Pocock, "Waitangi as Mystery of the State: Consequences of the Ascription of Federative Capacity to the Maori," in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton, and Will Sanders (Cambridge: Cambridge University Press, 2000), 25–35.

12. Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Vintage Books, 1979).

13. George E. Tinker, *Missionary Conquest: The Gospel and Native American Cultural Genocide* (Minneapolis: Fortress Press, 1993).

14. Ronald Niezen, *Spirit Wars: Native North American Religions in the Age of Nation Building* (Berkeley: University of California Press, 2000).

15. Christopher Vecsey, ed., *Handbook of American Indian Religious Freedom* (New York: Crossroad Publishing Company, 1993).

16. Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994).

17. Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History, University of Toronto Press, 1998).

18. Tomás Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* (Berkeley: University of California Press, 1994).

19. Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1974).

20. *Worcester v. Georgia* (1832).

21. Anaya, *Indigenous Peoples in International Law*, 16–19.

22. Harring, *White Man's Law*; Thomas Isaac, *Aboriginal Law: Cases, Materials, and Commentary*, 2nd ed., Aboriginal Issues Series (Saskatoon: Purich Press, 1999).

23. *Johnson v. McIntosh* (1823).

24. Pocock, "Waitangi as Mystery of the State," 27.

25. *Johnson v. McIntosh* (1823).

26. *Johnson v. McIntosh* (1823).

27. *Johnson v. McIntosh* (1823).

28. *Johnson v. McIntosh* (1823).

29. *Johnson v. McIntosh* (1823).

30. *Johnson v. McIntosh* (1823).

31. Marshall's "aboriginal title" was taken up by the colonies in Canada to justify land acquisition on the grounds that said title could be extinguished if the lands were not being used. See Antonio Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: University of British Columbia Press, 1994). This argument was likewise used by the Indian Claims Commission in determining Western Shoshone extinguishment of title to Newe Segobia.

32. Quoted in Sharon O'Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1989), 57.

33. *Worcester v. Georgia* (1831).

34. *Worcester v. Georgia* (1831).

35. *Worcester v. Georgia* (1831).

36. Hopewell 1785; Holston 1791; Philadelphia 1794; Tellico 1798; Tellico 1804; Tellico 1805; Tellico 1805; Washington City 1805; Washington City 1816; Chickasaw Council House 1816; Cherokee Agency 1817; Washington City 1819 (*Worcester v. Georgia* 1831).

37. *Worcester v. Georgia* (1831).

38. *Worcester v. Georgia* (1831).

39. *Worcester v. Georgia* (1831).

40. Deloria, *Behind the Trail of Broken Treaties*, 8.

41. See Harring, *White Man's Law* and Mills, *Eagle Down Is Our Law*.

42. Some have suggested that the discovery doctrine was historically linked to the Spanish doctrine of "right of conquest." See, for example, O'Brien, *American Indian Tribal Governments*.

43. See Anaya, *Indigenous Peoples in International Law*, and Pocock, "Waitangi as Mystery of the State."

44. Brain W. Dippie, *The Vanishing American: White Attitudes and United States Indian Policy* (Middletown CT: Wesleyan University Press, 1982); Richard Drinnon, *Facing West: The Metaphysics of Indian Hating and Empire Building* (New York: New American Library, 1980); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

45. Harring, *White Man's Law*, 19.

46. Harring, *White Man's Law*, 17.

47. Isaac, *Aboriginal Law*, 3.

48. Harring, *White Man's Law*, 19–20.

49. Harring, *White Man's Law*, 22.

50. Sir James Stephen, quoted in Harring, *White Man's Law*, 21–22.

51. Harring, *White Man's Law*, 22.

52. Harring, *White Man's Law*, 23.

53. Isaac, *Aboriginal Law*.

54. Mills, *Eagle Down Is Our Law.*

55. J. Kehaulani Kauanui, " 'For Get' Hawaiian Entitlement: Configurations of Land, 'Blood', and Americanization in the Hawaiian Homes Commission Act of 1920," *Social Text* 17, no. 2 (Summer 1999), 123–44, and "The Politics of Blood and Sovereignty in *Rice v. Cayetano*" *Political and Legal Anthropology Review* 25, no. 1 (2002), 110–28 (reprinted in this volume).

56. Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: University of British Columbia Press, 1995).

57. Joanne Barker, "Looking for Warrior Woman (Beyond Pocahontas)," in *This Bridge We Call Home: Radical Visions for Transformation*, ed. Gloria Anzaldúa and AnaLouise Keating (New York: Routledge, 2001), and "Indian(TM) U.S.A.," *Wicazo Sa Review: A Journal of Native American Studies* 18, no. 1 (Spring 2003).

58. Rayna Green, "The Pocahontas Perplex: The Image of Indian Women in American Culture," in *Unequal Sisters: A Multicultural Reader in U.S. Women's History*, ed. Ellen Carol DuBois and Vicki L. Ruiz (New York: Routledge, 1990), 15–21.

59. Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton, NJ: Princeton University Press, 1940).

60. *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*, collectively edited by contributing authors (Santa Fe: Clear Light Publishers, 1992).

61. Sara Hopkins Winnemucca, *Life among the Piutes: Their Wrongs and Claims* (New York: Putnam, 1883).

62. Anaya, *Indigenous Peoples in International Law*, 13–19.

63. Morris, "International Law and Politics."

64. Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999), and "Sovereignty," this volume.

65. Anaya, *Indigenous Peoples in International Law*.

66. Anaya, *Indigenous Peoples in International Law*; Franke Wilmer, *The Indigenous Voice in World*

Politics (Newbury Park: Sage Publications, 1993); Sharon Helen Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton, British Columbia: Theytus Books, 1998). Joanne Barker, "The Human Genome Diversity Project: 'Peoples,' 'Populations,' and the Cultural Politics of Identification," *Routledge Journal of Cultural Studies*, forthcoming.

67. It would be challenging to try to figure out what the long-term implications of the normalization of the discourses of sovereignty for indigenous peoples have been for theorizing indigenous epistemologies and perspectives of law and governance, because it is tempting—almost irresistible from the context of dominant ideologies of race and culture—to mark the authentic from the inauthentic, the pure from the contaminated, the traditional from the colonial. The fact remains that after hundreds of years of cultural exchange between indigenous peoples and colonial states, sovereignty's currency within indigenous discourses has been long established, and not always or necessarily to detrimental or disastrous ends (Dan Taulapapa McMullin, "The Passive Resistance of Samoans to U.S. and Other Colonialisms," this volume; Donna Ngaronoa Gardiner, "Hands Off—Our Genes: A Case Study on the Theft of Whakapapa" [paper presented at Sovereignty 2000 conference, University of California, Santa Cruz, May 2000]).

Indigenous peoples have impacted sovereignty in important ways, changing what it means within international law and politics. For while ideologies of race and culture would like us to look at the exchanges between indigenous and colonial peoples from the authority of the colonial to erase the indigenous from historical significance, the fact is that indigenous peoples have made an important difference in what sovereignty means (Michael P. Perez, "Chamorro Resistance and Prospects for Sovereignty in Guam," this volume; Déborah Berman Santana, "Indigenous Identity and the Struggle for Independence in Puerto Rico," this volume). Understanding this requires the consideration of the heterogeneity of the "local," of the impact of locally specific cultural perspectives on what sovereignty is and how it matters.

68. Barker, "Human Genome Diversity Project."

69. Tony Simpson, *Indigenous Heritage and Self Determination: The Cultural and Intellectual Property Rights of Indigenous Peoples*, On Behalf of the Forest Peoples Programme, International Working Group for Indigenous Affairs Document no. 86 (Copenhagen: IWGIA, 1997), 138.

70. Deloria, "Self-Determination and the Concept of Sovereignty," 123.

71. Kickingbird et al., *Indian Sovereignty*, 1.

72. David Harvey, *The Condition of Postmodernity: An Inquiry into the Origins of Cultural Change* (Cambridge: Basil Blackwell, 1989).

73. Gardiner, "Hands Off—Our Genes."

74. Hence the reason why indigenous scholars have been resistant to theories of postcolonialism and why postcolonial theory does not often work in understanding indigenous histories, meanings, and identities (see Barker, "Human Genome Diversity Project").

75. Alfred, "Sovereignty."

76. Compare Lee Maracle, *I Am Woman: A Native Perspective on Sociology and Feminism* (New York: Press Gang Publishers, 1996); Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Nova Scotia: Fernwood Publishing, 1995); Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (Maine: Common Courage Press, 1993).

77. Lawrence Grossberg, "On Postmodernism and Articulation: An Interview with Stuart Hall," in *Stuart Hall: Critical Dialogues in Cultural Studies*, ed. David Morley and Kuan-Hsing Chen (New York: Routledge, 1996), 131–50.

78. Vine Deloria, Jr., and Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon, 1984).

79. Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig Press, 1969); George Manuel, *The Fourth World* (New York: Free Press, 1974).

80. Bruce G. Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001).

81. Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon, Sasakatchewan: Purch Publishing, 1998).

82. Gloria Valencia-Weber and Christine Zuni, "Domestic Violence and Tribal Protection of Indigenous Women in the United States," *St. John's Law Review* (Winter–Spring 1995); Marianne O. Neilson and Robert A., Silverman, eds., *Native Americans, Crime, and Justice* (Boulder CO: Westview Press, 1996).

83. Alfred, *Peace, Power, Righteousness*, and "Sovereignty."

84. Mabo v Queensland No. 2 1992 (Cth), http://www.foundingdocs.gov.au (accessed January 5, 2002).

85. Torres Strait Islands Coastal Act (1982).

86. http://www.foundingdocs.gov.au.

87. http://www.foundingdocs.gov.au.

88. http://www.foundingdocs.gov.au.

89. Deloria and Lytle, *The Nations Within*; Curtis Cook and Juan D. Lindau, eds., *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (Montreal: McGill-Queen's University Press, 2000); Debra Harry, "The Human Genome Diversity Project," *Abya Yala News* 8, no. 4 (Fall–Winter 1993): 13–15, and "Biopiracy: The Theft of Human DNA from Indigenous Peoples" (paper, Sovereignty 2000: Locations of Contestation and Possibility, University of California, Santa Cruz, May 19, 2000).

90. For a list of some of the organizations, lobbyists, business people, and representatives making these arguments, see Adversity.Net's Web site for links and contact information at http://www.adversity.net. Adversity.Net is "a Civil Rights Organization for Color Blind Justice" that wants to "stop the divisive emphasis on race" in American law.

91. Kauanui, "The Politics of Blood and Sovereignty in Rice v. Cayetano."

92. See the Web site of the World Conference against Racism for information and documents on the debates at the conference, http://www.unhchr.ch/html/racism.

93. Morris, "International Law and Politics," 55–86.

94. Morris, "International Law and Politics," 27.

95. Alfred, *Peace, Power, Righteousness*, and "Sovereignty"; quoted text is from "Sovereignty," this volume.

96. Robert Allen Warrior, *Tribal Secrets: Recovering American Indian Intellectual Traditions* (Minneapolis: University of Minnesota Press, 1994); Elizabeth Cook-Lynn, "American Indian Intellectualism and the New Indian Story," *American Indian Quarterly* 20, no. 1 (Winter 1996): 57–76.

97. On exploitative practices see Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books/Dunedin, New Zealand: University of Otago Press, 1999). On revitalization see the following essays in the present volume: Guillermo Delgado-P. and John Brown Childs, "First Peoples/African American Connections"; Fiona Cram, "Backgrounding Maori Views on Genetic Engineering"; Kilipaka Kawaihonu Nahili Pae Ontai, "A Spiritual Defi-

nition of Sovereignty from a Kanaka Maoli Perspective"; Leonie Pihama, "Asserting Indigenous Theories of Change."

98. Louis Owens, *Mixedblood Messages: Literature, Film, Family, Place* (Norman: University of Oklahoma Press, 1998).

99. Laurie Anne Whitt, "Cultural Imperialism and the Marketing of Native America," *American Indian Culture and Research Journal* 19, no. 3 (1995): 1–31.