Counter-sovereignty

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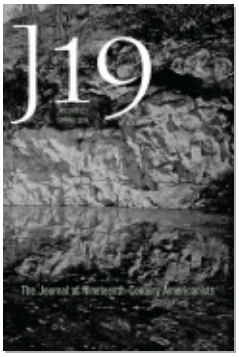

J19: The Journal of Nineteenth-Century Americanists, Volume 2, Number 1, Spring 2014, pp. 142-148 (Article)

Published by University of Pennsylvania Press
DOI: *https://doi.org/10.1353/jnc.2014.0005*

J19

Gaps between academic writers and the concerns of Indian communities continue, but the academics are catching up and catching on. As William Apess, Sarah Winnemucca, and others attest, the struggle to be sovereign can continue amid exploitation and brutal conquest and can take place in an infinite number of settings. Indigenous aspirations to autonomy and sovereignty—whether expressed by communities or individuals and whether they appear in the public arena or in private life—deserve careful scrutiny. Attending to those aspirations moves us closer to speaking *for* indigenous people while reducing the chances that when speaking *about* them we will be telling our own story and not theirs.

Counter-sovereignty

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Man, who appointed me a judge or an arbiter between you? (Luke 12.14)

All authority in heaven and on earth has been given to me. (Mathew 28.18)

United States sovereignty claims are actually claims of counter-sovereignty. That is, US claims to territorial authority are generated, in the first instance, in claims of discovery and the preemption of other non-Native claimants to Native lands and waters. In political terms, the dominion of the various states, and their Union, has its basis on the ongoing recognition of Native rights to occupancy and use. Following this logic, recognition of Native presence, however constrained, is logically necessary for the functioning of US rule of law. As counter-sovereignty, US sovereignty is in perpetual reaction to the prior and primary claims of Native peoples on the territories that the United States claims as its own. Seen in this light, US sovereignty will always be an unfinished project in perpetual crisis of unraveling.

Here, I read the US Supreme Court decisions collectively known as the Marshall trilogy in order to outline one legal-political enunciation of counter-sovereignty. The early fourteenth-century analyses of the rela-

tionship between papal and monarchal power from John of Paris and Marsilius of Padua provide context from a Western genealogy of sovereignty theory.[1] Their arguments provide a window to the underlying logic of counter-sovereignty in Marshall's decisions. In Marshall's telling, US sovereignty claims have their origins and limits in discovery, "the sole right of acquiring the soil and of making settlements on it," which works to "shut out the right of competition among those who had agreed to it."[2] This is a political claim leveraged among settlers. It is also a future-oriented, speculative claim, "pre-emptive privilege in the particular place," and not a description of reality.[3] "Discovery gave title . . . against all other European governments, which title might be consummated by possession."[4] The claims of discovery are limited and proscribed among settlers themselves and reactive and responsive to Native peoples. "They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell."[5] According to Robert Williams, Marshall's opinion "asserted that the law of the United States acknowledged the medievally derived doctrine of discovery of infidel-held lands by European nations vested the Europeans with superior title in those lands."[6]

Discovery establishes a property claim for nations and empires, not for individuals, and settler property, according to Marshall's logic, that is a problem internal to the settler order.[7] This resonates with a type of property analyzed by John of Paris: "Ecclesiastical property . . . has been given to communities, not to individual persons. So therefore, no one person has proprietary right and lordship over ecclesiastical property. It is the community concerned which itself has these."[8] US counter-sovereignty fits this mold of community property, so that individual settlers' property rights are constituted by counter-sovereignty. "He has this not as individual in his own right but purely as part and member of the community."[9]

Marshall argued that discovery asserts dominion over Native peoples. "While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives." For Marshall, this is the starting place for individual settler claims to landed property, the basis for the US property order. "Thus

has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees."[10] Settler property, in this reading, inherits imperial claims to dominion.

There is a contradiction between settler property claims limited by discovery and those asserting ultimate dominion.[11] Marsilius provides a key to navigate these contradictions, describing natural rights that "are believed to be licit and their opposites illicit in the same way in all lands: just as the actions of natural entities, which lack purpose, are produced in the same way everywhere, like 'fire' which 'burns here' in the same way as it does 'among the Persians.' "[12] Racial justifications for settler dominion provide no justification for US abrogation of indigenous peoples' natural rights. Civil right, for Marsilius, "is predicated of every human act, power, or acquired disposition that issues from an imperative of the human mind," so long as it is in keeping with natural right.[13] The evisceration of indigenous natural and civil rights is at the heart of collective and individual U.S. property claims.

Marshall focused on the preemption aspects of discovery as justification for US sovereignty. This is a twofold claim: a preemptive right to eventually claim title against the claims of other European sovereigns; and a claim on exclusive trading privileges. At issue is whether multiple powers can claim dominion over the same territory. As Marsilius wrote, "Supposing a plurality of principates in this way, no realm or city will be one."[14] This was a problem of governance, property rights, and settling competing claims without violence, as Marshall described its development among Europeans in the Americas: "In order to avoid conflicting settlements, and consequent war with each other, to establish a principle . . . by which the right of acquisition, which they all asserted, should be regulated as between themselves."[15] This is an intrasettler issue that requires no participation by Native peoples. "It was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves."[16]

From these claims of discovery, settlers limit the political and economic rights of Native peoples and assert authority over Native tribes and nations. "The general law of European sovereign, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others . . . The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it.

Goods, indispensable to their comfort, in the shape of presents, were received from the same hand."[17] Settler monopoly, enforced by threat of violence, gives the United States a semblance of title to Native lands and waters. It is, however, a brittle foundation for the settler property order, as it has no basis in the participation or acceptance of Native peoples themselves.

Domestic dependent nation status can be interpreted as a statement of boundaries and limitations of US counter-sovereignty claims. John of Paris wrote, in another context, "The pope is no more universal lord of all ecclesiastical property than are lesser prelates lords of the property of their chapters. The pope is in fact manager and steward of ecclesiastical property."[18] Following this logic, US sovereignty claims over Native territories are not universal, but, at best, a claim of stewardship of Native land and waters. Stewardship raises relationship and responsibility, distinct from dominion or absolute power. Even this claim of stewardship runs on shaky logic in Marshall's telling. Charging that Indians are in a "state of pupilage," in relation to the United States, Marshall asserts that Native peoples "occupy a territory to which we assert a title independent of their will." Here is a fundamental overreach of US counter-sovereignty claims, against a stable order of property. As Marsilius noted, "By human laws, anyone can licitly renounce a right brought forward on his behalf, while no one can be compelled by any law to accept the benefit of a right."[19]

Marshall attempted to find a rationale for US claims of sovereignty over Native lands "by bestowing on [indigenous inhabitants] civilization and Christianity, in exchange for unlimited independence."[20] This fabled transaction portrays settlers and Native peoples as equals in the act of exchange, even if the terms of exchange are unequal.[21] Marsilius wrote, in another context, of overriding claims of papal power that were made through "a certain façade of piety and mercy (the first, so as to be seen to be full of concern and care for all; the second, so that people would believe that they were able and willing to have mercy on all)."[22] Marshall's reasoning fits within this tradition of pretensions to moral claims of dominion. Marshall attempted another tack toward a moral justification for counter-sovereignty, writing about Native peoples: "When, in fact, they are ceding lands to the United States . . . it may very well be supposed that they might not have understood the term employed as indicating that, instead of granting, they were receiving lands."[23] Here, Marshall inverts the logical and historical relationship: receiving lands from the usurper.

John of Paris wrote of papal overreach, "If the pope deprives anyone arbitrarily, not in good faith, what he does is illegal. This means that not only is he obliged to do penance for his sin as if guilty of misusing his own property, but also, as betrayer of trust, he is bound to make restitution either from his patrimony should he have one or from what he has acquired, since he has cheated in what is not his."[24] The moral contradictions of counter-sovereignty claims buckle under the moral obligations of restitution.

Counter-sovereignty requires a logical sleight-of-hand to mask its reactive nature, to present itself as settler sovereignty.[25] This logical inversion of actually existing relations of rights, occupation, and precedence is a cornerstone for the plenary power doctrine, applied variously to Native peoples, immigrants, and colonies that are "foreign but within" the United States. Marshall writes, "[Indians] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility."[26] What matters to Marshall is US claims over territory. Any economic or political connection that Native peoples make with a government other than the United States, by Marshall's logic, constitutes an act of war against the United States.

In his critique of late medieval papal overreach, which, he argues, advances by "usurping jurisdictions" in a creeping manner, Marsilius argues that "the bishops of Rome were from the beginning sustained by these privileges—and by nothing else—in getting and keeping hold of coercive jurisdictions."[27] Likewise, in Marshall's logic, the origins of settler claims to dominion are in coercive jurisdiction over Native lands. Marsilius extends his critique to warn that the papacy aimed "to take over the coercive jurisdiction of all realms," a warning that can also be applied to the plenary power doctrine writ on a planetary scale.[28] Marsilius warned that "they want it to be understood that plenitude of power over the entire government of humanity was handed to them."[29]

Marsilius lays out different aspects of plenitude of power. On the one hand, "'plenitude of power' is . . . the power for any possible act: one that can bring about anything at will, for which nothing is excessive." In another way, "'plenitude of power' can be understood as the power of supreme coercive jurisdiction over all principates, peoples, communities, collective bodies and individual persons of the world." Ultimately, "'plenitude of power' could be understood . . . as a power that is not lim-

ited by any law."[30] Marshall's attempts to describe US sovereignty fall within this logic. Applied to Marshall's decisions, these warnings from Marsilius help us see that attention to the reactive and limited nature of countersovereignty unravels any semblance of settler legality.[31] To end with Marsilius: "For if this plenary power is due to him, it follows that it is licit for him to do what he likes. As a result he suspends and revokes all human ordinances and laws, even those ordered by a general council, at will."[32] The real barrier for settler sovereignty is settler colonialism.

Notes

1. John of Paris wrote *On Royal and Papal Power* in the first years of the fourteenth century, as a polemic in the context of Pope Boniface VII and Philip IV, king of France. Marsilius of Padua completed *The Defender of the Peace* a few years later, in 1324, commenting on conflict between Pope John XXII and Ludwig IV of Bavaria, the Holy Roman Emperor. Both writers argued for limitations on papal power, in the context of a shift in European politics, as nascent national monarchies asserted control over their aristocracies and over the Church. Both writers invoked terms of sovereignty and provide a glimpse into a prehistory of modern sovereignty in the Western tradition. As thinkers in a moment of political transition to sovereignty (and, in some interpretations, modern republicanism), they provide useful interpretive lenses for another shift in modern sovereignty: US arrogations of sovereignty in the Age of Revolutions. For a history of the sovereignty concept in relation to indigenous peoples' rights and governance, see Joanne Barker, "For Whom Sovereignty Matters," in Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska Press, 2005).

2. *Worcester v. Georgia*, 31 U.S. 515 (1832).

3. *Worcester v. Georgia*.

4. *Johnson v. M'Intosh*, 21 U.S. 543 (1823), 573.

5. *Worcester v. Georgia*.

6. Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), 231.

7. On the Doctrine of Discovery in US Supreme Court Law, see Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (New York: Oxford University Press, 2009), 93–101.

8. John of Paris, *On Royal and Papal Power* (Toronto: Pontifical Institute of Medieaval Studies, 1971), 96.

9. John of Paris, 97.

10. *Johnson v. M'Intosh*, 21 U.S. 543 (1823), 579.

11. In the words of Walter Echo-Hawk, "Can we simply take the land, or do we have to buy it?" Walter Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Golden, CO: Fulcrum, 2010), 55.

12. Marsilius of Padua, *The Defender of the Peace* (Cambridge: Cambridge University Press, 2005), 253–54.

13. Marsilius, 255–56.

14. Marsilius, 118.

15. *Johnson v. M'Intosh*, 573. Robert Williams argues that this decision "elevates a European colonial-era fantasy of white racial supremacy and dictatorship over entire continents of nonconsenting, non-European peoples into a skeletal principle of the U.S. legal system." Robert A. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005), 56.

16. *Worcester v. Georgia*, 543.

17. *Worcester v. Georgia*, 552.

18. John of Paris, 98.

19. Marsilius, 256–57.

20. *Johnson v. M'Intosh*, 573.

21. While I share her argument that "ultimately, given leading legal judgments [in the United States, Canada, and Australia], the question of legitimacy [of these states] is impossible to avoid," my analysis here departs from Carole Pateman's. While she argues that Terra Nullius is at the heart of the settler contract, I argue instead that, in the US context at least, the "settler contract" attempts to reframe international treaty relations as real estate contracts. Here, I follow Vine Deloria's line of thinking. See Carole Pateman, "The Settler Contract," in Carole Pateman and Charles Mills, *The Contract and Domination* (Cambridge: Polity, 2007), 37; Vine Deloria Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*Austin: University of Texas Press, 1985, 113.

22. Marsilius, 144.

23. *Worcester v. Georgia*, 553.

24. John of Paris, 101.

25. Joanne Barker wrote, "Though informed by international debates, no previous legislative or court decision had defined the 'doctrine of discovery' as such. 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." Joanne Barker, "For Whom Sovereignty Matters," in Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, Lincoln: University of Nebraska Press, 2005, 14.

26. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), 33–34.

27. Marsilius, 134.

28. Marsilius, 142.

29. Marsilius, 153.

30. Marsilius, 409–10.

31. David Wilkins argues that congressional plenary power has three dimensions: it is exclusive; it is preemptive; and it as unlimited or absolute. David Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 26–27.

32. Marsilius, 428.

Colonialism, Constituent Power, and Popular Sovereignty

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Indigenous sovereignty, as with all claims to and manner of sovereign power, is not a question of having or not having some transhistorical or universal thing or capacity named sovereignty. Despite its now conventional definition as supreme, unconditional, and indivisible authority, sovereignty is a necessarily relational and interdependent set of claims and strategies that are made and mobilized in specific times and circumstances with regard to particular antagonisms. Sovereignty is neither a self-evident principle nor does it have inherent explanatory value. In the juridical and political sense, sovereignty names an ensemble of claims, practices, and aspirations that take on specific meaning in the agonistic conditions in which it is enunciated. Just as Jean Bodin conceived of a secularized doctrine of sovereignty