

AMERICAN INDIAN SOVEREIGNTY: NOW YOU SEE IT, NOW YOU DON'T

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Sovereignty is an especially odd phenomenon. Everyone seems to want it. Those who claim to know it all tell us that sovereignty is just what we have, although some may have more of it than others. It seems to have been around for as long as anyone can remember. Even so, for such an established fact of life, and for such a cherished ambition, there is a disconcerting uncertainty as to what it is exactly, or where it is to be found, or who has it and who does not, or where it came from in the first place, let alone what is happening to it now. [[Walker](#), 16-17.]

"Discovery" and "Encounter"

Another Columbus Day has come and gone. Another year, now more than 500 since the Pope divided the world between Spain and Portugal, laying down the doctrine of discovery and conquest:

INTER CAETERA, MAY 3, 1493 -- "Among other works well pleasing to the Divine Majesty and cherished of our heart, this assuredly ranks highest, that in our times especially the Catholic faith and the Christian religion be exalted and everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself. ... [O]ur beloved son Christopher Columbus, ... sailing ... toward the Indians, discovered certain very remote islands and even mainlands [W]e, ... by the authority of Almighty God ... do ... give, grant, and assign forever to you and your heirs and successors, kings of Castille and Leon, all and singular the aforesaid countries and islands ... "

An earlier Papal Bull had declared the legitimacy of Christian domination over "pagans," sanctifying enslavement and expropriation of property:

ROMANUS PONTIFEX, JANUARY 8, 1455 -- " ... [W]e bestow suitable favors and special graces on those Catholic kings and princes, ... athletes and intrepid champions of the Christian faith ... to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and ... to reduce their persons to perpetual slavery, and to apply and appropriate ... possessions, and goods, and to convert them to ... their use and profit ... "

We might look at these ancient documents with amusement or condescension, confident in the modern view that church and state are separate. This would be a mistake. These Papal Bulls are part of the fabric of United States and international law.

The fact that Papal authority is the basis for United States power over indigenous peoples is not generally understood, even by lawyers who work with federal Indian law. This is due in large part to the sophistry of John Marshall, one of the greatest figures in the pantheon of the U. S. Supreme Court. Marshall borrowed from Papal Bulls the essential legalisms needed for state power over indigenous peoples. He encased Christian religious premises within the rhetoric of "European" expansion:

JOHNSON v. MCINTOSH, 21 US 543 (FEBRUARY, 1823) -- "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity."

Steve Newcomb said it succinctly:

Indian nations have been denied their most basic rights ... simply because, at the time of Christendom's arrival in the Americas, they did not believe in the God of the Bible, and did not believe that Jesus Christ was the true Messiah. This basis for the denial of Indian rights in federal Indian law remains as true today as it was in 1823. [[Newcomb](#), 309.]

Johnson v. McIntosh has never been overruled. "Christian discovery" remains the legal foundation for United States sovereignty over indigenous peoples' lands. But it is concealed, as most foundations are, because *Johnson v. McIntosh* acts as a Laundromat for religious concepts. After Marshall's opinion, no lawyer or court would need to acknowledge that land title claims in United States law are based on a doctrine of Christian supremacy. From that time on, in law and history books, "European" would be substituted for "Christian," so that schoolchild and lawyer alike could speak of the "age of discovery" as the age of "European expansion."

Marshall knew what he was doing. After writing that "Christian princes" could take lands "unknown to all Christian peoples," he admitted that the doctrine was an "extravagant ... pretension" which "may be opposed to natural right" and may only "perhaps, be supported by reason." Nonetheless, he concluded that it "cannot be rejected by courts of justice."

The "discovery doctrine" was not self-effectuating. It required force. As Marshall wrote, "These claims have been maintained and established ... by the sword." The (in)famous *Spanish Requirement* of 1513 is perhaps the most straightforward example. It was called the "requirement" because royal law required it to be read before hostilities could be undertaken against a native people. In Latin and/or Spanish, witnessed by a notary, the Conquistadors read:

On the part of the king, Don Fernando, and of Doña Juana, his daughter, queen of Castile and Leon, subduers of the barbarous nations, we their servants notify and make known to you, as best we can, that the Lord our God, living and eternal, created the heaven and the earth, and one man and one woman, of whom you and we, and all the men of the world, were and are descendants, and all those who come after us. ...

Of all these nations God our Lord gave charge to one man, called St. Peter, that he should be lord and superior of all the men in the world, that all should obey him, and that he should be the head of the whole human race, wherever men should live, and under whatever law, sect, or belief they should be; and he gave him the world for his kingdom and jurisdiction.

...

One of these pontiffs, who succeeded that St. Peter as lord of the world in the dignity and seat which I have before mentioned, made donation of these isles and Terra-firma to the aforesaid king and queen and to their successors, our lords, with all that there are in these territories,....

... Wherefore, as best we can, we ask and require you that you consider what we have said to you, and that you take the time that shall be necessary to understand and deliberate upon it, and that you acknowledge the Church as the ruler and superior of the whole world,

...

But if you do not do this, and maliciously make delay in it, I certify to you that, with the help of God, we shall powerfully enter into your country, and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their highnesses; we shall take you, and your wives, and your children, and shall make slaves of them, and as such shall sell and dispose of them as their highnesses may command; and we shall take away your goods, and shall do you all the mischief and damage that we can, as to vassals who do not obey, and refuse to receive their lord, and resist and contradict him: and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their highnesses, or ours, nor of these cavaliers who come with us.

It is fashionable, especially around Columbus Day, to speak about the "encounter" of the "old" and "new" worlds, as a way of trying to forget exactly how bloody this event was. But, as Michael Shapiro wrote, "National societies that ... have thought of themselves as a fulfillment of a historical destiny, could not be open to encounters." [[Shapiro](#), 56.]

Michael Dorris wrote:

The pre-existent variety of Native American societies ... has been consistently obscured and disallowed. Every effort has been made to almost existentially enclose the non-Western world into a European schema, and then to blame unwilling elements for being backward, ignorant, or without vision. ***

Federal Indian policy was ... shaped from the beginning at least as much toward deculturation as acculturation. [[Dorris](#), 75, 76]

Contemporary Non-Recognition of Indigenous Peoples

Over 300 million people on earth today can be said to be truly "indigenous" -- living on lands which they have inhabited since time immemorial. In every instance, indigenous communities are legally circumscribed by one or more nation-states, within territorial boundaries drawn by government geography. These 300 million constitute an increasingly self-aware force for global rethinking of the nature of power. Their challenge is increasingly overt and serious to the world's political structure.

The United Nations' designation of The Decade of Indigenous People is a symptom of this challenge. The nature of the challenge becomes more clear when we consider the revision of the original designation, which referred to indigenous peoples. The plural form -- "peoples" -- triggered immense anxiety and successful resistance by member states of the UN, on the grounds that these 300 million people are individual citizens of states claiming jurisdiction over them, and not members of independent peoples.

"Peoples" in international law implies rights of self-determination, which the United States took the lead to challenge as not applicable to indigenous peoples. The U.S. argues that there can collective self-determination exists only through states, and that indigenous people are groups of individuals with shared cultural, linguistic, and social features, but without any internal coherence as "peoples." This argument contradicts the U.S. claim that it deals with indigenous peoples on a "government-to-government" basis. Here is one example of "now you see it, now you don't."

In light of the history of treaty-making and with an eye toward restoring the sense of equality between nations that justified the treaty process to begin with, American Indians are -- in concert with indigenous peoples worldwide -- asserting a sense of their own "sovereignty." The United Nations Draft Declaration of the Rights of Indigenous Peoples is at the center of this global struggle for self-determination. The Declaration is the product of twenty years of negotiating among indigenous peoples and U.N. bodies. Its very title draws the line of battle -- rights of indigenous peoples (plural).

Federal Indian Law

When we enter into the realm of "federal Indian law," we need to keep in mind that we are traveling in a semantic world created by one group to rule another. The terminology of law is a powerful naming process. In working with this law, we will use the names that it uses, but we will always want to keep in mind that the reality behind the names is what we are struggling over.

According to the theory of sovereignty in federal Indian law, "tribal" peoples have a lesser form of "sovereignty," which is not really sovereignty at all, but dependence. In the words of Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831), American Indian societies, though they are "nations" in the general sense of the word, are not fully sovereign, but are "domestic, dependent nations." The shell game of American Indian sovereignty -- the "now you see it, now you don't" quality -- started right at the beginning of federal Indian law. The foundation of federal Indian law is the assertion by the United States of a special kind of non-sovereign sovereignty.

In 1973, the federal district court for the district of Montana stated the underlying principle in the case of *United States v. Blackfeet Tribe*, 364 F.Supp. 192. The facts were simple: The Blackfeet Business Council passed a resolution authorizing gambling on the reservation and the licensing of slot machines. An FBI agent seized four machines. The Blackfeet Tribal Court issued an order restraining all persons from removing the seized articles from the reservation. The FBI agent, after consultation with the United States Attorney, removed the machines from the reservation. A tribal judge then ordered the U.S. Attorney to show cause why he should not be cited for contempt of the tribal court. The U.S. Attorney applied to federal court for an injunction to block the contempt citations. The Blackfeet Tribe argued that it is sovereign and that the jurisdiction of the tribal court flows directly from this sovereignty. The federal court said:

No doubt the Indian tribes were at one time sovereign and even now the tribes are sometimes described as being sovereign. The blunt fact, however, is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign -- neither more nor less. [364 F.Supp. at 194.]

The court explained:

While for many years the United States recognized some elements of sovereignty in the Indian tribes and dealt with them by treaty, Congress by Act of March 3, 1871 (16 Stat. 566, 25 U.S.C. s 71), prohibited the further recognition of Indian tribes as independent nations. Thereafter the Indians and the Indian tribes were regulated by acts of Congress. The power of Congress to govern by statute rather than treaty has been sustained. *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886). That power is a plenary power (*Matter of Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905)) and in its exercise Congress is supreme. *United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916). It follows that any tribal ordinance permitting or purporting to permit what Congress forbids is void. ... It is beyond the power of the tribe to in any way regulate, limit, or restrict a federal law officer in the performance of his duties, and the tribe having no such power the tribal court can have none. [*Id.*]

The fundamental premise of "American Indian sovereignty" as defined in federal Indian law is that it is not sovereignty. Federal power truncates "tribal sovereignty" in myriad ways too numerous to list here. Federal Indian law is perhaps the most complex area of United States law (including tax laws). In civil and criminal law both, the range and scope of "tribal sovereignty" is fragmented into overlapping and contradictory rules premised on one foundation: the "plenary power" of the United States. That such "plenary power" is nowhere stated in the U.S. Constitution is no more than a small nuisance to the judges who have declared its existence. Administrative agencies and Congress alike grasp firmly to their judicially-created prerogatives of total power over their "wards," in whose "trust" they act as they see fit.

Federal Indian law is the continuation of colonialism. On the basis of a non-sovereign "tribal sovereignty," the United States has built an entire apparatus for dispossessing indigenous peoples of their lands, their social organizations, and their original powers of

self-determination. The concept of "American Indian sovereignty" is useful to the United States because it denies indigenous power in the name of indigenous sovereignty.

In 1831, the Cherokee Nation sued the state of Georgia in the Supreme Court to protect Cherokee lands. The Court denied the Cherokee suit on the ground that an Indian nation is not a "foreign nation" entitled to sue a state in the Supreme Court. That decision has never been overruled and is cited frequently today. In June of this year, 1997, the Supreme Court decided that the Cour d'Alene Tribe could litigate its land claims against the state of Idaho only in Idaho's courts. The Cour d'Alene were claiming "aboriginal title," a subsidiary title subject to the "trusteeship" of the United States. They were trying to work within the limited concept of "American Indian sovereignty." In throwing the Cour d'Alene suit out of federal court, the Supreme Court stated that the basis of its decision is that "Indian tribes ... should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity [citing *Blatchford v. Native Village of Noatak*, 501 US 775 (1991)]." [*Idaho v. Cour d'Alene Tribe*, No. 94-1474 (June 23, 1997)]. The Cherokee were barred from suing in the Supreme Court because an Indian nation is not a foreign nation. The Cour d'Alene were barred from suing in district court because an Indian nation is a foreign nation. You figure it out: "now you see it, now you don't."

Like every other colonial power, the United States early on found it did not have sufficient resources to maintain martial rule over territories it wanted to control. It resorted to "indirect rule" by puppet governments through the mechanism of appointed (and bribed) "chiefs." But it found that despite every attempt to make indigenous peoples disappear -- including "allotment" of their lands and prohibition of their spiritual practices -- indigenous peoples survived. By the 20th century, the condition of their survival was an embarrassment to the government. In 1934, the United States set out to "reorganize" indigenous peoples into elected corporate political structures -- a formalized system of "tribal councils." The concept of "American Indian sovereignty" was used to justify sufficient authority in the "tribal councils" to maintain order within the "tribe" while denying these councils any authority beyond the territory which was "reserved" for them.

If we are honest about the legal history of the 1934 *Indian Reorganization Act* (IRA), we have to say that the "tribal council" system was intended as a more elaborate puppet government. The system was not the result of the treaty process, but rather the distortion of treaties in the direction that the United States wanted to interpret and apply them. The IRA was passed in part to stabilize the land base and social conditions of American Indians, which had been devastated by the 1886 *General Allotment Act*. The fact that some of the worst abuses of indigenous peoples were stopped by the IRA was some excuse for the act. But the act was also passed -- as its title states -- to "reorganize" the Indians, overthrowing traditional organizations and promoting a "democratic" tribal council system structured as a corporate business. The fact that some tribal councils still raise sovereignty issues is evidence of the resilience and continued existence of indigenous peoples.

Let me illustrate IRA "sovereignty" with the case of the Western Shoshone. In 1863, the Western Shoshone and the United States signed a *Treaty of Peace and Friendship at Ruby Valley* in the heart of Western Shoshone country. The treaty acknowledged Western Shoshone control over their homelands and provided for easements across their land and some mining and related activities. Today, massive strip-mines ravage Western Shoshone lands and pollute and destroy the waters. The United States adds to this destruction by disposing radioactive waste in Yucca Mountain. Although Western Shoshone land title has never been proven to have been ceded or lost, the Supreme Court has ruled that they are precluded from litigating their title. Western Shoshone people who oppose the destruction of their lands as violations of their title are depicted as outlaws.

How did this come about? Was it through a denial of Western Shoshone sovereignty? No, it was through the affirmation of their "sovereignty" -- that is, through the affirmation of the kind of sovereignty that the Western Shoshone have under "federal Indian law." As we have seen, this kind of sovereignty is not real self-determination. This sovereignty is the non-sovereignty of "councils" created by the United States government in the name of the Western Shoshone people under the Indian Reorganization Act.

In accordance with IRA principles, the federal government "recognized" various Western Shoshone "tribal councils" as the agents of Western Shoshone "sovereignty." The Temoak Band, one of the councils empowered to "govern" the Western Shoshone people and to "represent" them in dealing with the outside world, filed a claim under the *Indian Claims Commission Act* of 1946. This Act was intended to wipe out all Indian title for non-reservation lands by providing money compensation for such lands. The Act did not require that a claim represent all or even a majority of the Indians in whose name it was filed. As a result of the Temoak claim -- which the traditional, "non-recognized" Western Shoshone opposed and the Temoak council subsequently tried to withdraw -- the Commission told the Western Shoshone that their lands had been "taken" and that they would receive compensation.

The Western Shoshone refused to take the compensation and one family (the Danns) went to court to defend title against the United States. The Ninth Circuit Court of Appeals ruled that Western Shoshone title had never actually been litigated, that none of the claims made against it were sufficient to take it away, and that since the Western Shoshone had refused the Claims Commission compensation they still held title. The United States Supreme Court reversed the Ninth Circuit, stating that the Western Shoshone could not argue about their title because the compensation had been accepted ... on their behalf ... by the United States, acting as their "trustee"!

The Western Shoshone case is not atypical. Similar events have unfolded for many other indigenous peoples under United States law. The point is that "American Indian sovereignty" in federal Indian law is a tool for limiting the powers of indigenous self-determination and for allowing the United States to determine the structure of indigenous government. We need to remember always that "sovereignty" in federal Indian law operates in conjunction with so-called "trust" and "wardship" doctrines -- two other concepts proclaimed unilaterally by the United States to assert power over indigenous

peoples. "American Indian sovereignty" can only be understood in context of the whole complex of federal court decisions over the last 174 years of colonial and neo-colonial law.

The recent proposal in the United States Senate [Senator Slade Gorton's rider to the appropriations bill for Department of Interior.] to eliminate American Indian sovereignty as a condition for receipt of federal funds shows several important things. First, the struggle over Indian "sovereignty" -- whatever it is -- is far from over and is indeed a hot topic. Second, even the Congressional defenders of this sovereignty say that the United States could eliminate it if it wishes. Third, the notion that federal funding is rooted in treaty obligations, not in discretionary programs, is almost wholly forgotten. Fourth, the attack on Indian sovereignty can be packaged in a rhetoric of "helping the poor Indians." Indians have been the victims of "help" since the first missionary efforts.

"Sovereignty" in International Law

"Sovereignty" in "international law" is a power system originated in the 16th century by Christian European states in their dealings with each other and the Catholic Church. By the nineteenth century,

[T]he European outlook upon the extra-European areas ... became one which instinctively applied the concept of the sovereign state and the notion of international sovereignty to conditions in which these ideas remained alien [[Hinsley](#), 206.]

Sovereignty became "the dominant concept in the field of ... political assumptions. ... the essential qualification for full membership [in] the international community." [214-215.] The concept of "sovereignty" provided state power with an "inside" and an "outside." [[Bartelson](#), pp. 53-54.] States claimed supreme power inside what they called their "domestic" realms and defined other states' realms as "outside."

Now, as the 20th century ends, "It is fashionable to argue that sovereignty is changing and that states are losing their validity and meaning." [9.] "[I]t has become virtually a cliché to discuss the decline of sovereignty." [[Lombardi](#), 153.]

... sovereignty cannot be an accepted dogma either in terms of its theoretical utility or political sufficiency. The ... elevation of sovereignty and statehood to universal supremacy is not just being called into question, but is being eclipsed by the press of events and ideas. [[Denham and Lombardi](#), 3.]

It is an irony of history that "the expansion/imposition of the European state system during decolonialization" of Africa and the so-called Third-World brought into question "the very idea of sovereignty." [*Id.*] Decolonized peoples did not fit into the structure of the sovereign state. The result was (and is) extreme social dysfunction, as new states and their patrons tried to coerce peoples and fragments of peoples into sovereign allegiance. "[E]conomic development, an explicit goal of a sovereign state," brought on repeated episodes of violence with "highly politicized elites grasping for non-African models of

governance that ultimately failed to fit African traditions and cultures." [7.] Today it is clear that the failure of post-colonial states to be a vehicle for indigenous self-determination is not a momentary problem of adjustment to "liberation."

Other events and ideas are eclipsing the notion of sovereignty. Multinational corporations -- entities dependent on and yet more powerful than states -- dominate the world economy. The overall ecological failure of the system of state sovereignty -- the destruction of the biosphere in the name of sovereign interests -- is also becoming frighteningly obvious.

"[S]tate sovereignty offers only a misleading map of where we are and an even less useful guide to where we might be going." [[Walker and Mendlovitz](#), 1,2.] Such terms as "internationalization," "globalization," and "interdependence" "slip easily off the tongue, ... but ... [defer] all the hard questions...." "What, for example, is it that is supposedly interdependent....? [2-3]

We ... need to think about how we think about sovereignty, and about how it ... constructs the non-options available to us. [23]

The classical attributes of "sovereignty" already foreshadow the problem of applying this concept to American Indians and other non-state peoples: absolute, unlimited power held permanently in a single person or source, inalienable, indivisible, and original (not derivative or dependent). These are characteristics of power associated with divine right monarchy and the Papacy of the Christian Church. They are the core concepts of state power that arose around monarchs and church. They were the brainchild of western political theorists of the 16th and 17th centuries (especially Jean Bodin and Thomas Hobbes), as a solution to the problem of violent religious struggle. They are not the characteristics of power in non-state societies.

Joseph Camilleri wrote:

The emergence of the sovereign state was ... the necessary instrument of Europe's colonial expansion. [[Camilleri](#), 14.]

With this remark we see the need for an inquiry into the question whether "sovereignty" can become the instrument of liberation from colonialism. If "state" and "sovereignty" refer to a framework of "supreme coercive power," and such power is absent in "tribes," is this a justification for "domestic dependent nation" or terra nullius, or is it rather a challenge to state sovereignty as the organizing principle of the world? Are we at the threshold of a new way of organizing politics that will -- like the state before it -- rearrange everything from villages to the world?

Camilleri pointed to "an increasingly powerful ... desire to cultivate indigenous values, traditions, and resources that are often antithetical to conventional notions of state sovereignty." [35.] In a long passage, he described the potential for a new era of social organization:

The resistance to the present political and economic organization of society, expressed by the peace/antinuclear, ecological, communalist, consumer, feminist, gay liberation, human potential/self-awareness and other movements, cannot be overestimated. They represent a multidimensional response to the "colonization of the life-world." Their praxis may not yet pose a decisive challenge to the status quo, but it has already generated ... a readiness to resist existing institutions and their life-eroding consequences. The point about these antisystemic movements is that they ... are reaffirming the priority of ... popular sovereignty over state sovereignty. For them the state retains a positive function only to the extent that it can be used as a vehicle for the realization of popular sovereignty. ... Whether or not, and in what way, the state can be effectively integrated into the praxis of critical movements remains, however, a largely unanswered question. [35-36.]

The conventional response to a suggestion that local politics might be the center of global organization is to dismiss it with the assertion that states are necessary because the functions they provide cannot be performed by smaller organizations. In a typical lecture "...the mere assertion of the state's necessity is enough to set the audience nodding in approval." [[Magnusson](#), 47.] But,

Why are we satisfied with such banalities? Why do we accept claims about the inevitability of the state, which, if posed in relation to capitalism or patriarchy, would be set aside in embarrassed silence? [*Id.*]

One might expect local politics to be the most celebrated arena of democracy. Why is it that the conventional view denies the possibility of local autonomy, and instead offers suggestions for "citizen participation" in state institutions? In conventional discourse, the idea of local democracy -- of popular sovereignty -- "fades as an object of political theory" and along with it fade "the ... communities that could sustain ... it." [50.] State sovereignty "encloses" local and popular sovereignty in "parties" and "interest groups," in "domestic, dependent nations," "wardship," and "trust relationships."

The concept of sovereignty was a response to civil war in the Christian world at the close of the Middle Ages. It spawned an era of centralizing, territorial power that in our times - - half a millennium later -- is coming into question. Sovereignty -- the notion of "absolute, unlimited power held permanently in a single person or source, inalienable, indivisible, and original" -- is today a theory under siege. Indigenous peoples are only one of the besiegers, but their presence is felt worldwide. Who would have thought even a generation ago that such an "old" state as Canada would be threatened by indigenous peoples within its borders, or that the Australian high court would find it necessary to abandon the concept of terra nullius?

The Way to Self-Determination

Indigenous peoples around the world are attacking the supremacy of state governments. From an indigenous perspective, state sovereignty is a claim that violates their own pre-existing self-determination. Western jurisprudence has done a great deal to exclude "non-

state societies" from the domain of law, because they lack hierarchical authority structures. If indigenous peoples follow the model of state sovereignty -- which they are being told they cannot do because they are not states -- they may find that when they attain this goal they have sacrificed the underlying goal of self-defined self-determination.

The critique of sovereignty jurisprudence is not just an academic matter. It is necessary to clear a space for "non-state" peoples to exist in the world. Can there be space -- in the world and in discourse -- for non-state societies, defined in their own terms? Is there a way to talk about indigenous self-determination without using "sovereignty"?

Tony Hillerman commented last month on the anti-Indian legislative strategy of those in the US Senate who want to strip "sovereignty" from American Indian tribes. He wrote that his friend, Navajo elder Hastiin Alexander Etcitty, "would say that the notion that any human, or group thereof, has sovereignty over any part of Mother Earth is a myth based upon the white man's Origin Story." [[Hillerman](#).] Hillerman concluded that the problem of Indian sovereignty "involves more than how to save what they have from the whites who yearn for it. It can become an internal fight over values."

We are talking about the clarification of the path toward self-determination. What can we say about "American Indian sovereignty" that might help us imagine a way out of the political confusion of this post-modern age? For starters, we could be clear that there is a problem in working with a concept of "absolute, unlimited power held permanently in a single person or source, inalienable, indivisible, and original." Why should indigenous peoples choose a model of thinking, organization, and development that was used to destroy non-state societies?

Ilyas Ahmad, in his discussion of the conception of sovereignty in Islam, suggested that a "realistic analysis" of sovereignty would discover

[T]hat the ultimate moving force which inspires and controls political action is a spiritual force -- a common conviction that makes for righteousness, a common conscience [[Ahmad](#), 67.]

This suggestion is startling because we are used to the western notion of separation of church and state. Western discussion can speak of "common will," but gets nervous with the thought that this phrase only acquires meaning in spiritual terms. As we have seen, however, western political thinking itself is grounded in theological concepts of "Christian nationalism." The notion of "absolute, unlimited power held permanently in a single person or source, inalienable, indivisible, and original" is a definition of the Judeo-Christian-Islamic God. This "God died around the time of Machiavelli.... Sovereignty was ... His earthly replacement." [[Walker](#), 22.]

All significant concepts of the modern theory of the state are secularized theological concepts, not only because of their historical development ... but also because of their systematic structure. [[Bartelson](#), 88.]

State sovereignty "is a 'religion' and a faith." [[Lombardi](#), 154.]

The skillfully drawn borders that cartographers have provided for us are ... spiritual and philosophical abstractions representative of a form of quasi-belief. They are ... not detached maps of reality as proponents would have us believe. These geographies reflect an ardent desire to make (or impose) sovereignty a physical reality as natural as the mountains, rivers and lakes.... [*Id.*]

What does this mean for indigenous peoples, with a multitude of non-sovereign Creators and an entire Creation of sovereign beings? We are in need of a reassessment of political discourse, a terminology that will link post-modern politics and pre-modern roots of non-state societies. "Indigenous is nearly synonymous with diversity." [[Barrerio](#).] The diversity of peoples' experiences and practices must be our focus, rather than the imposed "unity" of European experience and practice.

The 16th century "discovery of non-Christian forms of life in the Americas posed [a] ... threat to the stability of Christian values":

...[T]he discovery of the American Indians ... [t]he confrontation with something radically different from the Christian way of life raised the question of what kind of relations it is possible to entertain with this Other. First, to what extent is it possible to know the Indian except as something inferior....? Second, ... to what extent is it possible to bring him into the framework of universal law by giving him the status of a legal subject? [[Bartelson](#), 128, 131.]

The western response to this "discovery" was "an effort to ... [make] everything speak ... with one voice." [108.] In this effort, non-state societies were given a "choice": to assimilate to the state system and give up their independent self-definition, or to maintain their self-definition and be denied a place in the world's legal and political order. The underlying assumption was that there is only one reality and it is western.

The problem of figuring out how to talk about indigenous self-determination without "sovereignty" is partially solved by learning how to talk about states and sovereignty accurately. Far from being an inherent and necessary aspect of self-determination, it appears that state sovereignty is but one form of self-determination.

"Sovereignty" is not an immutable "fact," but a political choice made under certain circumstances which may no longer be relevant. The eclipsing of sovereignty in today's world threatens the international order of states and raises the possibility of new ways of understanding what it means to be a people. Half a millennium of "sovereignty" theory has not fully eradicated the "other" against whom sovereignty theory was constructed.

The task before us is to understand the immense differences between states and stateless societies. We must not fall for the line that all societies naturally lead to state formation or that state formation is even a social desire.

...[T]he ... emergence of the state reflects not the desire of a society for its kind of rule, but an urge in men to possess its kind of power.... ***

...[T]he concept of sovereignty arises in the wake of the rise of the state.... as an explanation of the basis of [its] rule.... [[Hinsley](#). 10, 17.]

It has been said that:

The principle of state sovereignty formalizes a specific answer to questions about who we are as political beings that were posed in early-modern Europe. ...

Yet while there has been considerable interest in the questions posed by the principle of state sovereignty, there has been much less reflection on the questions to which state sovereignty is itself an answer. Who are "we"? What is the political community within which we ought to be thinking about principles of freedom and obligation, justice and democracy? How ought we to understand the relationship between specific communities and other communities, and between specific communities and humanity in general? ***

It is often tempting to minimize the significance of these questions ... [[Walker & Mendlovitz](#), 5, 6.]

These are spiritual questions. "What does it mean to be people?" is a spiritual question. The western, Christian, rationalist answer to this question is not the only possible answer. This is not the place to catalog the ways in which indigenous peoples answer this question. Suffice it to say that the myriad versions do not require a concept of "state sovereignty." "Sovereignty," if it exists at all, is a quality of each Being in Creation. Beings join and part in myriad ways, none of them requiring "state sovereignty."

Indigenous answers to these questions are not some kind of creed or dogma. They are alive, "borne by ... people[s]" [[Ruiz](#), 85.] in the life of a community. The question "what does it mean to be people" is answered in "the giving and receiving of confidence and commitment between persons who recognize and affirm a common community." When a community has been fractured, the possibility of self-determination is undermined.

The most pressing problem for indigenous self-determination is the problem of "the people." Indigenous peoples who have been subjected to centuries of state violence in the name of state sovereignty face "a profound crisis of the meaning of community, a crisis of political identity." [[Ruiz](#), 86.]

In this crisis it is tempting for a people to take on the ways of the state. These ways can be taught. They are in fact the most basic part of the curriculum of the modern state education system. It is not accidental that "education" has been a primary vehicle for destruction of indigenous peoples. "Education" defined by colonizing states has aimed at eradication of indigenous traditions, at destruction of "confidence and commitment between persons who recognize and affirm" indigenous communities. When such education is complete, it is safe for the state to allow a "recognition" of "traditions," because "traditions" have become static relics of the past, no longer part of everyday relations. "Ethnic diversity" then becomes window-dressing, decoration, new clothes for the emperor. The American state can tolerate and even promote the "diversity" of Irish-

Americans, Italian-Americans, African-Americans, and, yes, Native-Americans. It would be possible for the American state to exist even if there were no "Americans" at all and everyone was a hyphen-American.

Ultimately, it is land -- and a people's relationship to land -- that is at issue in "indigenous sovereignty" struggles. To know that "sovereignty" is a legal-theological concept allows us to understand these struggles as spiritual projects, involving questions about who "we" are as beings among beings, peoples among peoples. Sovereignty arises from within a people as their unique expression of themselves as a people. It is not produced by court decrees or government grants, but by the actual ability of a people to sustain themselves in a place. This is self-determination.

Self-determination of indigenous peoples will be attained "through means other than those provided by a conqueror's rule of law and its discourses of conquest." [Williams, 327.] The "anachronistic premises" [*Id.*] of the current system of international law -- "discovery" and "state sovereignty" -- must be discarded in order to understand self-determination clearly and see a way to manifest it. This is the real struggle of indigenous peoples: "to redefine radically the conceptions of their rights and status.... to articulat[e] and defin[e] [their] own vision within the global community." [328.] On the plus side for all of us, this struggle has the "potential for broadening perspectives on our human condition." [*Id.*] As Phillip Deere said, "It is a mistake to talk about an American Indian way of life. We are talking about a human being way of life." [Deere.]

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