Alyosha Goldstein

Where the Nation Takes Place: Proprietary Regimes, Antistatism, and U.S. Settler Colonialism

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples by a vote of 143 in favor to 4 against with 11 abstentions. Thirty years of coalition building and lobbying by the International Indian Treaty Council and indigenous groups worldwide and more than two decades of negotiation within the UN preceded the vote.[1] The groundwork for the declaration arguably goes as far back as September 1923, when Cayuga chief Deskaheh traveled to Geneva on behalf of the Haudenosaunee (the Iroquois Confederacy) to petition the League of Nations about violations of international law by the United States and Canada. Conspicuous as the four dissenting votes in 2007 were Australia, Canada, New Zealand, and the United States. Strident opposition by these countries suggests the substantial threat that indigenous rights claims continue to pose to the fictive coherence of settler nation-states, which have historically sought to render the persistence of "nations within" as a domestic concern without international implication. Indeed, settler colonialism in the United States has insinuated itself over time in such a way as to obscure the persistence of colonialism

South Atlantic Quarterly 107:4, Fall 2008
DOI 10.1215/00382876-2008-019

as anything other than a historical trace, as well as to ostensibly naturalize settlers by habitation and descent.

In the United States, the vote against formalizing the rights of indigenous peoples has of course direct relevance for U.S.–American Indian relations and should be considered in the context of the recent U.S. Supreme Court decision *City of Sherrill v. Oneida Indian Nation of New York*. In March 2005, the Court ruled against the Oneida, concluding that two centuries of non-Indian land tenure in effect annulled the tribe's outstanding territorial claims. Although the decision directly affected only taxation, its legal implications further undermined tribal self-determination in the United States and quickly served as precedent in a number of prominent court cases. That jurisprudence has so thoroughly defined and determined the legacies of the colonial encounter not only constrains the terms of redress but, inasmuch as law promises to be a correlate of justice, also promises future resolution. This perpetually deferred resolution compels liberal juridical subjectivity and contract as requisite points of departure. The role of legal reason in the making of the modern rights-bearing possessive individual and in animating the conflict of private interests on which legal regulation is premised has been essential for the notions of self and property in liberal societies generally and in settler societies in particular. Moreover, Jacques Derrida argues, "Law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable. Applicability, 'enforceability,' is not an exterior or secondary possibility that may or may not be added as a supplement to law."[2] The U.S. vote against the UN declaration and the *Sherrill* ruling are especially interesting for the ways in which they apply equality in law and authorize the force of law in order to safeguard inequality outside of law.

This essay focuses on what this U.S. posture conveys about the colonial present in North America, as well as the ways in which white settler colonialism in the United States is articulated with the present-day constellation of neoliberal antistatism and post–civil rights "color-blind" discourse. I examine the statement issued by Robert Hagen, U.S. advisor to the UN, against the Declaration on the Rights of Indigenous Peoples and analyze his remarks in relation to both the *Sherrill* decision and the reactionary populist discourse of antisovereignty groups more broadly. Non-Indian "citizen" groups lobbying and litigating against American Indian sovereignty are an important part of this conjuncture, not only because their rhetoric shares

Hagen's emphasis on equality and rights claims detached from historical inequities, but also because of the ways in which these groups in fact envision themselves in opposition to the state and their actions as a more pure and authentic embodiment of American principles. In this essay, I am primarily concerned with the relationships among three elements of U.S. colonialism: the role of settler claims historically and in the present; how colonial projects advanced in part by legal disputes over the distribution of political authority; and the assertion of historical dispossession as a means to preempt American Indian self-determination and restitution.

Settler colonialism in North America is not a relic of the past but a historical condition remade at particular moments of conflict in the service of securing certain privileges and often to symbolically negotiate inequalities among white people. The postconquest history of North America and the making of the U.S. nation-state have been overdetermined by competing colonial regimes, settler claims, circuits of slavery, and the negotiation of seemingly incommensurable borders and cosmologies.[3] Understanding this context as more than a bygone historical era whose significance was eliminated with the overthrow of British rule demands addressing the peculiarities of settler colonialism and the ways in which "settlement" compromises and complicates colonialism as a relationship to a geographically distant ruling authority. As historian Ian Tyrell argues, "Settler societies represented a particularly complex and resilient form of European colonial expansion often not recognized as imperial conquest by its own agents precisely because they claimed to do more than extract wealth and then return to the metropolitan space." Similarly, anthropologist Patrick Wolfe notes, "Settler colonies were not primarily established to extract surplus value from indigenous labor. Rather, they are premised on displacing indigenes (or *re*placing them) on the land."[4] Accordingly, settler colonialism is not so much an "event" or a static relationship as a condition of possibility that remains formative while also changing over time.

The term *settler colonialism* is nevertheless fraught with its own discursive complicities. Cultural critic Michael Warner argues that the placid rhetoric of settlement casts the history of the British American colonies as a narrative free of violent conquest. As Warner observes, "Settling is intransitive, or, if it has an object, the object is merely the land."[5] Throughout the "colonial period," British settlement in North America galvanized a sense of belonging and place within the empire for colonists. At the same time, settlement provided European colonizers with a sense of themselves as

locals. "Settlement" as such already implied an entitled and possessive relation to place, as compared with the supposedly unsettled nature of indigenous populations. This worked in concert with colonial ideologies that subordinated indigenous peoples as "primitive" and by divine right rendered the continent the property of those Europeans who would suitably cultivate the land. The collision, contest, and adaptation of Spanish, French, Dutch, and British colonial regimes—and the constellation of resistance and maneuver they prompted—not only changed over time but were further complicated by subsequent immigration, as well as the Atlantic slave trade and its aftermath. Even as "settler" held little appeal or longevity as a political identity, the legal stipulations for who qualifies as "indigenous" remain embattled.

Yet the density and sometimes imperceptible dynamics of this imperial overlay should not lead us to believe that simply making visible genocide and dispossession is adequate to address the conditions of the colonial present. Indeed, in contemporary antisovereignty discourse, genocide and dispossession are acknowledged and accentuated as historical realities that are said, in fact, to contradict the assertion of Indian self-determination. Rather than indict Euro-American perpetrators, the fact of near-annihilation and the extensive displacement of Indian peoples is used by antisovereignty activists as evidence of the necessarily diminished capacity of tribal nations to make present-day claims. Whether confronted by the dismissive stance of antisovereignty groups—a position with apparent influence at the highest levels of the U.S. diplomatic corps, as evidenced by the rhetoric of the U.S. vote against the UN declaration—or faced with the intransigence of the U.S. state and the politically fickle rulings of the Supreme Court, tribal nations in the United States since Deskaheh have often turned to international forums for adjudication and redress. Not that international law—with its beginnings in Francisco de Vitoria's conception of natural law on behalf of the Spanish colonial enterprise—offers any guarantee of justice, but rather that such forums might substantiate the national status and authority of indigenous petitioners and therefore initiate possibilities for international accountability.[6]

Rights of Refusal

Just as neoconservative appropriations of civil rights discourse are not only indicative of cynical opportunism but also speak to the very material limits

of the civil rights framework, the statement circulated to the UN General Assembly by Hagen serves as yet another cautionary tale about the utility of abstractly universal "human rights." It was, after all, partially in deference to the inviolability of human rights that the United States justified its dissent. Furthermore, Hagen's statement speaks to how these universal values—both "human" and "rights"—are themselves bound up with modern property and sovereignty as they have been at least partially constituted by the juridical fictions of colonial conquest. The statement notably stops short of acknowledging how indigeneity is itself a category legible only by way of the colonial encounter and the recent nation-state world order.

In response to the UN declaration, Hagen objected that this was to "be an aspirational declaration with political and moral, rather than legal, force."[7] Hagen reaffirmed U.S. criticism of the 1993 draft declaration and charged that the declaration introduced a new legal concept of "self-government within the nation-state." He jettisoned the political history of U.S.-Indian relations in order to maintain that "indigenous peoples generally are not entitled to independence nor any right of self-government within the nation-state." At stake here was the fateful letter *s* on which so many of the battles over the declaration during the past two decades have turned. This is the difference between "indigenous people" or "indigenous populations" and "indigenous peoples," the latter implying national sovereignty and the right to self-determination according the UN Charter.[8] A subsequent UN resolution by European and U.S. representatives devised the "salt water doctrine"—limiting their support only to decolonization overseas—so as to repudiate pressure for self-determination from "nations within."[9]

U.S. opposition to the 2007 declaration followed an equivalent rationale. Hagen contended that at no point in the drafting of the declaration were its articles "intended to imply that the existing right of self-determination is automatically applicable to indigenous peoples per se or to indicate that indigenous peoples automatically qualify as 'peoples.'"[10] According to Hagen, to do so would fatally undermine U.S. democracy. This is because "collective rights"—an enduring dilemma within the discourse of liberal legalism—supposedly threaten majority rule with the tyranny of a minority. The declaration was unacceptable to the United States because, as a nation ostensibly committed to the principle of human rights, Hagen proclaims, "human rights are not to be violated in the exercise of collective rights." In other words, to specify "indigenous rights" would contaminate the universal rights of humankind with a corrosive particularity; it would,

in effect, cancel out universal rights by making rights claims on behalf of a specific group of people. In this regard, Hagen hyperbolically insists, "We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a 'veto' power over the legislative process."

Hagen's refusal to recognize the nation-to-nation relations constitutive of U.S.–American Indian relations insists on a fictive territorial and political exclusivity for the United States. It is precisely the contested character of territorial integrity that his comments aim to deny. Indeed, despite the historical distinctions between the two, Hagen's statement foregrounds the question of land as tied to sovereignty. Thus, he protests: "The provisions on lands and resources are phrased in a manner that is particularly unworkable. . . . For example, Article 26 [of the declaration] appears to require recognition of indigenous rights to lands without regard to other legal rights existing in land, either indigenous or non-indigenous. Clearly the intent of the Working Group was not to ignore contemporary realities in most countries by announcing a standard of achievement that would be impossible to implement."[11] It is difficult to conceive how Hagen might envision an "aspirational" document that simultaneously reinforces "contemporary realities." But the emphasis here is both on acknowledging and absolving past expropriation through the logic of private property. Thus, dispossession has occurred, and however regrettable, it was not realistic—"would be impossible to implement"—to return stolen or improperly obtained lands, especially in a manner that might expand the sovereignty of Indian nations. Thus, the incontrovertible fact of present-day private ownership and property rights foreclosed all other terms of contestation.

A Genealogy of Possession

In 1823, Supreme Court Chief Justice John Marshall's opinion on *Johnson v. M'Intosh* established the basis of both federal Indian law and subsequent property law in the United States. In the Court's ruling, Marshall provided an extended exegesis on the conquest of the "New World" that built on and revised past interpretations of European imperial sovereignty to assert the "doctrine of discovery." This doctrine minimized potential interimperial conflict during the early period of exploration and conquest by guaranteeing title to the first European power to claim and colonize a territory. Property rights were inaugurated by European discovery because

of what Marshall described as the colonial-era perception that New World inhabitants were of a lesser "character and religion" and were "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[12] Thus, according to Marshall, "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[13] When the United States won independence from England, it also acquired this exclusive right. Furthermore, by specifying that this was a right to extinguish Indian title of *occupancy* and not *ownership*, Marshall deliberately interceded in the debates of his time to retroactively strip Indians of their status as owners of the land they occupied.[14] Ownership appeared as an exclusively Euro-American faculty and did not preexist the right of discovery.

Marshall's logic of property rights relied on a fiction whose history of utility can be traced most saliently back to John Locke. Marshall's assertion that American Indians were principally hunters with no established attachment to place or agricultural practice was contrary to common knowledge at the time. Locke, who wrote the Carolina land laws in service to the Earl of Shaftesbury and pursued his own ill-fated agricultural venture in the same territory before completing his *Two Treatises of Government*, relied extensively on this trope of American Indians as exemplars of "natural man." A fictionalized and generic depiction of indigenous peoples in America served a double utility for Locke. On the one hand, they were for him evidence that freedom was the natural condition of humankind and that—in contrast to Sir Robert Filmer's divinely ordained patriarchalism—people were not by nature subject to the rule of others. On the other hand, their purported lack of settled agricultural labor—indeed, their presumed elemental freedom that Locke extolled in his case for natural liberty—served as the basis for his justification of settler colonialism. Indians were his evidence that there existed no inherent right to property in land and that only appropriation through labor provided the rights of ownership. Because, according to Locke, Indians neither cultivated nor enclosed land, the British colonists could reasonably claim property rights by way of settlement and agricultural labor.[15] Government was a corollary of private property, a mechanism to guarantee individual property rights. Although Locke's *Two Treatises* were formulated in defense of British colonialism, his theory of innate freedom, naturalization of property, and conception of the separation of powers in government were foundational for the new American republic.[16]

During the American Revolution and the early national period, tension between states seeking to expand both their authority and territory and the federal government's efforts to secure the confederacy were paramount. In the years between the creation of the Second Continental Congress and the end of the war, the issue of western lands loomed large in the post-war plans of the states. A number of states asserted conflicting territorial boundaries, each justifying their entitlement by colonial charter. The war ended the negotiated "middle ground" of French and British colonialism, where indigenous peoples had maintained their capacity to partially shape the colonial encounter, and initiated a new era in the consolidation of colonial dominance and continental conquest.[17] In the years immediately following the Treaty of Paris, relations with American Indian nations and the delineation of political boundaries were flashpoints in the struggle between individual states and the federal government over the distribution of authority and governance in the new republic. The Trade and Intercourse Acts of 1790 and 1793 required that all land transactions involving Indians and non-Indians, including state governments, be approved and authorized by Congress. These acts were intended to minimize potential Indian hostilities provoked by white settlement and trespass. States along the eastern seaboard, however, generally disregarded the acts and proceeded to negotiate treaties and pursue land acquisition without federal approval or consultation. Later, in 1891, a New York State court decision went so far as to assert legal principle for this noncompliance with what became known as the Thirteen Original States Doctrine.[18]

The legal recourse that did exist for states, if only ambiguously, was the sale or transfer of preemption rights to would-be settlers and land speculators. These rights did not convey ownership but rather the privilege of being first in line to purchase the property once the federal government, or—with federal approval—the state government, acquired the land. Although preemption rights were first introduced with the understanding that Indians owned the land, at the turn of the nineteenth century the principle that Indian territory was the property of the state or federal government with occupancy rights granted to Indians gradually became the conventional interpretation. Between the 1790s and 1820s, the burgeoning market for preemption rights encouraged the redefinition of Indians as occupants rather than owners.[19] With the thriving market in speculative investment came the added incentive for non-Indians to hasten tribal displacement in order to reap prospective financial rewards. *Johnson v. M'Intosh* consum-

mated the necessary legal standing for preemption rights by giving precedent to the "right of occupancy" perspective.

Marshall's *Johnson* ruling had substantial effects on federal policy as well. Beginning in the 1820s, the federal government accelerated its efforts to eliminate Indian occupancy in the east. By the mid-nineteenth century, virtually all of the remaining eastern tribes had been forced off their ancestral lands and compelled by land-exchange treaties to move west of the Mississippi River. Pressure from southern states eager to seize lands held by the Five Civilized Tribes was especially strong. Despite the extensive and brutal westward relocation of Indian nations, the problem of settler encroachment and trespass on the newly allocated territories quickly became volatile. Reservations were created by the 1851 Indian Appropriations Act in an effort to limit settler incursion. The legislation capitalized on settler-Indian conflicts as an excuse to further erode the tribal land base and, in many instances, to remove Indians to the least desirable territory. U.S. reservation policy triggered all-out military conflict, including the bloody Sioux and Nez Perce Wars. In the aftermath of violent pacification, Indian assimilation became the goal of U.S. policy. The 1887 General Allotment Act not only parceled out reservation land to individual Indians and sold off supposedly "surplus" property to white settlers, but also endeavored to detribalize Indians and inculcate "modern" values and conduct through the presumably transformative capacity of private ownership. During the mid-twentieth century, U.S. policy embraced the termination of federal recognition of tribes and encouraged the relocation of individual Indians to urban centers. The Indian Claims Commission (ICC) Act, passed by Congress in 1946, created certain opportunities for legal redress but was remarkably limited in scope, especially as it coincided with termination policy. The ICC restricted settlements to the dollar value of the land at the time when it was taken and categorically prohibited land recovery. Only cases in which claims were brought against the federal government were permitted, which excluded the considerable number of suits in which states, counties, or individual landowners would be defendants. Because states were so often at the vanguard of dispossession, the ICC's prohibition against such claims preempted more legal action than it enabled.

New York State's unrelenting purge of the Haudenosaunee (Six Nations of the Iroquois Confederacy)—the Seneca, Cayuga, Oneida, Onondaga, Mohawk, and Tuscarora—during the late eighteenth and nineteenth centuries is a prime example of state machinations in defiance of federal edicts.

Between 1784 and 1838, large tracts of the Haudenosaunee territory were taken by blatant coercion, fraudulent purchase, or illicit state-instigated treaty, while many Iroquois were forced or otherwise persuaded to move westward to what is now Oklahoma, Kansas, and Wisconsin or northwest to Ontario. Real estate speculators such as the Holland Land Company, Oliver Phelps, and the Ogden Land Company aggressively conspired to appropriate Indian title. Public and private construction of transportation infrastructure—first with the sprawling network of canals and, later, the statewide New York Central Railroad system—fragmented Haudenosaunee territory. The Iroquois, under a variety of circumstances, also participated in the loss of tribal land. After 1842, when western Oneida territory was allotted to individual Indian owners, all parcels were either leased or sold.[20] Likewise, leasing reduced Onondaga territory by four-fifths in the brief period between 1886 and 1888. Further complicating potential redress, Congress transferred criminal and civil jurisdiction over Indian affairs to New York State in 1948 and 1950. During the 1950s and 1960s, much of the remaining Haudenosaunee land was seized by the state for large-scale public works projects, such as dams and hydroelectric facilities.[21]

It was not until the landmark Supreme Court decisions in favor of the Oneida in *Oneida Indian Nation v. County of Oneida* (1974) and *County of Oneida v. Oneida Indian Nation* (1985) that state impropriety was effectively challenged. The rulings reasserted that the thirteen original states, including New York, were subject to the Trade and Intercourse Acts and, as such, positioned federal courts as a viable arena for tribal efforts to regain land in these states. Subsequent eastern Indian land claims sought to build on the *Oneida* precedents (including the Passamaquoddy and Penobscot of Maine, the Mashpee and Wampanoag of Massachusetts, the Narragansett of Rhode Island, the Schaghticoke, Mohegan, and Mashantucket Pequot of Connecticut, and the Catawba of South Carolina).[22] Despite the significance of such momentary victories, the tortuous articulation of juridical reason and multiscalar distribution of political and legal authority reinforce colonial rule even when appearing to challenge it. Competition or antagonism between U.S. federal, state, and local governments provides some opportunity for Indian tribes to maneuver, but the U.S. legal system—qualified only by the plenary power of Congress—remains the absolute limit and defines the only permissible terms of debate for such tactics. As with its vote against the UN Declaration on the Rights of Indigenous Peoples, the United States has carefully avoided any possibility that international law might take precedence in such matters.

A Measured Distance

The dispersed character and calculated distance of governance in U.S. liberal settler society bears a crucial historical relation to federalism as well as to the containment of political contestation. During the time of the 1974 *Oneida* decision, Richard Nixon's "new federalism" sought to strengthen the relative autonomy of the states and to direct government efficiency through a calculated distribution of administrative authority. This was partially in reaction to the multiple insurgencies of the 1960s and the crisis of the Keynesian welfare state in the context of global economic involution. Indigenous actions such as the Alcatraz Island occupation in 1969–71, the Trail of Broken Treaties and Bureau of Indian Affairs building takeover in 1972, and the violent confrontation at Wounded Knee in 1973 marked a resurgence of Indian activism that prepared the way for the Indian Self-Determination and Education Assistance Act of 1975. At the same time, the assertion of states' rights and the burgeoning white hostility to both state and federal authority—manifest in struggles such as those against taxation and school integration—advanced the devolution and downsizing of government. Ronald Reagan's more robust federalism further rationalized the neoliberal assault on regulative government and put reactionary populism to work in the upward redistribution of wealth. During the 1970s and 1980s, as "homeowners" groups gained increasing attention and influence for their criticism of what appeared to be government in general, the already volatile question of Indian jurisdiction over non-Indians within reservations resonated with this ascendant antistatist rhetoric.

In the wake of the 1974 and 1985 *Oneida* rulings, a number of other Haudenosaunee nations filed cases against both New York State and private landowners. Tribes were considerably divided on the decision to pursue individual non-Indian owners in land claim suits.[23] Although the naming of non-Indian individuals as defendants may have proven to be ill-advised strategically, this course of action identified a requisite feature of settler colonialism. Settlement not only occasioned the multiplication of claims to political and legal authority, it also promoted the proliferation of illegalities—be they trespass and unlawful inhabitance, or outright violence—and the measured distance of these transgressions from the propriety of colonial government. Such illegalities range from the deliberate incapacity of the General Land Office to enforce the regulation of westward settlement during the nineteenth century to the frequent impunity for crimes by non-Indians against Indians as a result of federal legislation undermining

tribal law enforcement. Incidents such as the notorious 1974 Farmington murders just outside the Navajo Nation and the mob violence against the Ojibwe in Wisconsin during the 1980s are symptomatic of the persistence of anti-Indian belligerence.[24] The extremist actions of settlers, while often renounced and sometimes punished by imperial power, have always been essential to colonial occupation and expansion. This history remains foundational for contemporary nonindigenous land ownership.

In 1993, the Seneca filed a class action lawsuit against the state of New York, Erie County, and all the private landowners in the claim area (roughly two thousand, including a few businesses, most of whom were concentrated on Grand Island, New York). Comprised of 17,385 acres of land, Grand Island is home to more than seventeen thousand non-Indians and includes a regional amusement park, golf courses, beaches, hotels, and various other tourist amenities, as well as access to two state parks. A state expressway across the island links the cities of Buffalo and Niagara Falls. The suit alleged that the U.S. government, as required by the Trade and Intercourse Act, had never properly ratified the transfer of land to New York State in 1815 and that therefore the tribe still held title to Grand Island properties. Because this involved the unauthorized acquisition of title by New York State, the U.S. Department of Justice joined the Seneca as a plaintiff.[25] Grand Island homeowner Darren Brown complained that "the U.S. Government turned its back on the innocent property owners of Grand Island by saying that they were actually going to defend the Indians in this case!" Brown protested that the case "could very easily set a dangerous precedent for the United States and every State in the Union."[26] Nevertheless, in 2002, the Seneca lost their case. The trial court ruled that a 1764 treaty with Britain in the wake of Pontiac's Rebellion provided evidence that the tribe had previously ceded the property in question and that the purchase by New York State was merely intended to avoid conflict with the tribe over land the state already owned. The decision was upheld in the Second Circuit of Appeals, and the U.S. Supreme Court dismissed the case in 2006.

The Seneca Grand Island suit was significant because so much of the litigation and attendant outcry concerned the inclusion of private landowners as defendants. Reflecting on the broader implications of their victory, lawyers for the defense in the Seneca case emphasized that "the landowners are innocent third parties, and their undisputed innocence makes them unique among land claim litigants."[27] Indeed, "innocence" and injury have long been cornerstones of settler ideology.[28] The defense lawyers, with

their indisputably innocent clients victimized by indigenous legal action, thus labored to deflect the plaintiffs' grounds for injury, citing the *Catawba Indian Tribe v. South Carolina* ruling that "monetary relief representing fair value is 'just compensation' and *constitutionally the equivalent of tangible or real property*."[29] This "just compensation" and monetary award of equivalent damages is construed as the only reasonable and possible outcome for Indian plaintiffs, but unthinkable for "innocent" landowners who were "hostages to history." The defense lawyers insisted that there was "no legal reason . . . for the tribal plaintiffs to continue to press their claims against the landowners."[30] But the decidedly nonlegal reason for landowners not to sell their property and transfer title back to the tribe—because landowners had lived on the property for generations and therefore had a deep, long-standing connection to that particular place, for which there was no equivalent in monetary compensation—categorically precluded tribal land reclamation.[31] For the Seneca apparently there could be no comparable attachment to the place of their ancestors who preceded the landowners' forefathers.

Just before the Supreme Court opted to pass on hearing the Seneca case, it reached its milestone ruling on *City of Sherrill v. Oneida Indian Nation of New York* (2005). In 1997 and 1998, the Oneida Nation repurchased title to land on the open market once held by the Oneida and at the time within the jurisdiction of the city of Sherrill in upstate New York. Sherrill proceeded to assess property taxes, which the Oneida ignored on the basis that the properties were now within the Oneida reservation and therefore nontaxable by states or municipalities. The city sent the Oneida Nation notices of tax delinquency, held a tax sale where it bought the land, and then initiated eviction proceedings against the Oneida. A U.S. District Court found in favor of the Oneida, and this decision was upheld by the Second Circuit Court of Appeals.

In its opinion on the 1985 *Oneida* case, the Supreme Court advised Congress to enact legislation that would prohibit future Indian land claims based on violations of the Trade and Intercourse Act. Writing on behalf of the majority, Justice Lewis F. Powell commented, "One would have thought that claims dating back for more than a century and a half would have been barred long ago."[32] In his dissenting opinion, Justice John Paul Stevens elaborated on this aside to argue that the Court should have barred the Oneida's claims based on the "doctrine of laches." Essentially a statute of limitation, laches assert the unreasonable or unexplained lapse of time

before legal action, an interval that indicates a rightful claim has been abandoned or foregone and that would impair the defendant's capacity to dispute the claim. Stevens objected, "Given their burden of explaining nearly two centuries of delay in the prosecution of this claim, and considering the legitimate reliance interests of the counties and other property owners whose title is derived from the 1795 conveyance [New York State's federally unauthorized treaty with the Oneida], the Oneida have not adequately justified their delay."[33] No substantive rebuttal of Stevens's argument appeared in the 1985 majority decision, and it was precisely to the terms of his objection and the doctrine of laches that the Court returned in its ruling twenty years later.

In March 2005, in an eight-to-one decision, the Supreme Court overturned the two earlier lower court rulings and decreed that the Oneida Indian Nation could not expand its tax-exempt land holdings. The Court decision cited the "long-standing, distinctly non-Indian character" of the region. Like the U.S. objection to the UN declaration, the Court maintained, "Generations have passed during which non-Indians have owned and developed the area that once composed the tribe's historic reservations." The Court denied the Oneida's claim, citing the doctrine of laches and "the impracticability of returning to Indian control land that generations earlier passed into numerous hands."[34] In other words, the Court acknowledged that this territory was formerly part of the Oneida Nation but insisted that the passage of time and its alienation through proprietary exchange disallowed its reinstatement as tribal land. Moreover, the decision allowed states and municipal governments opposing tribal sovereignty to raise equitable defense for the first time in recent history.

The *Sherrill* decision was quickly taken as precedent to undermine Indian land claims. It has had significant influence, despite the fact that, as legal scholar Sarah Krakoff points out, "the weight of federal Indian law counsels against the application of time-bound defenses to Indian tribes for the good reason that, for long stretches of [U.S. history], federal and state governments actively prevented tribes from attempting to vindicate their rights, even rights solemnly set out in treaties and statutes."[35] No sooner had the Supreme Court passed down its *Sherrill* decision than the Second Circuit used the ruling to reverse a $248 million damages award to the Cayuga Indian Nation for what the federal district court had earlier found to be indisputable violations of the Trade and Intercourse Act. In overturning the federal district court, the Second Circuit held that the *Sherrill* decision "dra-

matically altered the legal landscape against which we consider plaintiffs' claims."[36] The ruling against the Cayuga, however, was particularly insidious for how the Second Circuit interpreted the *Sherrill* ruling. The Supreme Court's decision on *Sherrill* applied to the very specific context of sovereign immunity and its territorial jurisdiction with regard to laches. The *Cayuga Indian Nation of New York v. Pataki* (2005) decision considerably expanded on this precedent by declaring that laches applied to all forms of redress, in this case specifically money awarded in damages. Thus, where the 1974 and 1985 *Oneida* rulings upended the Indian Claims Commission's authorization of monetary claims and exclusion of land reclamation, *Sherrill* once again inhibited the restitution of sovereign territory. *Cayuga* went even further by ruling out monetary settlement.[37]

Patriotism and Propriety

Writing in 2002 for *City Journal*, a publication of the neoconservative Manhattan Institute, Walter Olson described land claim conflicts in western New York from the perspective of those purportedly most victimized by the legal battles between the state and the Haudenosaunee:

> By 1999, [Daniel Gates] had been trying for two years to sell his 800-acre farm in order to pay off his debts and retire, but he could find no buyers, even at a cut price. As real-estate broker Michael Gaiser explained to a reporter, selling land in the Indian claim area had become a "nightmare," because the difficulty and delay in getting title insurance slow down transactions and spook potential buyers. Rumors periodically sweep the land-claim area that the state will use eminent domain to condemn privately held land and bestow it on the tribes as part of a settlement. "I've worked on this land all my life," says 70-year-old soybean farmer Peter Shuster of Seneca Falls; his family, like Gates's, had lived on the land for roughly two centuries. He found it hard to imagine that "you could lose that way of life after all these years." But the threat was real.[38]

In Olson's story the dwindling upstate economy and uncertain future of small-scale agriculture in the United States warrant no mention, but the callous threat of tribal land claims jeopardize the very embodiment of American values. Yeomen farmers such as Gates and Shuster, salt-of-the-earth personifications of the Jeffersonian ideal, were innocent bystanders in dan-

ger of being robbed of generations of hard work because state bureaucrats might acquiesce to Indian demands. For Olson, Iroquois efforts at land reclamation were absurd, but the real villain was the state itself, which quixotically conferred legitimacy to such initiatives. He writes, "Few groups could claim dispossessed status more plausibly—and more romantically—than Native Americans."[39] The dispossession of American Indians is, for Olson, a historical fact, but a fact indisputably in the past tense without reasonable claim on the present. The "romantic" and unreasonable attachments of "liberal" government are the problem with which Olson is concerned. His narrative renders Indian land claims as yet another pernicious symptom of the legacy of 1960s liberalism and the racial state it engendered.

The heroes of Olson's article are members of Upstate Citizens for Equality (UCE), a group involved in the *Sherrill* case, as well as numerous other Indian land claim cases in New York. Since forming in 1997, the same year that the Oneida began to repurchase territory, UCE has organized multiple chapters across the state, held large-scale public rallies, and directly lobbied state legislators to end negotiations with tribal nations. It is one of numerous local and regional antisovereignty groups across the United States. At the national level, the antisovereignty agenda is represented by organizations such as the Citizens Equal Rights Alliance and One Nation United.[40] UCE articulates reactionary populist antistatism and ostensibly post–civil rights antiracism with antisovereignty discourse. UCE and similar groups take particular issue with the ways in which they believe Indian sovereignty threatens private property rights and with what they allege are the moral and legal improprieties of Indian casinos. Groups such as UCE consider the recognition of Indian nationhood as equivalent to the United States forfeiting national sovereignty.

Whereas the 1970s taxpayer revolt and successive antiwelfare campaigns disputed what they characterized as the inordinate tax burden placed on them by the state, the antisovereignty movement protests the tax-exempt status of Indian nations. UCE was initially organized by small-business owners operating gas stations and convenience stores, disgruntled because comparable Oneida businesses were tax exempt and could therefore offer lower prices. New York State has tried to impose taxes on reservation retailers since the mid-1950s, and in 1994, the U.S. Supreme Court ruled that the state had the right to collect taxes on all sales to non-Indians. But, as Seneca scholar John Mohawk points out, tensions over taxation and enforcement were just as often between tribal merchants and tribal governments.

Despite plans in the late 1990s to introduce retail taxes collected by the tribes (not New York) to provide for tribal services and jobs, indigenous small-business owners refused to cooperate.[41]

But UCE objections to the Oneida's tax-exempt status are not simply calls for a competitive "level playing field"; they are also symptomatic of an unacknowledged sense of racial entitlement and displaced class resentment. Since opening in 1993, the Oneida's Turning Stone Casino has supplied capital to a stagnating upstate economy and become the third largest source of jobs for non-Indians in the surrounding three-county area.[42] Turning Stone's financial success has made possible a populist rhetoric that casts the Oneida as the wealthy elite against whom ordinary New Yorkers must unite to protect their economic well-being, despite the fact that from a purely fiscal standpoint the casino has provided substantial revenue to non-Indians in an otherwise anemic economy. This peculiar displacement of class resentment is evident throughout UCE discourse and conflates the economic status of all Haudenosaunee nations with the small faction of Oneida aligned with casino magnate Ray Halbritter. Speaking at a UCE rally, Rich Ricci, a member of the Seneca County Board of Supervisors, proclaimed, "They [Cayuga Indians] may out-money us, but they don't out-gun us. . . . We're a bunch of rag-tag soldiers who will fight like hell."[43] Ricci's statement speaks not only to an incendiary patriotism but to the affective, violent attachments of antisovereignty rhetoric.

UCE's focus on casinos, property rights, and taxation is intended to challenge the legitimacy of tribal sovereignty and is often couched in terms that either charge the federal government with allocating "special rights" for Indian peoples or accuse Indian nations of demanding such inequitable rights. The antisovereignty movement shares rhetorical strategies with campaigns against U.S. welfare programs as overly permissive and promoting a culture of dependency. The federal government's paternalism is cast as a root cause of moral decline and economic inequality. For instance, Walter Olson disparages how federal "Indian law had as a key premise the idea that tribes were childlike 'wards' of Washington, incapable of looking after their own interests."[44] Ironically, he makes this observation in the service of his broader diatribe against contemporary Indian claims for self-determination and restitution. In the now well-worn neoconservative condemnation of Lyndon B. Johnson's Great Society, the liberal state is characterized as having encouraged fraudulent or excessive claims by people of color and the poor. In this narrative, not only did the state fos-

ter inequality by undermining the self-initiative of certain populations but liberal policy makers developed a codependent state that rapidly expanded through the illegitimate transfer of money from deserving hard-working citizens to opportunistic, undeserving poor people of color.

But the antisovereignty discourse of groups such as UCE is also distinct from these campaigns for the ways in which it places patriotism at the center of its rhetoric. UCE casts its platform and members as a more authentic embodiment of American principles than either New York State or the federal government. UCE's slogan, "Born in the USA: We Are Native American," on the one hand, trivializes claims to Indian identity but, on the other, affirms the inborn patriotic fidelity of UCE members in opposition to the presumably corrupted machinations of the state. The spokesman of an antigaming organization closely allied with UCE likewise insists, "Our direct targets have never been the Indian nations themselves. Rather, our quarrel is with our own governments, at the national, state and local levels, who have participated or acquiesced in a cynical attempt to use the Indians to enable them to avoid compliance with [New York State's] Constitutional ban on casino gambling."[45] Similarly, UCE members often assert the betrayal of their private property rights by the federal or state government. According to Seneca Falls resident Harry Eno, it's the "same old story. All levels of government are against the property owners."[46] Whereas right-wing movements such as the taxpayer revolt in the 1970s also focused on the ostensibly illegitimate fiscal incursions of the state, the antisovereignty movement bases its position not on the grounds that the state supports morally reprehensible redistribution, but rather that government recognition of Indian sovereignty undermines the fundamental principles of equality and private property rights and as such threatens the political coherence of the United States. As one UCE activist puts it, "Like the pledge of allegiance says: 'One nation under God indivisible.'"[47] Thus, despite all evidence and precedent that qualifies and complicates U.S. sovereign rule—precisely the inconsistent and convoluted juridical reason that has both diminished and affirmed tribal sovereignty—according to antisovereignty activists, in the final instance pious allegiance compels the absolute singularity of the U.S. nation. Such an injunction, given the antisovereignty movement's sustained hostility to federal authority, also reiterates the distinction between the sanctity of the nation and the culpability of the state.

In terms reminiscent of opponents to affirmative action, antisovereignty activists vehemently disclaim the possibility that their actions or rhetoric is

racist. They argue that their platform is merely defensive. It is about equality under the law and does not single out any specific group of people. In 2000, Bernie Conklin, then UCE vice president, explained the organization's position in the following terms: "We're fighting a land claim here. We are not fighting a people. We would be fighting this if it was the Italian community, or German community, or any other group that set themselves up to do this."[48] Likewise, UCE activist Rodman Lott objected, "If they would live here like we do, there would be no problem with any Indian, any tribe. . . . But this thing of a sovereign nation, of a country in a country? As long as us residents have meetings, we will never, never agree on a sovereign nation—or anything but one country."[49] Of course, as these statements make clear, the terms of the "fight" and the demand to "live here like we do" are intelligible only as opposition to the particular claims of Indian sovereignty. Furthermore, groups such as UCE insist that Indian sovereignty is itself inherently racist and prejudicial. A. R. Eguiguren's book *Legalized Racism: Federal Indian Policy and the End of Equal Rights for All Americans*, for instance, is an account of land claims struggles in Minnesota and Wisconsin that develops the charge of Indian racism at length. As is characteristic of the antisovereignty movement, Eguiguren denounces the allegedly institutionalized racism of the federal government for conferring "special rights" to tribes, on the one hand, and the supposedly "racial" separatism of tribal sovereignty, on the other. Eguiguren combines a convoluted denunciation of racism historically with an indictment of tribal nations that conflates sovereignty with claims to superiority: "Racial, ethnic, cultural, and spiritual superiority is what many European colonists claimed upon first encountering the indigenous peoples of the Americas. The claim had no validity then and has no validity now, even when Native sovereignty nationalists use it."[50] Eguiguren argues that the epithet "racist" is used only to silence antisovereignty activists, but he proceeds to compare Indian sovereignty to white supremacist demands for racial separatism and to suggest that any federal recognition of tribal sovereignty has been equivalent to South African apartheid.[51] The expansion of tribal sovereignty, warns UCE newsletter editor Susan Galbraith, would mean the end of rights for non-Indians. Galbraith cautions, "A government of the tribe would exert jurisdiction to some extent over people who cannot participate, who can never be members no matter how long they reside there unless they are by blood defined as tribe members."[52] But this jurisdiction is *political*, not racial as implied by Galbraith. The colonial regimes of racial classification and

blood quantum are not inherently tied to tribal self-determination. This has not prevented some tribal governments, especially in internal conflicts over resources, from using blood quantum in highly divisive ways, but this should not obscure the fact that such categories remain colonial constructs. A number of indigenous scholars—including Audra Simpson, J. Kēhaulani Kauanui, Michael Yellow Bird, and Kim TallBear—have described in detail the hazards of blood politics and argued for tribal enrollment criteria such as traditional knowledge and forms of kinship not limited to the biological.[53]

Nevertheless, antisovereignty activists go so far as to suggest that they are the true champions of Indian rights. Daniel Warren, chair of the western New York chapter of UCE and director of the Coalition Against Gambling in New York, alleges that tribal governments use their sovereign status to deprive their members of rights they are guaranteed by the U.S. Constitution. In a remarkable inversion of privilege and oppression, Warren contends, "Racism is the oppression or act of bestowing special rights and privileges based on one's race." According to Warren:

> It is Federal Indian Policy which encourages U.S. and New York citizens of Native American descent to live on secluded plots of land called reservations and be governed by an entity that does not have to give them the same civil liberties guaranteed by the United States Constitution to other citizens. . . . The Supreme Court in 1954 struck down the hideous racist concept of "separate but equal," in all its nefarious guises—including in my view, Indian reservations, which are outdated anomalies left over from a sad era of institutionalized racism.[54]

Since Warren aims to discredit any land claims that the Oneida and other Haudenosaunee nations in New York have pursued or may pursue, he conflates the historical removal of Indians to reservations with all present-day Indian territory. By extension, in Warren's logic, efforts to expand sovereign land claims support the racism of the past and advance racism today. Similar to Robert Hagen's UN statement, Warren concludes his editorial, "One cannot have human rights without equal rights."[55] But of course this is decidedly untrue: "equal rights" are commonly the purview of particular nation-states and thus may be precisely the political entitlements against which, in Arendtian terms, the rights of those without rights—the human but not the citizen—are asserted.[56] In Warren's formulation, equal rights must be rights that any and all citizens can claim in law and that support

the unlikely premise that no right can in any way infringe on another—a premise that demands the definitive exclusion of those with contested or collective claims to rights.

At the same time, UCE and other such groups quite explicitly do not aim to erase the history of continental conquest. Rather, they insist on a facile and self-serving political realism. The antisovereignty movement advances a very specific, expediently circumscribed conception of history. In contrast to neoconservative arguments against affirmative action that dismiss the historical violence and dispossessions of slavery, apartheid, and racism as past, the movement collapses present conflicts into one incontrovertible moment of defeat. One member explains UCE's position in the following terms: "History is history, and as I understand it the white man beat the Indians. There was a war and we won this land." Another member similarly affirms, "Look, you have a war and the other guy loses; [they] don't have sovereignty, [they]'ve lost it."[57] UCE, like other antisovereignty groups, contends that federal Indian law violates constitutional equality accorded citizens by recognizing American Indian semiautonomy and, if only at times, the semblance of nation-to-nation relations. In this sense, antisovereignty activists resemble nativist groups hostile to immigrants and U.S. immigration policy. Speaking of Indian casinos, UCE President Dave Vickers complains, "The kind of lawlessness that's taking place [with government approval] is absurd, and previous generations would not have tolerated their leadership doing things like this."[58] Therefore, Vickers appears to suggest, when the state no longer upholds the law and does not protect the rights of its citizens, the nation of true patriots must intercede on behalf of these higher principles. Indeed, the nation takes place here in the sense both of claiming territory and of being constituted in its ostensibly most authentic form by the actions of vigilante patriots in opposition to the duplicity of the state.

Colonial Frictions

The U.S. statement against the UN declaration, the Supreme Court's *Sherrill* decision, and antisovereignty movement organizations such as UCE articulate overlapping yet distinct notions of the relationships among rights, property, and governance in their efforts to refute tribal sovereignty. In each case, however, there is the simultaneous acknowledgement and foreclosure of historical violence and dispossession situated in the past.

From the perspective of legal interpretation, the juridical reliance on precedent requires that the past authorize the present as a norm for the future.[59] In his *Johnson v. M'Intosh* opinion, Marshall distanced himself from the overt racism of the ruling by contending that its terms were not of his own device, but rather were the conventions of the historical record with which the Court was obliged to conform:

> However extravagant the pretensions of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. . . . However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[60]

Marshall's apparent discomfort with the language of his imperial forefathers has facilitated the still-unchallenged legal standing of the "doctrine of discovery" and the juridical force of the *Johnson* ruling.

Jurisprudence is thus propelled forward by precedent substantiated in Marshall's calculated narrative of legal history, the full consequence of which he further enumerated in *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832). Marshall's fateful trilogy carefully distinguished the legal standing of foreign nations, state governments, and tribal nations.[61] Indian sovereignty, according to Marshall, was inherently partial and dependent. Tribes did not have "permanent property in soil, capable of alienation to private individuals," and thus could not claim the capacity for self-government and territorial integrity. As Marshall puts it, "They remain in a state of nature, and have never been admitted into the general society of nations."[62] Government was thus a corollary of property. Private property supplied the material and symbolic support for autonomy as the affirmation of independence and separateness.[63] Since Marshall, the constitutive justification for liberal settler society in the United States has been that rights are given substance in property, made private in the act of appropriation through (settled, agricultural) labor, and that private property is requisite for autonomy, which in turn is the basis for self-determination.[64]

This legal circularity allows for the assimilationist logic of individual self-proprietorship but disallows collective sovereign claims and the rights of indigenous peoples. Hagen is exactly right that the logic of "human rights"—guaranteed as they are in the human as the self-owning private individual—is antagonistic to the rights of indigenous peoples, but only because of the way in which colonialism remains constitutive for contemporary proprietary regimes.

The persistence of settler colonialism in the United States as a condition of possibility and proliferation of political antagonisms nonetheless defies the historical closure proposed by antisovereignists. Kanienkeha (Mohawk) scholar Taiaiake Alfred points to the inadequacy of the juridical and political framework of the liberal democratic state for addressing the colonial present. Alfred argues, "The complex story of what went on in the past and the tangled complexities of the past's impact on the present and future of our relationships are reduced to questions of 'entitlements,' 'rights,' and 'good governance' within the already established structures of the state." But the ongoing colonial dilemma is precisely the impossibility of such a reduction and resolution in the conventional terms of the state. Alfred contends, "As majoritarian tyrannies within colonial situations, liberal democratic societies always operate on the assumption that Onkwehonwe [First Peoples of North America] will succumb and submit to the overwhelming cultural and numerical force of the Settler society." In opposition to the supposed inviolability of past conquest and the colonial present, Alfred proposes an explicitly anticolonial movement. He argues that "one thing, somewhat ironically given the long-term objective of restoring Onkwehonwe connections to *land*, is that the movement will not be tied to *territory*. . . . Land is not territory, except in a colonial way of looking at the landscape."[65] One possibility for confronting the colonial state is a plurinational framework that goes beyond conventional figurations of sovereignty toward the invigoration of an agonistic pluralism—*not* liberal ethnic group pluralism or neoliberal multiculturalism, but a reconfiguration of governance shaped by tribal self-determination and autonomous political authority, as well as recognition of past treaty obligations.[66] An anticolonial movement mobilized around the ethical gap between *land* and *territory* might make use of the historical contingency of sovereignty to breach the occlusions of equality in law and the fictive integrity of the U.S. colonial present.

Five weeks after the UN Declaration on the Rights of Indigenous Peoples was adopted, the declaration had already served as legal precedent. On

October 18, 2007, the Supreme Court of Belize affirmed the customary land rights of the indigenous Maya villages of Conejo and Santa Cruz, finding that the government had violated the provisions of the Constitution of Belize and international law by granting concessions on traditional Maya land to multinational speculators. Recognition of Maya customary land rights, while not breaching the liberal framework of rights, nevertheless troubled colonial proprietary regimes to the degree that previously inadmissible indigenous self-determination successfully resisted the sovereign authority of Belize. Although considerably different from the U.S. context, here, at least momentarily, the combined political and legal force that Robert Hagen so decried illuminated the precarious grounds of the colonial future.[67]

Notes

Many thanks to Grant Farred, Les Field, Alex Lubin, and Rebecca Schreiber for their feedback on earlier drafts of this essay.

1 Shara Svendsen, "Over Staunch United States Objection, the U.N. Adopts the Indigenous Peoples' Rights Declaration," *Indian Law Newsletter* 15.3 (November 2007): 8, 18–19.

2 Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" *Cardozo Law Review* 11.2 (1990): 925. On the constitution of law in the colonial context, see especially Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).

3 For discussion on the definitions and categories of colonialism, see D. K. Fieldhouse, *The Colonial Empires: A Comparative Survey from the Eighteenth Century* (New York: Delacorte, 1966); Ania Loomba, *Colonialism/Postcolonialism*, 2nd ed. (New York: Routledge, 2005); and Jürgen Osterhammel, *Colonialism: A Theoretical Overview* (Princeton, NJ: Markus Wiener, 2005).

4 Ian Tyrrell, "Beyond the View from Euro-America: Environment, Settler Societies, and the Internationalization of American History," in *Rethinking American History in a Global Age*, ed. Thomas Bender (Berkeley: University of California Press, 2002), 170; and Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* (London: Cassell, 1999), 1. Also see Daiva Stasiulis and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity, and Class* (London: Sage Publications, 1995); Caroline Elkins and Susan Pedersen, eds., *Settler Colonialism in the Twentieth Century* (New York: Routledge, 2005); and Annie E. Coombes, ed., *Rethinking Settler Colonialism: History and Memory in Australia, Canada, Aotearoa New Zealand, and South Africa* (Manchester: University of Manchester Press, 2006). On U.S. white–Indian relations, also see Thomas Biolsi, *Deadliest Enemies: Law and Race Relations on and off Rosebud Reservation* (Minneapolis: University of Minnesota Press, 2007); and Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007).

5 Michael Warner, "What's Colonial about Colonial America?" in *Possible Pasts: Becoming Colonial in Early America*, ed. Robert Blair St. George (Ithaca, NY: Cornell University Press, 2000), 56. Also see Malini Johar Schueller and Edward Watts, eds., *Messy Beginnings: Postcoloniality and Early American Studies* (New Brunswick, NJ: Rutgers University Press, 2003).

6 On Francisco de Vitoria and the colonial origins of international law, see Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

7 Robert Hagen, explanation of vote on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, Office of Press and Public Diplomacy, United States Mission to the United Nations, press release 204(07), September 13, 2007; available at www.usunnewyork.usmission.gov/press_releases/20070913_204.html (accessed March 24, 2008).

8 Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003), 160–65.

9 S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (New York: Oxford University Press, 2004), 97–103; and Steven M. Tullberg, "Indigenous Peoples, Self-Determination, and the Unfounded Fear of Secession," *Indigenous Affairs* 1 (1995): 11–13. In the UN General Assembly Resolution 1541 (XV), principle 4 stipulates that the right to a "full measure of self-government" is applicable only to a "territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it." UN General Assembly, 948th plenary meeting, Resolution 1541 (XV), principle 4, December 15, 1960, www.un.org/documents/ga/res/15/ares15.htm (accessed March 29, 2008).

10 Hagen, explanation.

11 Ibid.

12 *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), 590, www.utulsa.edu/law/classes/rice/ussct_cases/johnson_v_mcintosh_1823.htm (accessed March 27, 2008).

13 *Johnson*, 21 U.S. at 587.

14 Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005).

15 John Locke, *Two Treatises of Government*, ed. Peter Laslett (1689; Cambridge: Cambridge University Press, 1988).

16 Barbara Arneil, *John Locke and America: The Defense of British Colonialism* (Oxford: Clarendon Press, 1996).

17 Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (Cambridge: Cambridge University Press, 1991).

18 Jack Campisi, "The Trade and Intercourse Acts: Land Claims on the Eastern Seaboard," in *Irredeemable America: The Indians' Estate and Land Claims*, ed. Imre Sutton (Albuquerque: University of New Mexico Press, 1985), 337–62.

19 Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005), 150–90.

20 The 1842 treaty between the Oneida and New York State acknowledged that tribal land was held in common, but an appendix to the treaty divided the territory into parcels

attributed to individual Oneida families. A New York State law the following year sanctioned private ownership among the Oneida, although the state in fact lacked authority to do this without congressional authorization.

21 Segwalise, "The Hau De No Sau Nee: A Nation Since Time Immemorial," in *Basic Call to Consciousness*, ed. Akwesasne Notes (1978; Summertown, TN: Book Publishing Co., 1981), 1–6; Christopher Vecsey and William A. Starna, eds., *Iroquois Land Claims* (Syracuse, NY: Syracuse University Press, 1988); Laurence M. Hauptman, *Formulating American Indian Policy in New York State, 1970–1986* (Syracuse, NY: Syracuse University Press, 1988); and Laurence M. Hauptman, *Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State* (Syracuse, NY: Syracuse University Press, 1999).

22 Paul Brodeur, *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England* (Boston: Northeastern University Press, 1985).

23 Douglas M. George-Kanentiio, *Iroquois on Fire: A Voice from the Mohawk Nation* (Westport, CT: Praeger, 2006).

24 See, for instance, Ned Blackhawk, *Violence over the Land: Indians and Empires in the Early American West* (Cambridge, MA: Harvard University Press, 2006); Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W. W. Norton, 1987), 55–77; House Committee on the Judiciary, *Anti-Indian Violence: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 100th Cong., 2nd sess., 1988; Larry Nesper, *The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights* (Lincoln: University of Nebraska Press, 2002); and Sarah Deer, "Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State," in *Color of Violence: The Incite! Anthology* (Boston: South End Press, 2006), 32–41.

25 Laurence M. Hauptman, "Who Owns Grand Island (Erie County, NY)?" in *Treaty of Canandaigua 1794: Two Hundred Years of Treaty Relations between the Iroquois Confederacy and the United States*, ed. G. Peter Jemison and Anna M. Schein (Santa Fe, NM: Clear Light, 2000), 127–47.

26 Darren Brown, "New York Land Claim Victim Speaks" (n.d.), posted on the Citizens Equal Rights Alliance Web site at www.citizensalliance.org (accessed March 24, 2008).

27 Gus P. Coldebella and Mark S. Puzella, "The Landowner Defendants in Indian Land Claims: Hostages to History," *New England Law Review* 37.3 (2003): 587.

28 Limerick, *The Legacy of Conquest*, 35–54.

29 Coldebella and Puzella, "The Landowner Defendants," 589–90.

30 Ibid., 589.

31 Ibid., 585–92. Also see the reply by Arlinda Locklear, "Morality and Justice 200 Years after the Fact," *New England Law Review* 37.3 (2003): 593–601.

32 *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), 245, as quoted in Patrick W. Wandres, "Indian Land Claims: *Sherrill* and the Impending Legacy of the Doctrine of Laches," *American Indian Law Review* 131.1 (2007): 136.

33 *County of Oneida*, 470 U.S. at 267–68, as quoted in Wandres, "Indian Land Claims," 136–37.

34 *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), 19, www.law.cornell.edu/supct/pdf/03-855P.ZO (accessed March 27, 2008). Also see David Stout,

"Justices Refuse to Restore Sovereignty to Land Bought by Indians," *New York Times*, March 29, 2005.

35 Sarah Krakoff, "*City of Sherrill v. Oneida Indian Nation of New York*: A Regretful Postscript to the Taxation Chapter in *Cohen's Handbook of Federal Indian Law*," *Tulsa Law Review* 41.5 (2006): 10.

36 *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), 12, http://caselaw.lp.findlaw.com/data2/circs/2nd/026111p.pdf (accessed March 27, 2008).

37 Wandres, "Indian Land Claims," 141–42; and Jim Adams, "Aftershocks from *Sherrill* Case Spreading," *Indian Country Today*, April 8, 2005.

38 Walter K. Olson, "Give It Back to the Indians? Billion-Dollar Tribal Land Claims Are Wreaking Havoc," *City Journal* 12.4 (Autumn 2002), www.city-journal.org/html/12_4_give_it_back.html (accessed March 24, 2008).

39 Ibid.

40 Bruce E. Johansen, "The New Terminators: A Guide to the Anti-Sovereignty Movement," in *Enduring Legacies: Native American Treaties and Contemporary Controversies*, ed. Bruce E. Johansen (Westport, CT: Praeger, 2004), 305–32; and Jeffrey R. Dudas, "In the Name of Equal Rights: 'Special' Rights and the Politics of Resentment in Post-Civil Rights America," *Law and Society Review* 39.4 (2005): 723–58.

41 John C. Mohawk, "In the Indian Conflict, There Is More Than One Kind of 'Us' against 'Them,'" *Buffalo News*, April 26, 1997, as quoted in Bruce E. Johansen and Barbara A. Mann, eds., *The Encyclopedia of the Haudenosaunee (Iroquois Confederacy)* (Westport, CT: Greenwood Press, 2000), 302. On present-day tax politics in the United States, see Jacob S. Hacker and Paul Pierson, "Tax Politics and the Struggle over Activist Government," in *The Transformation of American Politics: Activist Government and the Rise of Conservatism*, ed. Paul Pierson and Theda Skocpol (Princeton, NJ: Princeton University Press, 2007), 256–80.

42 In 2004, the Oneida Nation employed 4,215 people, 97 percent of whom were non-Indian. That year the Oneida spent $140 million that supported an additional 1,928 jobs in construction and related industries. Oneida vendor payments totaled $342.3 million in New York State, of which $59.8 million went directly to firms and individuals in Onondaga, Oneida, and Madison counties. Jill Tiefenthaler and Chris Brown, *The Impact of the Turning Stone Casino on Employment, Taxation, and Social Factors in the Three-County Area* (Hamilton, NY: Upstate Institute, Colgate University, 2005), 29–40. On tribal casinos more broadly, see Renée Ann Cramer, *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgement* (Norman: University of Oklahoma Press, 2005); and Steven Andrew Light and Kathryn R. L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise* (Lawrence: University Press of Kansas, 2005).

43 As quoted in editorial, "Let Calm Prevail; Idle Talk of Guns and Fighting Cannot Serve Resolution of Land Claims," *Syracuse Post-Standard*, August 9, 2000, reprinted in Robert Odawi Porter, *Sovereignty, Colonialism, and the Indigenous Nations: A Reader* (Durham, NC: Carolina Academic Press, 2005), 284.

44 Olson, "Give It Back to the Indians?"

45 Joel Rose, "We Are Not Racists," *ArtVoice*, July 20, 2006, http://artvoice.com/issues/v5n29/letters_to_artvoice (accessed March 21, 2008).

46 As quoted in David L. Shaw, "Claim Foes Take Message to Motorists/State Police Tell Protesters to Remove Slogan-Bearing Signs Lining a Seneca Falls Road," *Syracuse Post-Standard*, May 27, 2000, reprinted in Porter, *Sovereignty, Colonialism*, 283.

47 As quoted in Eva Mackey, "Universal Rights in Conflict: 'Backlash' and 'Benevolent Resistance' to Indigenous Land Rights," *Anthropology Today* 21.2 (April 2005): 18.

48 As quoted in editorial, "Foes See Land Claim as a Hoax without Any Sound Legal Basis," *Syracuse Post-Standard*, June 25, 2000, reprinted in Porter, *Sovereignty, Colonialism*, 281.

49 As quoted in Hart Seely and Michelle Breidenbach, "Uncivil Civil Claim; Hate Mail, Naming-Calling: Threats Fly as Indians Sue," *Syracuse Post-Standard*, September 26, 1999, reprinted in Porter, *Sovereignty, Colonialism*, 281, 280.

50 A. R. Eguiguren, *Legalized Racism: Federal Indian Policy and the End of Equal Rights for All Americans* (Heathsville, VA: Sun on Earth Books, 2000), 104–5.

51 Ibid. For similar arguments, also see T. David Price, *The Second Civil War: Examining the Indian Demand for Ethnic Sovereignty* (St. Paul Park, MN: Second Source, 1998); and Elaine Devary Willman, *Going to Pieces: The Dismantling of the United States of America* (Toppenish, WA: Equilocus, 2005).

52 As quoted in editorial, "Foes See Land Claim as a Hoax," 282.

53 Audra Simpson, "Paths toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake," in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton, and Will Sanders (Cambridge: Cambridge University Press, 2000), 113–36; Kimberly TallBear, "DNA, Blood, and Racializing the Tribe," *Wicazō Śa Review* 18.1 (Spring 2003): 81–107; Michael Yellow Bird, "Decolonizing Tribal Enrollment," in *For Indigenous Eyes Only: A Decolonization Handbook*, ed. Waziyatawin Angela Wilson and Michael Yellow Bird (Santa Fe, NM: School of American Research Press, 2005), 179–88; and J. Kēhaulani Kauanui, "The Politics of Hawaiian Blood and Sovereignty in *Rice v. Cayetano*," in *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, ed. Joanne Barker (Lincoln: University of Nebraska Press, 2005), 87–108.

54 Daniel Warren, "Response to Mr. Niman's Article 'Anti-Casino or Anti-Indian,'" June 18, 2006, www.speakupwny.com/article_2743.shtml (accessed March 21, 2008).

55 Ibid.

56 For a related discussion on the subject of human rights and the rights of the rightless, see Jacques Rancière, "Who Is the Subject of the Rights of Man?" *SAQ* 103.2–3 (Spring–Summer 2004): 297–310.

57 As quoted in Mackey, "Universal Rights in Conflict," 18–19.

58 As quoted in Peter Lyman, "Oneidas Accuse UCE Head of Racism," *Syracuse Post-Standard*, December 8, 2006.

59 Austin Sarat and Thomas R. Kearns, "Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction," in *History, Memory, and the Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1999), 1–24.

60 *Johnson*, 21 U.S. at 591–92.

61 For a recent analysis of the Marshall trilogy, see Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*

(Minneapolis: University of Minnesota Press, 2005), 47–70; and Joanne Barker, "For Whom Sovereignty Matters," in *Sovereignty Matters*, 1–31.

62 *Johnson*, 21 U.S. at 565, 567.

63 Nicholas Blomley, "The Borrowed View: Privacy, Propriety, and the Entanglements of Property," *Law and Social Inquiry* 30.4 (2005): 617–61.

64 Notably, the Nixon administration's Self-Determination and Education Assistance Act of 1975 did not disturb the proprietary basis of colonial rule but instead devolved responsibility for governance to tribes while maintaining the preeminence of federal authority.

65 Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Petersborough, ON: Broadview Press, 2005), 152–53, 155, 206.

66 On rethinking the utility of sovereignty, see especially Barker, "For Whom Sovereignty Matters"; and Taiaiake Alfred, "Sovereignty," in *Sovereignty Matters*, 33–50. On plurinationality, see Suzana Sawyer, *Crude Chronicles: Indigenous Politics, Multinational Oil, and Neoliberalism in Ecuador* (Durham, NC: Duke University Press, 2004). On agonistic pluralism, see Chantal Mouffe, *The Democratic Paradox* (New York: Verso, 2000); and Chantal Mouffe, *On the Political* (New York: Routledge, 2005). Mouffe theorizes agonistic pluralism as a means to underscore the vital adversarial dimension of politics and in contrast to liberal pluralism. She argues, "Liberal theorists are unable to acknowledge not only the primary reality of strife in social life and the impossibility of finding rational, impartial solutions to political issues but also the integrative role that conflict plays in modern democracy." Mouffe, *On the Political*, 30–31.

67 S. James Anaya, "Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law: The Maya Cases in the Supreme Court of Belize," in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, ed. Federico Lenzerini (New York: Oxford University Press, 2008), 567–603.