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Lexicons of Colonialism: A Grounded Theory Examination of Indian and Supreme Court Definitions of Sovereignty

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A Project Presented to

the Faculty of the Undergraduate

College of Arts and Letters

James Madison University

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in Partial Fulfillment of the Requirements

for the Degree of Bachelor of Arts

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by Jacob Daniel Bosley

May 2015

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1. Introduction

The United States currently recognizes over 560 indigenous groups for purposes of "government-to-government" relationships. Of these 560, 334 are Indian nations, bands, communities, tribes, and pueblos and 226 are Alaskan Native villages and corporations (Porter 1997, 74). To be acknowledged by the United States federal government, Native groups must meet set criteria and register with the Bureau of Indian Affairs. To be eligible:

> (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900…
> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present…
> (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present…
> (d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures…
> (e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historian Indian tribes which combined and functioned as a single autonomous political entity…
> (f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe…
> (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. (5 CFR Part 83 §83.7, 1994)

That Tribal Nations require recognition and registration with the United States Department of Interior and the Bureau of Indian Affairs speaks to a larger legacy of colonialism responsible for the mass killing and forced relocation of Native peoples. Through the combined forces of factors such as diseases carried by European settlers, military conquest, Manifest Destiny policies to gain control of American soil from "sea-to-shining-sea," the Trail of Tears, and a litany of others, overwhelming numbers of indigenous people were killed. The United States Department of the Interior in 1894 estimated that 30,000 Indians died in the wars fought between 1789 and

1846 alone, while noting that because of difficulties acquiring the data a “safe estimate” is fifty percent greater, for a total of 45,000 Indian lives lost (637-638).

Since those times, the relationship between Tribal Nations and the United States has evolved dramatically. Following the legal practices that established the modern territorial boundaries and jurisdictions of tribal reservations, modern efforts have begun shifting some legal control and authority back to tribal populations, as a means to promote greater “self-determination” (Royster 2008, 1068). However, the common connection between both the original denial of political legitimacy as well recent trends to return governance powers back to Native peoples is the notion of “sovereignty.” Sovereignty as a concept structures all “government-to-government” relations between Native peoples and the United States because it provides the legal and philosophical foundation for what even constitutes a legitimate government.

Sovereignty is most commonly understood by Western political theorists as the origin of political legitimacy. Sovereignty serves to divide collections of people into independent political units, protect those units from encroachment by other powers, and provide an identifiable “locus of power” in the form of governments that serve as the reference point for government-to-government interactions (Hannum 1998, 488). In one sense, sovereignty is a term that speaks to “metapolitical authority,” the very “ability to define the content and scope of ‘law’ and ‘politics.’” Simultaneously, sovereignty functions as an empty term that has no determinate meaning outside of political struggles between groups of people (Rifkin 2009, 90-91).

Since the first encounters with Native peoples, European powers have struggled with classifying the political legitimacy of Native peoples despite entering into political engagements and agreements with them, primarily through land titles and treaties. Between 1778 and 1868

alone, the United States ratified 367 Indian treaties (Prucha 1994, 1). These treaties originated from the same political tradition of European powers employing treaties as a means of recognizing and engaging each other. Yet, over time Native peoples took an ever-changing legal status that makes their position distinct, "peculiar," and unlike any other political entity (Rifkin 2009, 89). As a result, the question of the "sovereignty" of Native peoples relative to the "sovereignty" of the United States consistently comes into question, sparking legal battles fought over the dimensions and aspects of each entity's respective sovereignty.

This study aims to examine some of the complexities of this relationship through an analysis of how historical and more modern American and Native political texts define and invoke sovereignty. By examining a series of major Supreme Court opinions and Native political texts that explicitly aim to define sovereignty, this study will seek to clarify if there are significant gaps or differences within the shared political vocabulary of sovereignty. By employing a grounded theoretical analysis that examines trends in definitions amongst individual instances in which authors define "sovereignty" and its characteristics, this study will propose that there are salient differences in meanings of the same words that can help account for some political difficulties and struggles witnessed and waged by Native populations today.

2. Literature Review and Historical Background

> [T]here exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.
>
> Oppenheim, *International Law: A Treatise Vol. 1*

Sovereignty as a concept in modern debates and historical analysis is both vaguely understood and taken for granted. Before examining individual Native texts and Supreme Court decisions, it is necessary to provide some historical background from where sovereignty as a basis for political authority originated (Jackson 1999, 435). This chapter will provide a brief historical outline that many scholars have traced of the origins of "sovereignty" as a political paradigm through shifts in European political traditions beginning in the Middle Ages. This historical outline is not meant to be comprehensive, nor in strict chronological order, as no history can ever be presented as such. Instead, this historical outline is meant to point to major historical trends in how "sovereignty" was viewed that had significant impacts on the formation of the American legal tradition and relations between Native peoples and the United States. I will then consider how this series of transformations points to the importance of engaging in qualitative analysis of writings about sovereignty as it is deployed by both Native peoples and the fundamental cases addressing sovereignty by the United States Supreme Court.

2.1. The European Tradition of Sovereignty

Many theorists such as Oppenheimer, Schmitt, and Wight loosely trace the origins of "sovereignty" as a paradigm to Europe. Following their analysis, I divide the European tradition into four major historical periods, each marked by a distinct conception of political authority:

rule by the Church under the paradigm of *respublica Christiana*, European statehood exemplified by the Peace of Westphalia, imperial sovereignty, and the emergence of "popular sovereignty" which gave birth to the United States. I will describe each in brief detail below.

2.1.1. The Church and Sovereignty: respublica Christiana

Before sovereignty had entered into the political lexicon of European powers, there were not clear divisions between territorial and political boundaries, nor between the origins of political power within powers. Instead, during the Middle Ages (5th-15th centuries) political life and private life were in many ways collapsed. For example, the extent of a King's political realm and jurisdiction was simultaneously his private property. Feudalism as an economic and political system did not lend itself to drawing clear demarcations between political authority and instead produced "overlapping and constantly shifting Lordships" (Jackson 1999, 435). Notably, these powers and Lordships did not necessarily recognize each other politically (Croxton 1999, 571).

At this time, the only power described as "sovereign" was the Judeo-Christian God, whose decrees and principles demanded strict obedience by Christians. This association of sovereignty with the "higher authority" of Christianity fell under the paradigm of *respublica Christiana*, which Jackson defines as:

> The notion that secular authorities no less than spiritual authorities were subjects of a higher authority, God, whose commandments were expressed by the precepts of Christianity. Both secular and religious authorities were Christ's subjects and servants…In short, if there was a `sovereign state' in medieval Europe, it was the Christian empire… (1999, 436)

Respublica Christiana wedded political authority and religious authority into a joint structure embodied in the organization of the Holy Roman Empire headed by both the pope and the emperor, which at the end of the Middle Ages was the head of the Habsburg dynasty. In this

model, sovereignty was not earthly in the sense that it could belong or originate in a particular European power; instead, the Holy Roman Emperor and the Pope were charged with actualizing God's divine sovereignty on Earth (Croxton 1999, 571; Jackson 1999, 436).

Near the end of this period, a multi-state system began to emerge as powers consolidated and particular dynasties such as those in England and France began to take power. This shift to multiple loci of power did not destroy the paradigm of *respublica Christiana* on its own. If anything, during the 14th century the papacy attempted to further expand its political authority and what it could lay claim to as God's "single earthly representative" (Croxton 1999, 571). In order to transition to locating political authority elsewhere in the popular imaginations of European powers, the power of the papacy and the Holy Roman Empire had to first be challenged philosophically as well as politically.

2.1.2. The Peace of Westphalia

Many scholars trace sovereignty's emergence, or at least its practical establishment in European international politics, to the Peace of Westphalia in 1648 (Hannum 1998, 487). The Peace of Westphalia is the common name provided for a series of treaties signed in Münster and Osnabrück in 1648 to end the Thirty Years War fought originally along religious lines between Protestants and Catholics but which expanded to engulf much of Central Europe (Croxton 1999, 569). In addition to a complicated series of land title transfers that occurred between the Holy Roman Empire, Sweden, and France, the Treaties of Münster and Osnabrück were significant because they included explicit recognition of Protestantism, the Christian sect that arose in opposition to the Catholic tradition of the Holy Roman Empire (Croxton 1999, 571-572). This placed the Treaties in line with other events of that period that sought to undermine the influence

of the Holy Roman Empire, such as King Henry VIII's divorce of Catherine of Aragon that, symbolically and literally, served to divorce English rule from *respublica Christiana* and shift English politics away from papal authority (Jackson 1999, 438).

Scholars such as Croxton have noted, however, this portrayal of the Peace of Westphalia marking the "end of the era" of Christian political authority is historically misguided or at least incomplete. One primary contention opposing the traditional narrative of the Peace of Westphalia as the "dawn of sovereignty" is that it didn't actually end the Holy Roman Empire, which continued to maintain strong political influence for another 158 years (1999, 573). In addition, while the treaties had thoroughly detailed clauses related to property ownership and political jurisdiction to avoid misinterpretations and loopholes in land title transfers, the terms used to describe the political authority of involved parties were frequently vague. These vague terms lead scholars to acknowledge the treaties were not in great part about recognizing the "sovereignty" of England, France, Sweden, or Spain, but instead point to a variety of kinds of authorities (Croxton 1999, 576-580). Finally, it is difficult to describe the Peace of Westphalia as ushering in a new era of multi-lateral engagement and mutual recognition between sovereign powers. The Peace of Westphalia did not involve multilateral treaties, but instead a series of bilateral treaties that did not recognize the signatories as political equals (Croxton 1999, 582).

However, a conservative interpretation might point the Peace of Westphalia as merely symptomatic of a larger collection of shifts in how political actions became justified during the 17th century. During this same time, political theorists shifted their descriptions of political authority from derivatives of the church towards secular, independent and "sovereign" states that are "self-determining" and do not dictate the governmental organizations of other similarly independent states (Jackson 1999, 438-439). For example, Jackson and Potter both note that

"sovereignty" as a specific term first entered into French political theory through Jean Bodin's 1576 political treatise *Les six livres de la Republique* (Jackson 1999, 439; Potter 2002, 16). While the Westphalian treaties themselves relied on the political language of the Medieval tradition under *respublica Christiana*, there are notable shifts in how European powers interacted with each other outside of the terms of Christendom (Jackson 1999, 438-439).

2.1.3. Imperial Sovereignty

The principles of political organization in Europe underwent another shift in the development of "imperial sovereignty" that served to legitimize colonial expansion by European powers including Great Britain, France, Spain, and Portugal. As Jackson explains:

> When a government exercises supreme authority over a foreign territory that government can be said to possess imperial sovereignty. A foreign territory is somebody else's homeland. Imperial sovereignty is thus a denial of local sovereignty in foreign countries. Sovereignty gave imperial states independent status in their foreign territories while simultaneously imposing a dependent status on the populations of those same territories. (1999, 441)

European states drew upon significantly older legal traditions, such as the ancient Roman doctrine of *terra nullis*, or conquest of land, to legitimate the establishment of settlements and colonies. As substantial colonial enterprises were developed through the world, including in the Americas, Asia, Africa, and Australia, sovereignty came to be "understood as a distinctly European institution." European states agreed to recognize each other's claims to foreign territory as legitimate conquests while also refusing to recognize non-European political authority (Jackson 1999, 442-443).

Colonization and empire-building had begun before the end of the Peace of Westphalia. During the 16th century, the Church legitimized colonial acquisition, such as the papal sanctions

issued to Portugal and Spain for the acquisition and division of what is modern day North America. However, in the years following the Peace of Westphalia, secular political authorizations arose that massively increased the scope of colonialism. For example, Great Britain began to provide royal charters to companies such as the East Indian Company and the Hudson's Bay Company as the basis for acquiring land, beginning a larger network of colonies promoting inter- and intra-national trade (Jackson 1999, 442).

European states' rationales for colonialism did only focus on the material gains provided by new access to resources and expanding markets. Instead, colonial efforts were increasingly justified by appeals to *paternalistic* attitudes; namely, that non-European populations required the assistance and education of European powers, who are obligated to assist in "civilizing" local populations (Jackson 1999, 443). As will be discussed below, this particular justification found its way into American relations with Native peoples.

2.1.4. Popular Sovereignty and the American Revolution

The final notable shift in political conceptions of sovereignty that arose within Europe was the principle of *popular sovereignty*; namely, that a political power derives its authority from the will and consent of a people in a territory, not its ruler. The rise of liberalism in the 18th century, with its emphasis on freedom and autonomy as political ideals, made it increasingly difficult to justify colonial claims to foreign territory and populations even in benevolent and paternalist terms. Representative theories of sovereignty and political authority gradually unseated dominant autocratic and imperial conceptions of sovereignty (Jackson 1999, 444). The practical result of the growing influence of popular sovereignty was increased political resistance and revolutions against perceived tyranny and autocracy, such as the Glorious Revolution of 17th century

England (Wight 1977, 159), the French Revolution of the late 18th century (Jackson 1999, 444), and the American Revolution of 1765 (Grey 1978, 888-893).

In the American case, the works of thinkers such as Thomas Paine and John Locke inspired resistance against British colonial rule by popularizing the idea that a people always have the "Supreme Power" to overthrow a government that is superior to the power of any individual ruler, including the King of England (Kalyvas 2005, 226). The Declaration of Independence makes this principle explicit by defending "the Right of the People to alter or to abolish [any government], and to institute new Government" should they choose (1776). In the aftermath of the American Revolution, the efforts of political thinkers such as Alexander Hamilton, John Jay, and James Madison ensured continued debates and focus on popular sovereignty as a founding legal principle for the United States (Deudney 196, 197). The centrality of popular sovereignty as a legal principle is evident in the preamble of the United States Constitution (1787) in that "the People of the United States" have the ultimate authority to establish both the Constitution as well as the United States as a sovereign power (Jackson 1999, 444).

2.2. The American Tradition of Sovereignty

The founding of the United States following the American Revolution dramatically altered the relationship between the former British colonists and Native peoples occupying nearby territory. Colonists had previously encountered Native peoples prior to their independence from Great Britain; notably, during the French and Indian War whose aftermath and resulting taxation upon the colonies was a major impetus for independence. However, this section will focus on the founding documents of the United States as a separate political

"sovereign" and how that impacted further relations with Native peoples, including significant Supreme Court decisions.

2.2.1. America's Founding Documents

As previously mentioned, the members of the Continental Congress of 1776 that drafted the Declaration of Independence as well as members of the Constitutional Convention of 1787 drew on political precedents and lessons from the European state system to draft their political principle. In establishing a federal system of divided power and semi-autonomous states, American political thinkers sought to correct the witnessed failures of Europe, namely political infighting, while providing a clear grounding for political authority and its exercise (Jackson 1999, 449).

Notably, both the Declaration of Independence and the Constitution do not define the political authority of the United States federal government in terms of "sovereignty." However, there are clear traces of popular sovereignty in their writings. For example, the Declaration of Independence explicitly defines governments as "instituted among Men, deriving their just powers from the consent of the governed" (1776). In defining the specific powers and scope of the newly formed government, reference to Native peoples is notably scarce, despite approximately 200 years of previous interactions leading up to the writing of the Constitution. There are three explicit and implicit references to Native peoples in the Constitution that are worth examining.

First, the infamous "3/5ths Compromise" clause that establishes how individual states may count citizens to determine representation within the House of Representatives contains an often-overlooked reference to Native peoples that excludes them from calculations of

representation because they are not taxed. This provision functionally excludes Native peoples from the definition of the United States population represented by the Constitution. The clause in its entirety states that:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and *excluding Indians not taxed*, three fifths of all other Persons. (1787, Article I, Section 2, emphasis my own)

Second, the Commerce Clause, found in Article 1, Section 8 of the Constitution which enumerates the specific powers of Congress, states that Congress has the power "To regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes*" (1787). This clause is notable because it draws an explicit distinction between the power of Congress to regulate commerce with "foreign nations" and with "Indian tribes." This single line was foundational in the *Cherokee Nation v. Georgia* (1831) decision that will be discussed below.

Finally, the Supremacy Clause, which establishes the Constitution as the "supreme law of the land," references the authority and legally binding nature of treaties. Notably, the clause states that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (1787, Article VI, emphasis my own)

Wildenthal notes that this language is significant in that it makes clear that it is referring to treaties that were ratified under the "authority of the United States" but *prior* to the ratification of the Constitution which legally founded the United States, such as the 1785 Treaty of Hopewell –

one of seven treaties with Indian tribes that was ratified after American independence but prior to the Constitutional Convention of 1787 (2003, 8).

Despite the importance of each of these references for understanding the United States' orientation towards Native peoples in regards to perceived sovereignty, it is notable that American Indians were not parties to the convention. As Wildenthal notes:

> Like women and African Americans, [the Indians] had no voice in framing or agreeing to the founding documents of the United States. Indeed, one finds in the Constitution, as in the Articles of Confederation before it, no explicit recognition of the tribes as a part of our governmental structure and little mention of them at all. But the Indians, like the African slaves who were subjected to the Constitution' fugitive slave clause … were not ignored altogether. (Wildenthal 2003, 6-7)

2.2.2. Early American Relations with Indians

As previously mentioned, interactions between the United States and Native peoples was primarily codified in the form of treaties, with 367 individual treaties ratified between 1778 and 1868 (Prucha 1994, 1). These treaties not only altered the material distribution of resources and power between Native peoples and the United States but also functioned as an "inclusive exclusion" of forms of Native political organization. While treaties were used to simultaneously recognize (to some degree) the political legitimacy of particular groups of Native peoples, these treaties also relied on forcing indigenous forms of governance to make themselves understandable or conform to American standards of what constitutes "government" or a proper political representative of a tribal nation (Rifkin 2009, 89-96). This process is notable because while these treaties operated to help establish and resolve questions of jurisdiction, national boundaries, or legal control and status of people within territories, it also served to define Native

peoples by what they “categorically lack,” namely a political and governmental organization understandable by the United States (Rifkin 2009, 89).

This resulted in a fundamental philosophical and legal contradiction; engaging in treaties with the United States meant that Native peoples gained political recognition in terms of their collective organization and territory at the same time treaties defined the United States as having the “ultimate title to the land” (Rifkin 2009, 96). This legal distinction became the foundation for future legal disputes that shape American Indian law.

This study will now consider a select few Supreme Court cases that demonstrate the legacy of this American understanding of sovereignty. While the individual definitions of sovereignty contained within these decisions will be examined in greater detail in the qualitative content analysis, this section will focus on the place of these Supreme Court decisions within the larger historical narrative of sovereignty and the effects these decisions had on the conditions of Native peoples.

2.2.3. The Marshall Trilogy and Trail of Tears

The “Marshall Trilogy” refers to three Supreme Court decisions under Chief Justice John Marshall that set the foundation of interactions between tribal nations and the United States; *Johnson v. M’Intosh (1823), Cherokee Nation v. Georgia (1831)*, and *Worcester v. Georgia (1832)* (Eaglewoman 2012, 671). Collectively, these three cases established the legal precedent for understanding the United States has having “overriding sovereignty” over tribal nations, as each case dealt explicitly with the definition of “sovereignty.”

Johnson v. M’Intosh, short for *Johnson & Graham’s Lessee v. M’Intosh* (21 U.S. 8 Wheat. 543), concerned the legality of property purchases and agreements between private individuals

and tribal nations. Thomas Johnson had bought land from the Piankeshaw Indians in 1775, and the plaintiffs were lessees of his descendants. The defendant, William M'Intosh, purchased tracts of land in 1818 that supposedly came from the same territory (*Johnson v. M'Intosh*, 555-561). In the majority opinion, Chief Justice Marshall ruled that private parties may not purchase land from tribal nations because the United States federal government has the sole authority to do so.

Chief Justice's Marshall's majority opinion includes a history of European colonization of the Americas, the competition and cooperation between states such as Great Britain, Portugal, France, Holland, and Spain, and how each came to acquire foreign territory, and how that territory potentially changed ownership because of treaties. Chief Justice Marshall uses this history in order to define the origin and legal justifications of the "Discovery Doctrine" (*Johnson v. M'Intosh* 546-548). The Discovery Doctrine is the legal principle that:

> …discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans *necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it*. It was a right with which no Europeans could interfere. (*Johnson v. M'Intosh,* 572-573, emphasis my own)

Thus, because of the United States "discovery" of this particular territory held by a tribal, or at least so Chief Justice Marshall states, the result is that:

> The United States…maintain, as all others have maintained, that discovery gave *an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest*, and gave also a right to *such a degree of sovereignty* as the circumstances of the people would allow them to exercise. (*Johnson v. M'Intosh,* 587, emphasis my own)

Chief Justice Marshall's decision not only provided a historical and legal foundation for the United States to have this exclusive authority to acquire territory, but it defined this right to

acquire territory as, by its very nature, superseding and "diminishing" the sovereignty of Native peoples. According to the Discovery Doctrine:

> … the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil … *but their rights to complete sovereignty as independent nations were necessarily diminished*, *and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it.* (*Johnson v. M'Intosh,* 574, emphasis my own)

Moreover, Chief Justice's Marshalls decision directly imports the paternalist and racist language of the legacy of British colonialism. The Discovery Doctrine is justified not only legally, but ethically, due to the very nature of Native peoples themselves as "fierce savages," as he writes:

> But the tribes of Indians inhabiting this country were fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence. (*Johnson v. M'Intosh*, 590)

Statements like these through Chief Justice Marshall's decision provide an important frame for American Indian policy; the ability to limit tribal sovereignty derives not merely from actual legal documentation, but instead from racist conceptions of Native peoples undeserving of equal political consideration as other European powers (Eaglewoman 2012, 694).

Two major events happened in the years immediately following *Johnson v. M'Intosh*. First, gold was discovered on Cherokee lands in 1828. This resulted in Georgia, Alabama, and Mississippi seeking to gain jurisdiction over Cherokee lands. Second, in 1830, Congress passed the Indian Removal Act. In writing, the act did not negate any treaties, and was a voluntary offer for "such tribes or nations of Indians as may choose to exchange the lands where they now reside" for lands west of the Mississippi (411-412). Contrary to popular belief, the law itself did not include any provisions allowing use of military force by President Jackson against Native

peoples, but simply allowed the President to negotiate for these land exchanges (Cave 2003, 1330). However, the act foreshadowed Andrew Jackson's intent of ridding the eastern United States of Indian inhabitants.

The discovery of gold on Cherokee lands led to the second of the three Marshall Trilogy cases, *Cherokee Nation v. Georgia* (1831). The state of Georgia had passed an act to seize control "of the gold and silver and other mines lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee country," which the Cherokee Nation challenged in court (*Cherokee Nation v. Georgia*, 75-76). This legal dispute did not challenge *federal* authority over the land, but individual *state* authority to control native land (Wildenthal 2003, 8-9). Relying on the precedent set by *Johnson v. M'Intosh*, the Cherokee Nation sought to prove that Georgia had no right to seize the land because only the federal government has that authority. Once again delivering the majority opinion, Chief Justice Marshalled the Court would not hear the case on its merits because the Court lacked jurisdiction given the Cherokee Nation could not be deemed a "foreign nation" (*Cherokee Nation v. Georgia*, 15-16).

Chief Justice Marshall's opinion relied on conceptualizing the sovereignty of the Cherokee Nation in terms of both their territorial occupation relative to the United States as well as their relationship to the United States. Chief Justice Marshall notes that, "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else," drawing an explicit distinction between the situation of Native peoples and other peoples deemed "foreign nations" (*Cherokee Nation v. Georgia,* 16). Chief Justice Marshall made this distinction explicit by redefining the Cherokee Nation:

> Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict

> accuracy, be denominated foreign nations. *They may, more correctly, perhaps, be denominated domestic dependent nations*. *They occupy a territory to which we assert a title independent of their will*, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. *Their relation to the United States resembles that of a ward to his guardian.* (17, emphasis my own)

This excerpt represents the primary legal precedents for the "Trust Doctrine" which establishes a duty on the United States federal government to protect Native peoples. This "protection" includes administering tribal lands, approving tribal government decisions, and providing and funding basic services to Native peoples (Eaglewoman 2012, 679). By defining tribes as a "ward" of the United States, Chief Justice Marshall articulates the legal and moral principles for federal control over Native people's land and government. The further implication is that the United States serves as the political representative for all international law principles, as they are under the governing authority of the United States (Barker 2005, 11).

Chief Justice Marshall further draws evidence that Native peoples do not constitute "foreign nations" by drawing on the distinction made in the commerce clause between "foreign nations" and "Indian tribes." The majority opinion does acknowledge that the Cherokee legally constitute a "distinct political society" that is "capable of managing its own affairs and governing itself." However, by itself, this is not enough to overcome the legal distinctions in the Constitution between the legal status of Indian tribes and foreign nations. For Chief Justice Marshall, that this distinction ultimately results in a "peculiar" understanding of the relations between the United States and Indians is not enough to overcome the plain wording of the commerce clause that, as part of the supreme law of the land, takes legal precedent (*Cherokee Nation v. Georgia*, 16-17).

Cherokee Nation v. Georgia included four opinions; Chief Justice Marshall's majority opinion, Justice Thompson's dissenting opinion, Justice Johnson's separate opinion, and Justice

Baldwin's separate opinion. The latter three were included in this study as they each take different views on the scope of Native sovereignty. However, within Chief Justice Marshall's majority opinion, the term "sovereignty" appears only *once*. This reference not only is exclusive to the United States' sovereignty, but more significantly continues the pattern of paternalist justifications for Supreme Court decisions:

> [The Indians] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their Great Father. They 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. (*Cherokee Nation v. Georgia*, 17-18)

In plain language, Chief Justice Marshall represents Naïve peoples as reliant and demanding federal involvement, and yet fails to quote a Native person anywhere in his decision.

The final case composing the Marshall Trilogy is *Worcester v. Georgia* (1832). Samuel Worcester was an American missionary who was a resident of the Cherokee Nation. He was indicted by the state of Georgia for violating a law that prohibited non-Indians from occupying Cherokee Nation land without a license or permit from the state of Georgia (515-516). In the majority opinion, Chief Justice Marshall declared the Georgia laws unconstitutional on the grounds that they "impair the obligation of the various contracts" (539). In doing so, the opinion further solidified the principal that the federal government had sole authority over Indian tribes.

The decision in *Worcester v. Georgia* is a double-edged sword. In some respects, the case represented a legal victory for the Cherokee Nation. Marshall set a legal precedent both against state control over Indian tribes as well as for interpreting Native people's treaty rights generously and "strictly against the unnecessary erosion of tribal sovereignty," a principle known as the "canons of construction" (Wildenthal 2003, 9).

For example, Marshall notes that:

> *To construe the expression "managing all their affairs" into a surrender of self-government would be a perversion of their necessary meaning*, and a departure from the construction which has been uniformly put on them…Is it credible that they could have considered themselves as surrendering to the United States the right to dictate their future cessions and the terms on which they should be made, or to compel their submission to the violence of disorderly and licentious intruders*? It is equally inconceivable that they could have supposed themselves*, by a phrase thus slipped into an article on another and mere interesting subject, *to have divested themselves of the right of self-government on subjects not connected with trade.* (*Worcester v. Georgia,* 518-519)

More significantly, Marshall provides the legal argument that “that a weaker power does not surrender its independence – its right to self-government – by associating with a stronger and taking protection.” Noting that feudal states “do not thereby cease to be sovereign and independent states,” Marshall explicitly connects this relationship to the Cherokee Nation as a defense against encroachment by the state of Georgia (*Worcester v. Georgia*, 520).

However, in striking down the authority of the states over Native peoples, Marshall also explicitly elevated the power of the federal government over them. The formulation of the Cherokee Nation’s right to self-government is still mediated by federal control. Immediately following his explanation that treaties of protection do not divest Native peoples of their right to self-government, he notes that:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, *or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States.* (*Worcester v. Georgia*, 520)

Thus, in a single opinion, Marshal provided a paradox of legal precedent which seemed to at least *imply* some notion of sovereignty, or at least self-government, held by Native peoples, while simultaneously denying that this authority overrides federal control.

While *Worcester v. Georgia* laid the foundation for a potentially more hospitable engagement between tribal nations and the United States, the immediate aftermath of the decision was hardly an example. President Andrew Jackson was furious with the decision, and it did not enforce its mandates (Barker 2005, 13). Instead, President Jackson accelerated the forced relocation of Indian tribes through the use of “fraud, coercion, corruption, malfeasance both in the negotiation of removal treaties and in their execution” (Cave 2003, 1337). The ultimate result was the cession of all Cherokee land east of the Mississippi and a 1,000 mile-long march westward of 16,000 Cherokees in an event the Cherokee call *Nunna dual Tsunyi*, commonly translated as the “Trail of Tears” (Bowes 2007, 69).[1]

2.2.4. Oliphant v. The Suquamish Indian Tribe and United States v. Wheeler

This study will also consider two other Supreme Court cases in the legacy of decisions relating to tribal sovereignty. Unlike many other cases which are identified as having *practical* effects on sovereignty, *Oliphant v. The Suquamish Indian Tribe* (1978) and *United States v. Wheeler* (1978) both directly spoke to the definition of tribal sovereignty by addressing the effects of a tribal nations legal status on its criminal jurisdiction. These decisions are also important because they demonstrate the lasting effects of the Marshall Trilogy which were cited throughout the opinions of both decisions.

In *Oliphant v. The Suquamish Indian Tribe* (1978), Mark Oliphant was a non-Indian resident of the Port Madison reservation who assaulted a tribal officer and resisted arrest. He sought a writ of habeas corpus on the grounds that the tribe lacked jurisdiction to try him as he

[1] The Cherokee were not the only tribe relocated westward. The Choctaws, Chickasaws, Creeks, and Seminoles were also forced to relocate. See (Bowes 2007, 75)

was a non-Indian (*Oliphant v. The Suquamish Indian Tribe*, 194-195). Justice Rehnquist delivered the majority opinion ruling against the Suquamish Indian Tribe on the grounds that they lacked jurisdiction to try non-Indians because of what Eaglewoman calls the "implicit divestiture doctrine" (2012, 689). The "implicit divestiture doctrine" is the legal principle that, "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States, and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty" (*Oliphant vs. The Suquamish Indian Tribe,* 203).

The implication of this doctrine is that sovereign powers can be divested from Indian tribes, not just by treaty provisions or Congressional restrictions, but also from two other implicit legal sources. First, "unspoken assumption[s]" such as "Indian tribal courts were without jurisdiction to try non-Indians" may be used to divest sovereign powers (*Oliphant vs. The Suquamish Indian Tribe* 209). Second, Indian nations can be denied sovereign powers if the court deems those powers "inconsistent with their status" (Oliphant vs. The Suquamish Indian Tribe 208). These two non-statutory and non-treaty based means of diversity sovereign powers of Indian tribes lead Justice Rehnquist to explicitly re-define Indian tribes as "quasi-sovereign entities" (*Oliphant vs. The Suquamish Indian Tribe* 196). This stark re-defining and vague political theory might best be described as what Mark Rifkin deems an "inclusive exclusion;" Native peoples are bought into the terms of sovereignty only enough such that they can be selectively excluded when needed due to implicit explanations of the differences of Native peoples from all other political entities within American law (2009, 90).

A mere sixteen days later, *United States v. Wheeler* (1978) was before the Supreme Court to test the precedent set by *Oliphant v. The Suquamish Tribe* by applying that decision to the

concept of “double jeopardy.” Double jeopardy is the legal principle that an individual cannot be charge and tried for the same crime twice, and is found in the Fifth Amendment to the Constitution (1791). In *United States v. Wheeler*, a Navajo Tribe member had been charged for an offense in both tribal and federal courts. The Court of Appeals for the Ninth Circuit dismissed the case on the grounds that “since ‘Indian tribal courts and United States district courts are not arms of separate sovereigns,’ the Double Jeopardy Clause barred the respondent's trial” (*United States v. Wheeler* 316). Delivering the majority opinion, Justice Stewart reversed the Court of Appeals ruling and held that the Double Jeopardy Clause did not apply. Justice Stewart ruled that Indian tribal courts and the United States federal courts belong to two separate sovereigns, and that Indian tribes retain the inherent power within their sovereignty to charge and try members of their own nation (*United States v. Wheeler* 319-320).

2.2.5. Summary of Supreme Court Decisions

In conclusion, each of these cases addresses a separate legal question regarding the scope and character of tribal sovereignty. First, *Johnson v. M’Intosh* (1823) addressed the power of Native peoples to engage in binding legal agreements; the Court ruled that the United States federal government has the exclusive right to purchase or acquire land from Native peoples based on the “Discovery Doctrine,” negating all agreements between private individuals and tribal nations. Second, *Cherokee Nation v. Georgia* (1832) addressed the legal status of Native peoples; the Court found that Native peoples do not constitute “foreign nations” but are instead “domestic dependent nations” that rely on the United States federal government to manage their affairs. Third, *Worcester v. Georgia* (1832) addressed the degree to which Native peoples are protected from interference in their affairs by external powers; the Court struck down state laws

seizing Cherokee territory, but in doing so affirmed the overriding control of the federal government over tribal land. Finally, *Oliphant v. The Suquamish Indian Tribe* (1978) and *United States v. Wheeler* (1978) each defined the legal jurisdiction of tribal nations to try individuals. Tribal nations are considered sovereign insofar as they have the right to enforce their own laws on their own people, but lack the legal jurisdiction to try non-Native peoples due to "unspoken assumptions" about the powers they divested to the federal government.

Collectively, these cases establish a paradoxical precedent that finds Native peoples as "quasi-sovereign," a flexible legal category that allows the federal government to deny Native peoples certain sovereign powers deemed "inconsistent with their legal status" (*Oliphant v. The Suquamish Indian Tribe,* 208). This legal reasoning seems to become "fundamentally circular and self-validating;" the Supreme Court can appeal to "unspoken assumptions" without clear legal precedent to justify a particular interpretation of the United States "overriding sovereignty" over Native peoples which then becomes legal precedent for future cases (Rifkin 2009, 91). Native peoples' presence continues to "trouble" United States legal discourses in that their "peculiar" and contradictory legal status forces the United States to shift the definition of sovereignty to maintain control of Native peoples (Rifkin 2009, 96-7). In being forced to shift the definition of sovereignty, the United States Supreme Court potentially demonstrates the "groundlessness of U.S. claims" in that the citations of sovereignty used to resolve legal disputes with Native peoples are themselves flexible interpretations without any clear legal foundation (Rifkin 2009, 113).

This dynamic prompts a qualitative analysis of the meanings of sovereignty invoked throughout the opinions of these cases. If sovereignty acquires meaning through its usage in legal discourses, and these legal discourses ultimately structure the present and future relations

between Native peoples and the United States, it is necessary to closely analyze how and what definitions of sovereignty are used. Analyzing definitions of sovereignty within these major Supreme Court decisions, as well as definitions of sovereignty provided by Native peoples, can demonstrate potential differences and trends across what seems to be a shared political vocabulary. Any differences found across Supreme Court decisions, or in comparing Supreme Court decisions to Native text's defining sovereignty, can help produce possible explanations for the recurring legal and material conflicts between Native peoples and the United States.

3. Methodology

In order to more closely examine the definitions of sovereignty used by the Supreme Court decisions and Native peoples' texts discussed above, this study employs qualitative content analysis to analyze individual definitions of sovereignty throughout and across a series of texts. Following Hseieh and Shannon, qualitative content analysis is "a research method for the subjective interpretation of the content of text data through a systematic classification process of coding and identifying themes or patterns" (2005, 1278). Individual instances of definitions of sovereignty within the texts are coded and examined to produce a range of definitions and aspects of sovereignty. I will examine these instances to derive themes and patterns across texts based on common and divergent definitions of sovereignty. Instead of comparing definitions of sovereignty on the level of an entire text versus another entire text, this study focuses on individual instances within texts. Coding individual instances is necessary to account for divergent and multi-faceted understandings of sovereignty within individual texts; categorizing *Cherokee Nation v. Georgia* (1831) as representing a single definition of sovereignty would paper over significant differences in definitions of sovereignty provided by different justices within the same decision.

3.1. Grounded Theory

The specific form of qualitative content analysis employed by this study is grounded theory. Grounded theory is defined by Martin and Turner as "an inductive, theory discovery methodology that allows the researcher to develop a theoretical account of the general features of a topic while simultaneously grounding the account in empirical observations of data" (1986, 141). Grounded theory is best described as both an inductive and abductive method. It is

inductive in that it does not rely on hypothesis testing. Unlike some forms of qualitative analysis which seek to verify whether or not a trend will be found within a set of texts, my study does not test whether or not a particular definition of sovereignty or a particular trend across the texts will be found. Instead, my study aims to let the texts "speak for themselves" and allow findings and trends to emerge from the texts instead of in comparison to my own personal knowledge or background on the subject of sovereignty. This aspect of grounded theory is desirable for my research because hypothesis testing in textual analysis can result in confirmation bias that is undesirable given that I am analyzing definitions of sovereignty of a cultural group to which I do not belong (Charmaz 2008, 155).

Because data collection and analysis occur simultaneously, abductive inquiry is also involved in the process of deriving trends and categories of terms by connecting passages found to have similar meanings through "successive levels of data collection and analysis," and drawing potential explanations for those trends (Charmaz 2008, 156-158). The combination of these processes in grounded theory allow for flexibility that can account for anomalies and complexities that arise while analyzing the texts while accounting for the inevitable role of the researcher's position and interpretation.

While grounded theory is qualitative in nature, this study also employs measuring frequencies of occurrences of passages within each coding category. Grounded theory commonly employs a variety of measures such as word counts or frequency of coding categories as a means of illustrating trends such as differences in emphasis across texts (Suddaby 2006, 636; Holm et al. 2003, 10). Considering the relative frequency of particular definitions of sovereignty from amongst Native political texts compared to Supreme Court opinions allows me to draw limited conclusions about the relative importance or emphasis of particular definitions of sovereignty for

the authors of the examined texts. These quantitative measures serve to complement, but not supplant, qualitative observations of the variety of definitions and invocations of sovereignty across the texts examined.

This study's grounded theory analysis is conducted based on post-positivist assumptions about knowledge production and meaning. By this, I mean that, following Denzin and Lincoln, while "reality can never be fully apprehended, only approximated," and that "qualitative research is a situated activity that locates the observer in the world," meaning and reality are not entirely constructed (2005). As Alcoff writes:

> To say that location bears on meaning and truth is not the same as saying that location determines meaning and truth…To the extent that location is not a fixed essence, and to the extent that there is an uneasy, underdetermined, and contested relationship between location on the one hand and meaning and truth on the other, we cannot reduce evaluation of meaning and truth to a simple identification of the speaker's location. (1991, 17)

Unlike the "poststructuralist" view that textual meaning is disconnected from the author's intent, or that meaning is strictly a matter of subjective interpretation, texts are analyzed assuming they have a clear intent belonging to the authors of those texts. Simultaneously, my access to that intent is influenced and highly structured by my position as a researcher and interpreter. While this has significant consequences for the reliability and external validity of this study which will be described below, it also allows this study to strike an important balance between relativism and self-reflexivity.

In the context of this study of Native Americans, it is necessary to acknowledge that I as a researcher am situated as a White, middle-class, cis-gendered male who has lived on the East Coast of the United States my whole life with limited personal interactions with people belonging to tribal nations. I do not have the same cultural ties or history of the Indigenous authors sampled, such as knowing that my ancestors experienced literal and cultural genocide. In

addition, I have never physically traveled to a tribal reservation to witness firsthand a tribe's material conditions as a legacy of these forms of violence and American case law defining tribal sovereignty and territorial boundaries. Each of these has an effect on my ability to interpret texts by indigenous authors which forefront the importance of this history or cultural ties, which can result in me misunderstanding or undervaluing particular passages.

Nonetheless, given the importance of this subject for understanding the modern political position of tribal nations, throughout the study I strive to interpret texts keeping these facts in mind and accounting for them as I produce categories and theories from the textual data.

3.2. Text Selection Process

I restricted my analysis to a non-random sample of select texts by Indian political theorists and Supreme Court opinions. This was done to both limit the scope of the project while simultaneously allowing for comparison between two sets of texts that had the express purpose of defining Indian tribal sovereignty from different political and cultural backgrounds. The texts were derived from the literature review that indicated they had the express purpose of defining tribal sovereignty. This is consistent with grounded theory because while it focuses on limiting the researcher's influence on data collection, it can and does employ guided research to both avoid the possibility that this study overlapped with work that has already been conducted, as well as ensure a reasonable foundation for assuming that trends and connections across texts considered can be drawn. This is meant to "achieve a practical middle ground between a theory-laden view of the world and an unfettered empiricism" (Suddaby 2006, 635).

In addition to relying on the literature to point me towards indigenous texts that define tribal sovereignty, I employed the following criteria.

1. The primary authors of essays representing views on Native American conceptions of sovereignty had to be of Native American descent determined by tribal affiliation.
2. Native authors were selected to include a non-random diversity of tribal nations across the United States. Diversity was understood as referring to both the tribal affiliation of primary authors as well as the geographical location of those tribal nations within the United States. Thus, I selected texts from authors with differing tribal affiliation and made locations included the Northeast, Northwest, and Southwest of the United States.
3. Native authors representing tribal nations outside the *continental* United States (such as Alaska, Hawaii, New Zealand, and Australia) were excluded from the sample. This exclusion is based on greatly different backgrounds and issues faced by those groups that would be difficult to account for or emphasize when drawing connections across Native texts.

Given these guidelines, I selected the following texts listed in Table 1 for analysis as representative of indigenous political thought on "sovereignty." All texts can be found in two collections of essays on Native American sovereignty, further supporting that these are texts representative of a range of views. Texts are listed in alphabetical order.

Table 1. Native American Sources

Author(s)	Background/Tribal Affiliation	Text
Barker, Joanne	Lenope (Oklahoma)	"For Whom Sovereignty Matters"
Coffey, Wallace Tsosie, Rebecca	Comanche (Oklahoma) Yaqui (Arizona)	"Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations"
Deloria Jr., Vine Lytle, Clifford	Standing Rock Sioux (South Dakota)	"The Future of Indian Nations"
Kickingbird, Kirke Kickingbird, Lynn Chibitty, Charles Berkey, Curtis	Kiowa (Oklahoma) Comanche (Oklahoma)	"Indian Sovereignty"
Porter, Robert	Seneca Nation, Heron Clan (New York)	"The Meaning of Indigenous Nation Sovereignty"
Tonasket, Mel Stevens, Ernest Whitehorn, Katherine	National Congress of American Indians	"American Indian Declaration of Sovereignty"

To represent the United States interpretations of tribal sovereignty, I selected five Supreme Court decisions that sought to define tribal sovereignty. I restricted my analysis to Supreme Court decisions because they provide the clearest legal guidance and interpretation of the effects and legal significance of formal legislation, even though legislation also has a direct impact on tribal nations. They were also included because Supreme Court opinions establish significant legal precedent that affects all other legislation and future court decisions. When analyzing these Supreme Court cases, I analyzed the opinions and not just the decisions, including concurring and dissenting opinions by other justices.

The first three decisions included compose the "Marshall Trilogy" discussed in the literature review as the foundational Supreme Court decisions for modern Indian law. Two more decisions, *Oliphant v. The Suquamish Indian Tribe* (1978) and *United States v. Wheeler* (1978), were included as more modern cases that sought to define the scope of Indian sovereignty.

Including later cases was important to allow for more accurate comparison of interpretations found within Native texts that were written far later than the Marshall Trilogy cases.

Given these justifications, Table 2 includes the selected Supreme Court cases and their opinions, listed in chronological order.

Table 2. Supreme Court Decisions and Opinions

Texts	Justices/Opinions
Johnson v. M'Intosh (1823)	Chief Justice Marshall
Cherokee Nation v. Georgia (1831)	Chief Justice Marshall Justice Thompson Justice Johnson Justice Baldwin
Worcester v. Georgia (1832)	Chief Justice Marshall Justice McLean
Oliphant v. The Suquamish Indian Tribe (1978)	Justice Rehnquist Justice Marshall
United States v. Wheeler (1978)	Justice Stewart

3.3. Coding Process

My coding process began with an initial coding of each text that was in a digital format converted to be readable in Microsoft Word. I then found every instance of the term "sovereign" or "sovereignty" within the texts. Of those instances, I examined each usage of "sovereign" and its surrounding context to determine if an instance had an intent to define the term "sovereign" or "sovereignty" or if it was used in a manner that did not define the term. Passages that did not define "sovereign" included more than just title pages or citations; these passages also included passing references, such as to "European sovereigns," that did not explicitly define what made a group or power sovereign. Passages that defined "sovereign" or "sovereignty" instead either explicitly defined sovereignty as possessing a particular aspect or power, or which defined the

exercise of a particular power as deriving from a group's sovereignty. Examples of sovereignty defined by examples of exercising a power included such as the following:

> [The Cherokee] contended that they enjoyed a special relationship to the U.S. federal government because they were a sovereign nation, proven by the fact that since 1785 they had entered into twelve treaties with the government that would constitute the United States. (Barker 2005, 12)

Passages that had intent to define were analyzed to determine how they defined sovereignty, and what particular powers or aspects of sovereignty those definitions included. Each aspect or part of a definition that emerged was used to establish initial coding categories. For example, if sovereignty was defined by an author as including eleven different powers, including the power to "wage war," then "wage war" became a separate coding category as a definition of what makes a group sovereign. Similarly, if a passage differentiated between "cultural sovereignty" and "political sovereignty," each received its own coding category. Passages that included multiple definitions were listed under each coding category that it applied to, which means that the numerical totals for instances of the term "sovereignty" is not equivalent to the totals of each category of instances but instead account for multi-faceted definitions.

As I conducted this coding process, categories and connections between terms arose. For example, some passages connected sovereignty to language, ceremony, or oral tradition, while also stating that each of these are part of larger traditional cultural ties that unify an indigenous group as a people. I thus connected these passages together under the coding category of "tradition" because the all aimed at connecting sovereignty to specific cultural practices, as opposed to simply defining sovereignty as "cultural" which was its own coding category. As these categories emerged simultaneously during data collection, I then also coded for passages

that defined each of those aspects that may have not been picked up in the initial coding process. My personal interpretation of passages was thus necessary to draw connections between texts, but those connections were derived from the findings within the texts, and not my pre-conceived notions of how "sovereignty" is defined.

These passages and individual instances were ultimately not divided by each time the word "sovereign" occurred. An "instance" is instead defined as a sentence or collection of sentences in immediate proximity to each other that expressed the same definition of sovereignty. This was needed to prevent a single paragraph illustrating one idea from counting as four separate instances, or for a single sentence that included the word "sovereign" or "sovereignty" multiple times from also counting as unique instances. If within a paragraph a new sentence defined sovereignty differently, that was considered a unique instance of sovereignty and was divided accordingly.

3.4. Research Limitations

While grounded theory, and qualitative inquiry more generally, is useful for observing and analyzing the complexities of meanings within texts that cannot be captured by quantitative measures, there are important limitations to this method in terms of its reliability and validity that must be considered.

3.4.1. Reliability Concerns

Grounded theory's emphasis on the position of the researcher poses some challenges for the reliability of this study. Every researcher has a different social and historical position that can affect interpretation and analysis, making it difficult to claim that this study is reliable in its

ability to be reproduced by another researcher employing the same method. In addition, post-positivism forgoes the assumption reality can be perfectly measured or represented in a neural manner, which also poses issues for standard understands of reliability (Denzin and Lincoln 2005, 19).

To account for this, social scientists have suggested different ways of evaluating the quality of a grounded theory study that embrace both the limits and insights of post-positivist emphasis on subjectivity in research. Charmaz argues that transparency of research methods and the researcher's position in grounded theory can actually serve to build confidence in the credibility of grounded theory research. First, given that grounded theory aims to develop theories that correspond with observed data, greater acknowledgement of a researcher's biases can assure critics that the empirical research conducted has a real basis that corresponds to what was observed (2005, 509-11). The findings of such a grounded research study become contestable on its own terms insofar as a study's observations can be examined through the methods provided to see if bias is actually minimized and accounted for in analysis of the data (Elliot and Lazenbat 2005, 51-52). This helps avoid the concern that any observations can be represented as quality research by invoking grounded theory without seeking standards of falsifiability of research based on assumptions of universal neutrality of observation that are seen as impossible and undesirable from a post-positivist perspective (Charmaz 2005, 509-511).

Grounded theory as a process also minimizes potential bias of a research through the abductive process of simultaneous coding and analysis. Simultaneous coding and analysis of coding categories to find patterns and new directions for further coding minimizes bias by ensuring the researcher's coding is directed by empirical observation, instead of producing abstract categories after neutrally coding all terms in isolation that may not accurately represent

trends within texts. This improves reliability by directing the analysis in accordance with what is found in the data, as opposed to connecting data points after the fact in accordance with the biases and background information and theories the researcher inevitably has developed on their own (Elliot and Lazenbat 2005, 50-52). As such, this study engages in abductive coding and analysis to produce coding categories and determine trends across texts, such as coding for new terms based on the findings of other texts.

This study's usage of non-random sampling may also affect the reliability of this study because only Supreme Court opinions are analyzed as representations of definitions of sovereignty by the United States. Supreme Court opinions, by their nature as legal documents, may not address some definitions of sovereignty because it is outside of their purview or legalistic focus. Each Supreme Court opinion focuses on a particular case and legal question without requiring the Supreme Court to define tribal sovereignty holistically. This may result in certain definitions of sovereignty being underrepresented or omitted by Supreme Court opinions in terms of their frequency without necessarily indicating that such definitions are unimportant or not considered by the United States legal tradition. As frequencies of definitions of sovereignty are analyzed as a means of deriving trends across texts, this can have a direct effect on the conclusions drawn by this study.

While the legal nature of Supreme Court opinions could potentially have an impact on the observed empirical differences in definitions of sovereignty, these Supreme Court opinions are still an important representation of the United States federal government's orientations around sovereignty. Supreme Court opinions require thorough explanation and defenses of why particular legal actions are taken, such as divesting Native peoples of the right to try non-Natives, because the commentary provided by justices in their decisions serves as binding legal

precedent for future legal actions. Federal laws, agency guidelines, or executive orders do not necessarily require legal precedent or interpretations before laying out their implementation guidelines. This makes Supreme Court opinions uniquely suited for the use of grounded theory to examine individual passages because they are written to provide definitions of legal principles, including tribal sovereignty, which can be coded for clear and distinct definitions.

3.4.2 Validity Concerns

Grounded theory implicates both the internal and external validity of this study. Internal validity concerns do not arise from any attempt to draw causal connections, as this study is not necessarily concerned with how an independent variable can be deemed to *cause* a dependent variable. Instead, they arise from the ability to say that the data collected has a necessary and accurate connection to the coding categories and ultimately the findings of this analysis. To account for this, I have tried to be both self-reflexive and transparent in the coding process, including providing example passages throughout the Results and Discussion chapters of how and from where I drew my conclusions.

Second, external validity is implicated because grounded theory and qualitative content analysis by their very design do not lend themselves to generalizability. My sample size was both relatively small and non-random which limits the potential of this study to be generalized to larger groups of people or trends. The attempt to make broad generalizations from the observations and knowledge produced by and from particular Native people risks falsely essentializing Native identity, culture, and political views as homogenous. This ignores that the needs, cultures, worldviews, and relationships with the United States federal government vary drastically from tribal nation to tribal nation; “native communities are not homogenous, do not

agree on the same issues, and do not live in splendid isolation from the world" (Smith 2005, 115). Given an ongoing legacy of non-native researchers that intend to act as "translators" or "interlocutors" for Native peoples, research that is not self-reflexive about the role and desires of researchers such as myself who personally gain from academic work risks recreating a kind of political ventriloquism that misrepresents and fails to serve the interests of Native peoples (Marker 2010, 362-367).

To address this, I am transparent about my text selection process that controls for tribal and geographical diversity amongst texts. Texts were represented as I was writing the literature review according to which texts were cited as significant in the debate and historical legacy of tribal sovereignty that builds confidence that trends observed in the data are significant enough to produce a theory worth exporting to further research. In addition, the purpose of this study is not to produce theories I assume are universally or even generally true for Native peoples. As Urquart et al. note, the purpose of grounded theory is "theory building, not theory verification." Categories that are abstracted from data are used to generate potential explanations or theories that can account for empirical observations, but this process of theory generation is not meant to falsify other theories (2010, 360). Instead, grounded theory focuses on the relations between actors to expose the trends and relations between those actors and generate theories that account for those relations that can serve as a guide for further research and engagement (Suddaby 2006, 635).

A third external validity concern is found in the sampling process given that Native texts were selected because they explicitly present themselves as commentary or regarding Native American political philosophy and theories of sovereignty. This means analysis was restricted to source material that conforms to particular standards of the United States legal tradition and the

larger Western academy, as opposed to other sources such as Indigenous myths and storytelling, narratives, poetry and literature, art, and so forth. This decision was made not because alternative forms of discourse are not important, but because they present serious complications and limitations on drawing comparisons with Supreme Court opinions as well as Native political texts. The cost of the making comparison easier, however, is that my research is potentially aimed towards works that have already been "whitestreamed." Grande explains that:

> …at the same time that American Indian scholars are held to the "publish or perish" rule of the academy they are held captive to market imperatives that demand easily digestible, readily accessible texts, prepackaged for whitestream consumption… In other words, the game is rigged. The space for American Indian intellectualism is conscripted by academic colonialism and the essentialist fascination with "authentic subjectivities… In response to this dilemma, many American Indian scholars have resorted to occupying a sort of intellectual middle ground, a space where relatively safe and easy questions can be asked of controversial subjects, often cleverly disguising critique behind the literary mask of fiction and poetry. (2004, 103)

Grounded theory by its nature takes the concern of "whitestreaming" and academic bias into account. First, grounded theory can and should be conducted with an explicit commitment to social justice. Charmaz argues that focus on social justice, understood as "furthering equitable distribution of resources, fairness, and eradication of oppression" (2005, 507), can minimize the damaging effects and validity concerns of grounded theory by both tempering research and providing heightened sensitivity to the researcher for how their work might be used in the future (2005, 512-513). In the context of Native peoples, this study does not assume that primarily academic sources by Native peoples are representative of indigenous views holistically. Instead, academic sources are engaged because they provide the most explicit definitions of sovereignty, and all trends found by this study are only meant to serve as basis for other kinds of research or engagements with knowledge of Native peoples.

In addition, this study explicitly connects my location as a colonial researcher of European descent within the academy and the historical conditions that made my position possible to the actual study of data. Connecting the historical conditions of a study to its analysis can help avoid drawing hasty generalizations from the data that fail to take into account what might lead particular authors to make the claims they do, such as appealing to particular formats or organization of information as opposed to storytelling (Charmaz 2005, 512). In this study, I acknowledge that there are certainly alternate means of discussing the meaning of sovereignty outside of explicit definitions of sovereignty in texts by Native academics and political leaders, such as the fiction or poetry that Grande describes. However, alternative mediums are outside the scope of this project. My interest is in providing theories to account for trends found in the data of Supreme Court definitions of sovereignty and Native academics responding to the American legal tradition, and nothing more.

3.4.3. The Importance of Speaking for Others

Each of these measures helps address the concerns that arise with academic focus on marginalized populations such as Native peoples by researchers external to those communities. While these concerns cannot be wholly eliminated, there is good reason to believe that such academic focus is worth the associated risks. Alcoff notes that the "retreat" from research and activism on behalf of others can be equally problematic for marginalized populations. While it is necessary to recognize that our individual experiences limits our ability to come to know the "truth" of those in different positions, giving up on all academic or political representation of others can produce complacency:

> … the "retreat" response … is simply to retreat from all practices of speaking for and assert that one can only know one's own narrow individual experience and one's "own truth" and can never make claims beyond this. This response is motivated in part by the desire to recognize difference, for example, different priorities, without organizing these differences into hierarchies… We certainly want to encourage a more receptive listening on the part of the discursively privileged and discourage presumptuous and oppressive practices of speaking for. But *a retreat from speaking for will not result in an increase in receptive listening in all cases; it may result merely in a retreat into a narcissistic yuppie lifestyle in which a privileged person takes no responsibility for her society whatsoever*. She may even feel justified in exploiting her privileged capacity for personal happiness at the expense of others on the grounds that she has no alternative. (1991, 17, emphasis my own)

This dynamic is especially true in the context of tribal sovereignty. The debate over the meaning of tribal sovereignty and the legal status of tribal nations is dominated by Western academics, legal scholars, and researchers who assume their understanding of the Western legal tradition and the "superior sovereignty" of the United States is neutral and objective, instead of structured by their subjective position relative to Native peoples (Rifkin 2009, 107). This study illustrates the importance of considering indigenous views on sovereignty which potentially implicate the legal tradition established by the Supreme Court. It is not that this study provides a unique vehicle for Indigenous scholarship into the academy, as the very existence of literature points to an ongoing debate within the academy. Instead, this study might serve as a potential example of engagement with cultural difference that allows for other encounters with indigenous research and populations on their own terms, in whatever limited way this is possible. While I cannot alter the history of consumption of Native scholarship within academia and the social sciences, I can only strive towards gestures of a "hospitable academy" which is open to both "Indigenous and Western epistemes" (Kuokkanen 2003, 269-270).

4. Results

The first part of this analysis coded for every instance of the terms "sovereign" or "sovereignty" in the texts. Those references to "sovereign" were then categorized based on whether or not they provided an intent to define "sovereign" or "sovereignty," or if references only used the term in passing. Table 3 illustrates the results.

Table 3. Total References of Sovereign(ty)

	Total Instances	*Total Instances with Intent to Define*	*Total Indigenous Definitions (# of Unique Sources)*	*Total Supreme Court Definitions (# of Unique Sources)*
Sovereign	471	110	75 (6)	33 (10)

The references that sought to define "sovereign" and "sovereignty" varied widely and were frequently multi-faceted. However, the individual facets and components of sovereignty that emerged could be grouped into four primary categories:

a. *Political (Internal)* – This category of terms includes governmental and political operations of indigenous tribes amongst their own populations and people without interaction with external agents. Examples include "self-governance," "regulating domestic relations," and "economics."

b. *Political (External)* – This category of terms includes governmental and political operations of indigenous tribes that involve interactions with external agents, namely foreign powers, other tribes, or the United States. Examples include "treaty power," "recognition," "non-intervention," and "waging war."

c. *Cultural* – This category includes aspects of sovereignty directly tied to indigenous culture. Examples include “tradition,” “spiritual,” “history,” and “language.”

d. *Other* – This category includes other definitions or aspects of sovereignty that do not neatly fit into other groupings nor have great similarity to each other, but were nonetheless emphasized as definitions of sovereignty, or Native sovereignty in particular. This includes, for example, questions regarding understanding sovereignty as “collective” or Native sovereignty as “dependent” or “limited.”

Each term is described below, organized by frequency within each category.

4.1. Political (Internal)

The first coding category under *Political (Internal)* included all entries that defined sovereignty as “political,” such as the explicit definition of “political sovereignty.” For example, some indigenous authors such as Coffey and Tsosie explicitly refer to “political sovereignty” in contradistinction to “cultural sovereignty” (2001, 191). These entries were classified as “internal” because these passages were near passages defining the powers of a sovereign over the people considered a part of the sovereign power.

Internal political functions and aspects of sovereignty were further divided based on specific functions and aspects of sovereignty. Table 4 illustrates these occurrences.

Table 4. Political (Internal) References

	Total Instances	*Total Instances with Intent to Define*	*Total Indigenous Definitions (# of Unique Sources)*	*Total Supreme Court Definitions (# of Unique Sources)*
Political	65	21	21 (5)	0 (1)
Government	60	22	15 (5)	7 (7)
Administer and Enforce Laws	32	18	6 (3)	12 (7)
Inherent	31	12	10 (3)	2 (3)
Economics	20	8	7 (4)	1 (1)
Jurisdiction	15	10	2 (3)	8 (6)
Regulate Property Use	9	3	2 (2)	1 (1)
Regulate Domestic Relations	5	1	1 (1)	0 (1)

4.1.1. Political

Passages coded as "political" do not include all instances of sovereignty defined in terms of specific political functions such as having a government, administering and enforcing laws, or economic functions such as taxation. Instead, passages coded as "political" were passages that defined sovereignty as political, or defined the expression "political sovereignty." These passages fall under the larger category of *Political (Internal)* because these passages defined "political sovereignty" in terms of the governmental powers that a tribal nation has over its population, and did not explicitly emphasize or mention other governmental powers that fall under the category of *Political (External)*.

4.1.2. Government

"Government" as a category includes all references to sovereignty that define it in terms of requiring some formal political organization of peoples under the label of "government" as

well as the ability of a sovereign to define the form this organization takes (Kickingbird et al. 2005, 4-5). For example, a sovereign power does not need to be a democracy, have a federal system, or any other specific form of government, but these entries refer to sovereignty as requiring some central power that produces and enforces laws and acts as the reference for international negotiations.

"Government" was the most common association and defining aspect of sovereignty across both indigenous texts as well as the Supreme Court opinions analyzed. It appeared across every indigenous text and most of the Supreme Court opinions, excluding three.

4.1.3. Administer and Enforce Laws

"Administer and Enforce Laws" as a coding category included all references to lawmaking, the enforcement of laws including punishment, and specific law-making powers such as education, health care, and child welfare, but excluded entries regarding citizenship, marriage, adoption, and economics. Thus, it included all generic references, such as associating sovereignty with the exclusive right to administer and enforce laws on a people, as well as passing references to kinds of laws that could be passed that did not feat into categories of economics or "regulating domestic relations." The focus on laws was the second most prevalent association with sovereignty overall as well as in the Supreme Court cases.

4.1.4. Inherent

References to sovereignty as "inherent," or aspects of sovereignty as "inherent" referred to the powers of sovereignty stemming from the mere political organization of a people under a sovereign power without reference to any external force. It is thus the opposite of

conceptualizing sovereignty as relying on recognition of other sovereign powers. As Coffey and Tsosie explain, “Inherent sovereignty is not dependent upon any grant, gift or acknowledgment by the federal government. It preexists the arrival of the European people and the formation of the United States” (2001, 195). This coding category also includes entries that define sovereignty as “self-defined” or “internally defined” by a population insofar as it is made distinct from understandings of sovereignty that rely on external recognition.

Many of the indigenous texts expressly sought to define sovereignty as conditional and without a distinct form, but which was defined by the people themselves. Thus, even if authors do not define sovereignty as necessarily including specific powers such as taxation, the ability to wage war, or to regulate marriage, Porter, Barker, and the American Indian Declaration of Sovereignty all stressed that whatever “sovereignty” might be was certainly internally defined, and thus sovereign power is inherent to a group regardless of external recognition, even if that recognition also plays a part in sovereignty.

One unique synonym term that was coded under belief was introduced by Robert Porter who described sovereignty as requiring “belief.” The “belief” he describes is:

> …the belief that an Indigenous people have in their own sovereignty. It may be an absolute belief, such as in "we maintain the right to do whatever we want to in our own territory without limitation," or it may be a more limited version, such as "we maintain the right to do whatever we want to in our territory so long as our neighbors do not object." (2002, 102)

These passages were also coded under the “inherent” category because Porter explicitly contrasts this belief as a basis of sovereignty from external recognition, and because the extent of political functions is based on what belief those nations can do within their own territory. For example, Porter later notes that “the problem with giving so much emphasis to the recognition factor is

that it unnecessarily casts aside belief and ability as key determinants of being a sovereign" (2002, 105).

It is also worth noting that what makes sovereignty "inherent" to a population may be understood to include more than merely a "mandate of the people," but instead can include cultural aspects such as being connected by cultural ties or spiritual origins. For example, Oren Lyons, an Iroquois leader, links inherent sovereignty to the fact that "all beings are created equal" and "embody the Creator" (Coffey and Tsosie 2001, 200). However, because the ultimate effect of this inherent political sovereignty is to determine governmental form, these entries were coded as *Political (Internal)* and entries relating to the ability of a sovereign power to determine cultural practices were coded as "Self-Determination."

4.1.5. Economics (Internal)

References coded as related to "economics" included those that define sovereignty as control of one's economic resources, establishing a monetary system, taxation, allocation of money such as governmental spending, and regulation of trade within and across the borders of a sovereign power, such as the power to establish tariffs or regulate imports and exports.

It is important to note that the "regulation of property" does not imply other economic concepts such as "private property" or particular sovereign powers such as eminent domain (Kickingbird et al. 2005, 23). Those powers are defined separately, and fall under the power of a sovereign to regulate property use.

4.1.6. Jurisdiction

“Jurisdiction” includes all references to the scope of sovereign power, or the extent to which a sovereign power has “authority” to act. The scope of jurisdiction was frequently further defined and associated with particular territory or populations, such as Indian nations “sovereign authority over their members and territories” (Porter 2002, 84).

4.1.7. Regulate Property Use

“Regulate property use” includes all references to a sovereign power’s ability to control the territory over which it has jurisdiction, including resource management and extraction, setting aside land for specific purposes such as hunting or conservation, eminent domain, and others.

4.1.8. Regulate Domestic Relations

“Regulate Domestic Relations” included all references that both used this exact expression as well as references to the sovereign’s power to regulate membership or citizenship, marriage, and adoption. While “membership” to a sovereign nation was defined in the Supreme Court cases as premised on “citizenship,” that is not necessarily the framework employed by indigenous authors to describe “membership.” Instead, membership can be determined by Native customs and understood as belonging to an indigenous community in ways that are not captured by the relationship between a citizen and a state (Kickingbird et al. 2005, 10).

4.2. Political (External)

Political (External) includes all powers involving the sovereign powers government interacting with external agents or powers. Table 5 illustrates the number of occurrences of these references.

Table 5. Political (External) References

	Total Instances	*Total Instances with Intent to Define*	*Total Indigenous Definitions (# of Unique Sources)*	*Total Supreme Court Definitions (# of Unique Sources)*
Recognition	60	14	8 (4)	6 (5)
Treaties	55	12	6 (5)	6 (9)
Territory	51	19	8 (3)	11 (9)
Nation (State)	27	6	6 (3)	0 (3)
Non-Intervention	12	3	1 (2)	2 (4)
Wage War	8	3	1 (2)	2 (4)

4.2.1. Recognition

The most frequently associated aspect of sovereignty that is both politically and externally determined is the notion of "recognition;" namely, is a power recognized as having a "separate autonomy political existence" other powers (Coffey and Tsosie 2001, 198)? This recognition sometimes takes the form of being considered a "nation" by other sovereign powers, but need not be in the specific Western terms of "nationhood." This recognition is frequently is established by formal agreements that can are defined as only being able to be taken by two or more sovereign nations, such as treaties or land sales. Defining indigenous sovereignty in terms of "recognition" as includes passages that refer to "federally recognized tribes" status by the United States.

Kickingbird et al. note that the refusal to recognize another nation as sovereign does not necessarily negate their sovereignty. However, “the recognition of a nation’s sovereignty by other nations can strength the claim to sovereignty” made by a power (2005, 3-4). Regulating use of property does include, however, control over resources on tribal territory, such as water, fossil fuels, and other resources that require mining such as uranium or gold.

4.2.2. Treaties

Sovereignty is frequently defined and associated by indigenous authors based on the ability to enter into treaties, as exemplified by over 800 treaties signed between various American Indian nations and the United States (Kickingbird et al. 2005, 6). While arguably a subset of “recognition,” passages defining sovereignty in terms of the ability to enter into treaties were coded separately as treaty powers contain a range of actions that a sovereign power can take, such as forming alliances (Kickingbird et al. 2005, 5), as well as forms of cultural and political recognition that is distinct from “recognition” in a purely political sense. Coffey and Tsosie provides examples such as the Comanche/Southern Ute Treaty and the Navajo/San Juan Southern Paiute treaty which explicitly rely on appeals to culture, tradition, and recognition of historical claims legitimized by oral tradition (2001, 199).

4.2.3. Territory

Across all of the texts, sovereignty was defined as having some major relationship to the land/territory of a power. While defining sovereignty in terms of territory has some conceptual ties to coding categories that fall under *Political (Internal)* such as jurisdiction, this study considers territory an aspect of *Political (External)* sovereignty because it relies on acceptance

other nations and because control over territory is the primary source of political contestation between sovereign powers mentioned by the authors sampled.

The connection of a sovereign power to land need not necessarily be considered one of "ownership," as not all tribal nations or authors sampled understand the relationship as being of indigenous groups having "ownership" of the land because of particular traditional or spiritual conceptions of land. However, that language is frequently used in legal disputes and appeals to treaty obligations.

4.2.4. Nation (State)

"Nation (State)" includes all references that define sovereignty as belonging to or being embodied in a "nation" or "state." "Nationhood" is a particular political organization that implies a large-scale organization as well as participation in the international arena of "nations." Thus, to be sovereign is to be a "nation" which is why justices such as McLean in *Worcester v. Georgia* believe that Native American tribal groups are not "sovereign."

4.2.5. Nonintervention

Powers were defined in multiple texts as "sovereign" if they are understood to have a "right" to not have their domestic affairs or the administering of self-governance interfered with by other powers (Barker 2005, 3). While this notion of non-intervention was also associated with Western definitions of sovereignty and nationhood, some authors noted that the principle of non-intervention is held by many indigenous powers as an appeal against the external forces of colonization (Barker 2005, 18).

4.2.6. Wage War

"Sovereignty" was at times defined as the right to wage war or maintain a military. This is because it involves recognition by other sovereign powers as engaging in "war" defined in terms of nations that would fall under international regimes such as the Law of Armed Conflict. Any other violence between powers not defined as "sovereign" is thus not considered "war."

4.3. Cultural

Some indigenous authors explicitly defined "cultural sovereignty" as a separate conception of sovereignty, or at least defined sovereignty as necessarily containing a cultural component such as how to determine membership or what laws a sovereign power would administer and exist under. Those entries that referred to "culture" as an aspect of sovereignty or used the term "cultural sovereignty" were thus coded as "culture," and further divisions were made for specific aspects of cultural sovereignty.

Table 6 illustrates these references and their occurrences.

Table 6. Cultural References

	Total Instances	*Total Instances with Intent to Define*	*Total Indigenous Definitions (# of Unique Sources)*	*Total Supreme Court Definitions (# of Unique Sources)*
Culture	50	22	21 (5)	1 (1)
Self-Determination	27	8	8 (5)	0 (0)
Tradition	18	9	9 (3)	0 (0)
History	4	3	3 (1)	0 (0)
Spiritual	4	3	3 (2)	0 (0)

4.3.1. Self-Determination

As Deloria and Lytle note, “self-determination and self-government are not equivalent terms” (307). However, self-determination throughout the texts was frequently used without an intent to define the meaning of the term, even if sovereignty was defined as a right to self-determine. Barker comes closest by referring to self-determination as:

> … a legal category that came to be defined by both group and individual rights not to be discriminated against on the basis of race, ethnicity, gender, sexual orientation, or physical or mental ability, and to determine one’s own governments, laws, economies, identities, and cultures. (19)

Thus, sovereignty defined in terms of “self-determination” is explicitly cultural in that it refers to the ability of a sovereign to determine whether the government and people adopt or are able to practice particular cultural practices and various other functions related to identity, tradition, or cultural expression. This is consistent with references throughout indigenous texts to the United Nations Declaration of Human Rights specific granting of the right of indigenous people to “self-determine” in terms of “tradition, custom, property, language, oral histories, philosophies, writing systems, educational systems, medicines, health practices, resources, lands, and self-definition” (quoted in Barker 20).

4.3.2. Tradition

Sovereignty was defined across multiple indigenous texts as being founded on or tied to indigenous people’s tradition, including oral history, language, ceremonies, and others cultural expressions. Barker notes that many indigenous activists point to the unique shared culture of indigenous groups as the basis of their sovereignty. To be sovereign is to have cultural autonomy

as a group to determine how a group will practice, exercise, and maintain one's traditions (Barker 2-3; 18).

Spiritual conceptions of sovereignty were coded separately because they provided an alternate account to how sovereignty is founded, for example as being granted by the Creator, whereas cultural origins of sovereignty need not necessary include any conception of spirituality but may simply include ties by family or shared practices (Coffey and Tsosie 203).

4.3.4. History

In addition to understanding oral history as merely an aspect of tradition that provides the founding basis for people coming together under a "sovereign power," "history" can also be a separate aspect of "sovereignty" in that the details of that history affect how sovereignty is understood and exercised, especially in relation to interactions with foreign powers. Coffey and Tsosie note that incorporating cultural into a comprehensive definition of sovereignty would result in practices such as oral tradition being considered in negotiating disputes over land as well as interpreting terms of treaties based on how a group understands their ancestors intent in signing a treaty, as opposed to strict legal interpretations of terms (200-202).

4.3.5. Spiritual

Defining sovereignty as based on "spiritual sources" (Kickingbird et al. 2) or "spirituality" is to understood spirituality or religion as not just being a factor that brings people together under a single sovereign power, but can itself be defined as the basis or origin of sovereign authority. For example, Coffey and Tsosie quote Dagmar Thorpe who explains how Native understandings of sovereignty can include recognition of the:

…one sovereign – the Creator. He has given us a life, and we live by the Creator's good will. If we are to survive we must recognize and live within His law. Our laws were created to keep our people within the framework of the Creator's laws. They were principles of behavior toward each other and all of creation. Our nations are eroding because we have ceased to recognize the sovereignty of the Creator and have replaced it with a sovereignty established by human beings. (203)

4.4. Other

Sovereignty was also defined and associated with other terms that did not fit neatly into the other three categories, nor had a clear grouping to establish another category. These occurrences are illustrated in Table 7.

Table 7. Other References

	Total Instances	*Total Instances with Intent to Define*	*Total Indigenous Definitions (# of Unique Sources)*	*Total Supreme Court Definitions (# of Unique Sources)*
Limited	46	19	9 (3)	10 (4)
Collective	20	14	14 (3)	0 (0)
Belief	12	8	8 (1)	0 (0)
Problematic	7	1	1 (1)	0 (0)
Contingent	6	3	3 (1)	0 (0)
Self-Defined	5	2	2 (1)	0 (0)
Western Origin	6	3	3 (6)	0 (0)

4.4.1. Limited

References coded as “limited” included all passages that define Native American sovereignty as “limited” or “dependent” or subject to the “overriding sovereignty” of the United States federal government. When found in Native American texts, these references explicitly cited the legal precedent established by Supreme Court cases such as *Cherokee v. Georgia* which legally defined tribes as “domestic dependent nations,” or implicitly referred to this legal precedent by describing modern indigenous sovereignty as being subject to the “overriding sovereignty” of the United States.

These definitions did not define “sovereignty” as an overall concept as being “limited” or “dependent,” but instead defined Native American sovereignty, both currently and historically, in terms of being “limited” by or “dependent” on the United States federal government. Similarly, the Supreme Court opinions only associated sovereignty with being “limited” when directly referring to Native American tribes as “dependent” or “limited” by the federal government.

4.4.2. Collective

Passages coded as “collective” definitions of sovereignty include two primary concepts. First, defining sovereignty as pertaining only to collectives of people, and not individuals. Second, defined sovereignty as premised on and aiming to benefit collective benefit and not individual gains.

First, passages that defined sovereignty as belonging to collectives drew a distinction between the ability of an individual to have control over themselves, or “personal sovereignty,” and “sovereignty” in terms of collective political organizations. For example, Porter notes that:

> It is also worth mentioning that the concept of sovereignty is *only applicable to peoples, not individuals*. In other words, *an individual cannot be sovereign.* (106)

Porter later states:

> To the extent that anyone might adhere to a notion of "*personal sovereignty*," they are really adhering to *selfishness, not some attribute associated with being and maintaining an existence as a distinct people.* (107)

Second, sovereignty is also defined as “collective” in contrast to other understandings of sovereignty that focus on the importance of the individual in a society under a sovereign power. Under a collective understanding of sovereignty, those that are part of a sovereign power are not understood as merely individuals with self-interested reasons to acknowledge sovereign power,

but are instead fundamentally connected such that the primary purpose of sovereignty is the collective interest of a group, as opposed to individual success. For example, as Coffey and Tsosie note:

> The group-based structure of tribal societies leads to a conception of sovereignty that is "oriented primarily toward the existence and continuance of the group." For Indian nations, then, unlike other "oppressed groups" in society, sovereignty seems to require "constructive group action rather than demands for self-determination. (197)

4.4.3. Problematic

In addition to authors discussing the importance of sovereignty as a paradigm for Native Americans to conceptualize their means collective organization or governance, some authors also identified the very conception of sovereignty as problematic or harmful as a term or paradigm for indigenous epistemologies, much in the same vein of authors such as Rifkin and Alfred as mentioned in the literature review. As Barker notes:

> … translating indigenous epistemologies about law, governance, and culture through the discursive rubric of sovereignty was and is problematic.64 Sovereignty as a discourse is unable to capture fully the indigenous meanings, perspectives, and identities about law, governance, and culture, and thus over time it impacts how those epistemologies and perspectives are represented and understood. (2005, 19)

Similarly, and more strongly worded, Barker also states that, "Sovereignty carries the horrible stench of colonialism. It is incomplete, inaccurate, and troubled" (2005, 26). This is often because sovereignty is associated with "its etymological origins within European colonial law and Christian ideologies" (Barker 2005, 24). Thus, passages that criticize the usage of "sovereignty" as a paradigm means of understanding anything about Native American peoples' political and cultural organization was coded under the category of "problematic."

It is worth noting that these entries do not always go so far as to say that sovereignty is an irredeemable concept. Instead, these entries merely stress the importance of recognizing the

limitations and potential problems associated with relying on sovereignty as a concept without recognition of its origins as well as simultaneously stressing alternative indigenous means of understanding political organization, law, culture, or other themes. This dynamic will be explored in detail in the discussion chapter.

4.4.4. Contingent

References to sovereignty as "contingent" defined sovereignty as being inherently unable to be defined universally in an ahistorical manner. Thus, definitions of sovereignty are always contextual and particular, and at best can speak to forms or aspects of sovereignty as opposed to providing an essential definition of sovereignty that could be considered true when describing any population. As Barker writes:

> What is important to keep in mind when encountering these myriad discursive practices is that sovereignty is *historically contingent*. *There is no fixed meaning for what sovereignty is—what it means by definition, what it implies in public debate, or how it has been conceptualized in international, national, or indigenous law*. Sovereignty—and its related histories, perspectives, and identities—is embedded within the specific social relations in which it is invoked and given meaning. (2005, 21, emphasis my own)

Sovereignty is further described as contingent through Barker and Porter not just because the historical content or time period can alter its definition and reception, but because the definition or meaning of "sovereignty" is constituted by a multiple of sources with varying interpretations, especially when considering differences in the position of the colonizer and the colonized. As Porter notes:

> …a complete definition of Indigenous nation sovereignty requires an understanding of all three different perspectives. *No single definition can suffice*. Accordingly, any complete answer to the sovereignty question must incorporate the Indigenous "answer," the colonial "answer," and the international "answer." (2002, 78, emphasis my own)

Porter goes on to say that:

> The second step is to reject the notion that within the Indigenous perspective there is any such thing as one single, monolithic Indigenous perspective. There are, within the United States, over six hundred recognized and unrecognized Indigenous sovereigns. They vary in every conceivable manner. By virtue of population, culture, geography, and the nuances of history, no two Indigenous peoples are the same. *It serves little purpose*, other than to encourage mistake, *to take the position that, with respect to defining Indigenous nation sovereignty, "one size fits all."* (2002, 101, emphasis my own)

Both of these passages capture the importance of recognizing that any attempt to define sovereignty cannot be seen as generalizable in all cases or contexts.

4.4.5. Western Origin

As discussed in the chapter on the historical background of sovereignty, some scholars trace the meaning and etymology of "sovereignty" to Western legal and political origins. For example, Barker, quoting Deloria, Jr., ties sovereignty to European religious tradition:

> Deloria, Jr., writes that sovereignty originated as a theological term within early east Asian and European discourses: "sovereignty is an ancient idea, once used to describe both the power and arbitrary nature of the deity by peoples in the Near East. Although originally a theological term it was appropriated by European political thinkers in the centuries following the Reformation to characterize the person of the King as head of the state." (2005, 1-2)

However, these references are not just presentations of historical facts as mere background information but instead define sovereignty as a political paradigm based on how these historical origins and legacies affect its deployment in the present. Barker later notes that:

> Many find it troubling that indigenous histories and cultures are often framed through sovereignty without a consideration of the ways in which its *ideological origins might predispose a distortion or negation of indigenous epistemologies of law and governance.* (2005, 20, emphasis my own)

While providing an account of what definitions of sovereignty are observed across texts and the frequency of those definitions is helpful in illuminating overall trends and prevalence of topics, alone they are insufficient for demonstrating the importance or implications of differences or findings. It is necessary to closely compare the definitions provided in order to produce theories and potential explanations that account for the differences observed.

5. Discussion

This chapter will highlight the major findings of the results and coding categories, connecting these findings and particular ideas from the texts to larger discussions of how tribal sovereignty becomes conceptualized. These findings include the absence of focus on in Supreme Court opinions, greater emphasis by Supreme Court opinions on external political definitions of sovereignty, Native characterization of terms as "problematic," and Native definitions of sovereignty as "contingent." Each will be discussed below.

5.1. Cultural Sovereignty vs. Political Sovereignty

A major finding when analyzing trends across the texts was the difference in emphasis placed on culture as a definitional aspect of sovereignty. Culture in this context includes things such as language, heritage, traditions, ceremonies and rituals, and other unique aspects of a collection of people. While the Native American texts had 50 references to culture linked to mentions of sovereignty, with 21 of those references explicitly defining sovereignty in terms of culture, the Supreme Court opinions had only one reference to culture as an aspect of sovereignty. Justice Thompson in the dissenting opinion of *Worcester v. Georgia* (1823) concludes that, in reference to the Cherokee Indians:

> … it is not perceived how it is possible to escape the conclusion that they form a sovereign state… They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and *customs* within their own territory, claiming and exercising exclusive dominion over the same, yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self-government over what remained unsold. (53, emphasis my own)

This entry does not even make a strong claim that culture is a primary aspect of sovereignty, but instead merely notes that the fact that the Cherokee Indians are governed by particular customs, and frames sovereignty as a question of "dominion" over territory.

Justice Thompson's focus on territory and legal domination of land posits cultural tradition as an *effect* of sovereignty; something that can be protected by the laws of a sovereign nation, but which is not a *foundational aspect* of sovereignty. Native authors such as Barker, Coffey and Tsosie who were analyzed noted that the American legal tradition understands the purpose of sovereignty when founding a "state" or "nation" is to secure individual rights or benefits of peoples that form political associations without the necessity of cultural ties. The focus is thus on "political" purposes such as securing property rights, providing physical security, and so on. In this view, sovereignty is founded on a social contract whose instrumental purpose is to maximize an individual's well-being because it is in the member's self-interest, without any direct or necessary relationship to culture, religion, language, and so on (Coffey and Tsosie 2001, 197).

In contrast, the Native American texts suggest a much more fundamental role for culture. For authors such as Coffey and Tsosie, the very definition and scope of sovereignty is "deeply rooted in our cultural identity and our traditional spiritual values" (2001, 210). The purpose of sovereignty is thus not to maximize a disparate set of individual rights and interests, but instead to maximize the collective interest of a group defined by cultural ties (Cobb 2005, 121). The modern legal struggles for Native jurisdiction and control of land is thus only a minor part of a larger battle for Indian cultural survival in the legacy of two centuries of violence (Coffey and Tsosie 2011, 195-196).

Whether or not sovereignty is defined in terms of culture has significant implications both in terms of providing a foundation for sovereignty located in cultural distinctness as well as in altering the way that political functions such as treaties are implemented.

5.1.1. The Importance of Cultural Distinctness

The authors sampled went so far as to say, as illustrated by Porter, that "cultural distinctness is the most powerful force for ensuring one's belief in being sovereign as well as being recognized by other peoples" (2002, 111). Ties of culture are not simply tolerated by a sovereign power or a mere right to be protected or not under whatever government tribal nations choose for themselves, but instead becomes the very basis of the "people" of a sovereign (Fairbanks 1995, 145). This might be one way of understanding what Rifkin refers to as the "meta-political authority" in question by sovereignty defined as "the ability to define the content and scope of 'law' and 'politics'" by locating the origin of that ability in collective cultural identification (2009, 91). This marks an important shift in analysis of tribal sovereignty away from the scope of sovereignty defined by legal mandate and the legacy of treaties, as decisions such as *Cherokee v. Georgia*, *Worcester v. Georgia*, and *United States v. Wheeler* each emphasized.

Focus on cultural connections as a basis for sovereignty is simultaneously tied to and yet distinct from questions of jurisdiction of territory. For example, Coffey and Tsosie note that some Indian nations have distinct sets of rights for tribal members that live on reservations and for those that live off-reservation, including the denial of voting rights to those who do not live on reservations. Such tribal decisions and disputes cannot be explained in terms of strictly territorial conceptions of sovereignty because the demand for a right to vote can only make sense by acknowledging that their ties the same sovereign authority is based on culture, and not just territory or residence (Coffey and Tsosie 199). This example is not raised to show that either cultural sovereignty is problematic compared to territorial conceptions of sovereignty, or even to take a stance on how such nations should orient themselves towards voting rights for their

members. It more important demonstrates that the scope and particularities of tribal governance is seen to derive from cultural norms, and not strictly political jurisdiction.

The focus on cultural distinctness as foundational to sovereignty raises other questions beyond merely what particular laws or norms can be drawn from culture. For example, a critical question that arises is how culturally "distinct" must a people be to be considered culturally "distinct" enough to motivate inherent sovereignty or be recognized as sovereign by foreign powers? Porter, Barker, and Coffey and Tsosie all raise this question but ultimately acknowledge that is not something that can ever be determined in advance, or externally (Porter 2001, 102; Barker 2005, 26; Coffey and Tsosie 2001, 191). That being said, some aspects of culture are emphasized within the texts as important for understanding tribal nations as "distinct." These emphasized aspects of culture included language, oral tradition, and spirituality.

For Deloria and Lytle, language is "the first glue that links peoples together" (2005, 312). It serves as not only a very concrete reminder of cultural ties and shared heritage, but language uniquely translates all other information or ideas with particular connotations. For example, Deloria and Lytle analyze the effects of education programs, such as American Indian boarding schools established by the Civilization Fund Act of 1819, on Native Americans ability to formulate ideas of self-government and self-determination. They note federal land allotment and housing policies created rural slums with Indian children whose first language became English, threatening not only survival of unique languages but also the preservation and communication of ideas not easily captured by the English language. While many tribal nations were able to appeal for funding for bilingual education programs which helped protect the survival of these languages in areas where usage had begun to decline, the effects of these policies were significant threats to Indian cultural survival (Deloria and Lytle 2005, 312). The result of the

legacy of these policies to emphasize English is the continuous decline in speakers of traditional languages, which results in modern Native Americans acquiring most of their information about tribal sovereignty and legal authority from texts written in English by non-Indians. For example, tribal leaders may acquire the information they use to base their legal challenges from colonial sources such as the Bureau of Indian Affairs and Supreme Court traditions which both assume severely limited conceptions of tribal sovereignty. The result is that they may be convinced that their range of legal options available is limited, and thus they may scale back demands placed on the federal government (Porter 2011, 89-91).

Oral tradition serves a similar purpose to language in that it functions as a cultural tie. However, its purpose might be understood not as the *how* of communicating traditional values, but the *what*. Oral tradition and the stories contained within them are of deep importance to many tribal nations in ways that are difficult to explain or comprehend within English or from a non-Native perspective. As Harjo and Storm explain:

> Stories are our wealth. Winter nights we tell them over and over. Once a star fell from the sky, but it wasn't just any star, just as this isn't just any ordinary place. That cedar tree marks the event and the land remembers the flash of its death flight. To describe anything in winter whether it occurs in the past or the future requires a denser language, one thick with the promise of new lambs, heavy with the weight of corn milk. (1989, 24)

These stories serve as a means of preserving "collective knowledge and memory of the people … through the generations," much in the way that European countries and the United States use written histories to maintain legacies of past interpretations of history, law, and cultural values (Porter 2002, 88). While American legal scholars may point to American case law, the Federalist Papers, and other written records of legal debates in order to form views of interpretation of laws throughout history, many tribal nations must rely on an oral legacy of those histories and past

organizations, such as the Ho-de-no-sau-ne (also known as the League of the Five Nations, or the Iroquois Confederacy).

Finally, spirituality can be a fundamental source of conceptualizing tribal sovereignty because it can set the scope and purpose of sovereignty through values of what constitutes the responsibility or purpose of collective organization. Coffey and Tsosie, citing other Native leaders and scholars such as Deloria and Lyons, describes this usage of spirituality as being the origin of obligation to their welfare of the population of a tribe, and to the welfare of the land and others more generally. Instead of the importance of welfare or protection of members of a nation deriving from a "social contract," the binding force of a population might be the "spiritual instructions which demand respect for the other living beings which share this earth and for the future generations who will inherent this earth." The very sense of political and cultural "community" that allows for the collectivity of sovereignty can be derived from spirituality that provides the "overriding values and content of governance," in stark contrast to Western and secular notions of sovereignty (Coffey and Tsosie, 200).

These aspects of culture are directly tied to "inherent" understandings of sovereignty because they are employed by Native peoples to define sovereignty on their own terms. Tradition does not serve as a static referent that binds tribal nations to the past, but instead lends itself to a dynamic process of interpretation and deliberation that allows Native Americans to define how they wish to govern themselves (Coffey and Tsosie 199). Culture becomes one of the critical aspects of sovereignty as a means to challenge the limited paradigm of political sovereignty through a "constitutive redefinition of sovereignty that supersedes the political definition" (Endres 2009, 44-45). As such, Deloria and Lytle argue that focus on cultural preservation is of the utmost importance for tribal nations seeking sovereignty and self-determination because, as

the note, “Until Indians can get a more comprehensive idea of their own regarding the content of their cultures, resolution of conflicts with the larger society will be almost impossible” (2005, 311).

5.1.2. Culture and Treaty Interpretation

One final area in which incorporating culture into definitions of sovereignty is crucial for understanding how tribal sovereignty is incorporated and understood within the law is in treaty interpretation. As mentioned earlier, inclusion of oral tradition when considering the scope and effects of treaties today could significantly alter the way they are read to consider that the original ancestors of tribal nations were not signing to the conditions that the treaties were later interrupted to include. As Eaglewoman argues:

> “Native ancestors did not negotiate treaties and agreements to achieve the substandard quality of life, the criminalization and victimization of Native peoples, and the constant struggle for cultural survival endured by the majority of tribal citizens in the 2000s.” (2012, 680)

Instead of strict interpretation of the contents of treaties and other legal agreements, inclusion of oral history into treaty interpretation could be part of what Coffey and Tsosie deem a “bilateral process” that includes both literal interpretations of English terms of the treaty as well as the intent of tribal Ancestors derived from oral tradition. This is not meant to supplant the English terms of the treaty, but to acknowledge the importance of the fact that the words of tribal ancestors are not mentioned at all in these critical documents, for example in the 1785 Treaty of Hopewell. This might alter legal doctrines founded on these treaties as the “trust doctrine” which is based on tribal groups ceding many aspects of political sovereignty to the United States in exchange for protection and management (Coffey and Tsosie 2001, 204). Cultural interpretations

of sovereignty are foundational to understanding external aspects of political sovereignty because they can set the terms of what relationships with other countries even entails (Coffey and Tsosie 2001, 198).

An important finding of this study is that the idea of using oral tradition as a means of interpreting the extent of the treaties is briefly mentioned indirectly within the Supreme Court decisions that are constantly cited as a means of circumscribing modern tribal nations' sovereignty. For example, in Justice McLean's concurring opinion in *Worcester v. Georgia*, he describes the issues that arise from solely relying on the English terms of treaty obligations to hold Natives accountable to legal agreements when he writes:

> Is it reasonable to suppose that the Indians, who could not write and most probably could not read, *who certainly were not critical judges of our language*, should distinguish the word "allotted" from the words "marked out." *The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject.* When, in fact, they were ceding lands to the United States, and describing the extent of their cession, *it may very well be supposed that they might not understand the term employed as indicating that, instead of granting, they were receiving lands. … It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved* . (552-553, emphasis my own)

Justice McLean later in his decision also makes the explicit claim that how the treaty was understood, not only what the treaty stated, was important for interpreting treaty obligation. Justice McLean explicitly rejected any interpretation of the treaties meant solely to prejudice Native Americans, in stating that:

> *The language used in treaties with the Indians should never be construed to their prejudice*. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "allotted," in reference to the land guarantied to the Indians in certain treaties, indicates a favour conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. *How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.* (582, emphasis my own)

Ironically, Justice Rehnquist, in his opinion in *Oliphant v. The Suquamish Indian Tribe* (1978) that tribal nations did not have the right to try non-natives within their own legal system, also indicates that treaties cannot be interpreted neutrally by their texts, but must also consider the views of those who wrote them at the time:

> "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which, *beyond their actual text*, form the backdrop for the intricate web of judicially made Indian law, *cannot be interpreted in isolation*, *but must be read in light of the common notions of the day and the assumptions of those who drafted them.* (206, emphasis my own)

Each of these passages and others point towards the importance of incorporating tribal history and tradition into even modern legal disputes, as they cannot be understood in isolation. This is significant given the importance that both indigenous texts and Supreme Court opinions placed on the importance of treaties for explaining the scope of indigenous as well as United States sovereignty.

5.2. Emphasis on Internal vs External Political Sovereignty

Another critical finding that arose from comparing Native American conceptions of sovereignty with the Supreme Court opinions was the differences in emphasis on *internal* versus *external* determinations of sovereignty. While both understandings of political sovereignty were featured throughout both sets of texts, the Supreme Court decisions placed greater emphasis on external definitions of political sovereignty, especially the importance of treaty obligations. This difference in emphasis was both numerical and conceptual. First, the Supreme Court opinions had more references to treaties as dictating the scope of United States and Tribal sovereignty. Second, while definitions of sovereignty as “inherent” or “self-defined” were throughout the

Native texts, there is very little mention of sovereignty defined as "inherent" in the Supreme Court opinions.

While the Native American texts each placed at least some emphasis on tribal nations defining the terms of their sovereignty which emanates from their own organization and decisions without exclusively relying on foreign recognition, this was not as clear within the Supreme Court opinions. It is thus worth looking at detail how sovereignty is described within the court decisions with reference to recognition by the United States.

5.2.1. Treaties as the Basis of Tribal Sovereignty

For example, in *Johnson v. M'Intosh*, the first of the Marshall Trilogy decisions, the United States is understood to have sovereign control of the land it controls in the United States by appealing to the "discovery doctrine," the principle that gave whichever European nation was first to discover territory in the Americas the exclusive right to acquire territory from any native groups present on that land. Justice Marshall, in his dismissal of the case on the grounds that native groups had no standing in US courts as "foreign nations," traces the history of various European powers such as Spain, France, and Great Britain acquiring land by appealing to these "titles of discovery" (574-575). Having a title of discovery thus allowed these nations the exclusive right to extinguish the "right to occupancy" that Indians were understood to possess. While Indians were understood to have "possessed in full sovereignty" the land originally, the discovery doctrine limited the actors that could be involved divesting land from Indians by either "purchase or by conquest" (587) by only allowing governments of European nations to acquire territory, allowing the United States to "annul deeds made by Indians to individuals for the private use of the purchasers" (585).

Throughout this historical tracing of the origins of sovereign control of territory, there is no mention to sovereignty originating from the *inherent* organization of people. Even when there are conflicting views of the scope of tribal sovereignty, these disagreements between opinions are consistently framed within the terms of external recognition and within treaties. This conflict of conclusions but reliance on external understandings of political sovereignty can be seen in the disagreement between Chief Justice Marshall and Justice Thompson in their opinions in *Cherokee v. Georgia.*

Justice Marshall provided the opinion of the court that Indians are not "foreign nations." Justice Marshall provides only one mention of "sovereignty" in which he states that:

> [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. (17-18)

Chief Justice Marshall also appeals to the framers of the Constitution in how the wrote the Commerce Clause. As written, this clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This wording draws an explicit distinction between "foreign Nations" and "Indian Tribes." As such, Chief Justice Marshall concludes that:

> These considerations go far to support the opinion that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the union to controversies between a State or the citizens thereof, and foreign states. (18)

Justice Thompson provided a dissenting opinion in which he refuted the claim that Indian Tribes lacked sovereign status. However, his argument derived from the fact that previous treaty engagements guaranteed their sovereignty, as opposed to their own personal identification or organization. Justice Thompson differed from Chief Justice Marshall's view of sovereignty

which relied on the law of nations and the commerce clause, and argued that the only relevant determinant of "whether the Cherokee Indians are to be considered a foreign state" was "the practice of our own government and the light in which the Nation has been viewed and treated by it" (54). As such, he noted that:

> What is a treaty as understood in the law of nations? *It is an agreement or contract between two or more nations or sovereigns*, entered into by agents appointed for that purpose and duly sanctioned by the supreme power of the respective parties. *And where is the authority, either in the Constitution or in the practice of the government, for making any distinction between treaties made with the Indian nations and any other foreign power?* They relate to peace and war, the surrender of prisoners, the cession of territory, and the various subjects which are usually embraced in such contracts between sovereign nations. (60)

While ultimately serving as a defense of tribal sovereignty, Justice's Thompsons decision ultimately relied on external recognition as the basis of sovereignty, and provided no mention of tribal sovereignty originating from anything else.

5.2.2. Inherent Tribal Sovereignty in Supreme Court Opinions

Not every Supreme Court opinion defined sovereignty in terms of external recognition or treaty terms. For example, the opinions of both Chief Justice Marshall and Justice McLean in *Worcester v. Georgia* that Indian tribes had some right to self-governance over their peoples and lands. Justice McLean in his concurring opinion responded to the argument that Indian tribes necessarily sacrificed their sovereignty as an entirety when entering into treaties that placed them under the protection of the United States when he argued that:

> By various treaties, the Cherokees have placed themselves under the protection of the United States; they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts. (520)

Supreme Court opinions almost a century later maintained the same understanding of tribal sovereignty. *United States v. Wheeler* was a 1978 Supreme Court decision that addressed the question of whether or not an individual could be tried twice, once in a tribal court and once in an American federal court, or whether the double jeopardy clause applied given the overriding sovereignty of the United States. In the opinion of the court, Justice Stewart seems to indicate that Indian tribes possess sovereign power that they can then divest to other foreign powers. Justice Stewart notes that "our cases recognize that the Indian tribes have not given up their full sovereignty." If a tribe does not divest that power in a treaty, they retain that sovereign power:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, *Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.* (323).\

In making this statement, Stewart affirmed the doctrine of "dual sovereignty" by explicitly drawing a distinction between the tribal courts and federal courts as belonging to the "arms of separate sovereigns (330).

Both of these sets of decisions point to the role of treaties in circumscribing or limiting Native sovereignty, but not defining Native sovereignty in its entirety. While these decisions do not contain passages that have intent to define tribal sovereignty as inherent, they did refer to there being some powers inherent in sovereignty held by the tribes that was not removed by treaties. As such, these decisions leave open the possibility of pointing to holes in the law that allow for articulating notions of inherent tribal sovereignty and self-definition. However, such holes are small, as these decisions also lay the precedent for the overwhelming and overriding sovereignty of the United States that circumscribes many of the practical aspects of exercising tribal sovereignty in terms of internal political affairs.

5.3. Deployment of Problematic Terms

While both Supreme Court opinions and the Native texts frequently used similar vocabularies and definitions of sovereignty, both sets of texts contained few instances with intent to define that defined sovereignty as problematic because of its philosophical legacy and history. It is perhaps unreasonable to expect Supreme Court opinions, which are targeted at answering very specific legal questions. However, these Supreme Court opinions also included quite a bit of extraneous information and background, as well as legal precedent in *dicta* (statements in court decisions that are not binding but considered authoritative for future decisions). While Chief Justice Marshall in *Johnson v. M'Intosh* took the time to trace an extended history of the application of the discovery doctrine in the interactions between Great Britain, France, and Spain in the Americas, and how the principles of European sovereignty allowed for exclusive claims to land acquisition, there was no mention of the historical origin or even meaning of European sovereignty, nor discussion of whether it was appropriate to consider Indian political organization in terms of sovereignty.

One may be led to ask why would these authors risk usage of that vocabulary instead of establishing their own terms from which to launch their political advocacy and critique. If Porter is correct that there are radical differences between colonial and colonized views of sovereignty and political governance, there is a reasonable concern that such political language is always already tainted by American epistemes. As Rifkin notes, some scholars reject the paradigm of sovereignty entirely because it relies on particular understandings of power and dominance that they understand to be inherently harmful to Native peoples or because sovereignty as a political aspiration carries particular beliefs and practices that are fundamentally European and limit the

potential of Native political thinking (2009, 91-94; 108-109). Native peoples face what Endres describes as a "catch-22 where have to accept the limited notion of sovereignty granted through federal law in their quest for more rights within Indian Law" (2009, 44). Some pessimistically argue that the result of invoking the language of sovereignty before American law is a patchwork of convoluted cases that defines Indian tribes as "quasi-sovereign," such as in *Oliphant v. The Suquamish Indian Tribe* (208).

The answer is neither simple nor consistent throughout each text. However, there is some acknowledgment in the works of Barker, Coffey and Tsosie, and others that it is necessary to occupy the language of sovereignty strategically. These authors do not use these terms neutrally or haphazardly and frequently criticize other indigenous authors who do. Barker, for example, criticizes authors who rely on the "taken-for-granted" and essentialist conception of sovereignty as if it is always appropriate or always understood in a particular way, "without a consideration of the ways in which its ideological origins might predispose a distortion or negation of indigenous epistemologies of law and governance" (2005, 20-21). These authors engage in a cautious project of trying to translate Native political views into the language of American case law, while simultaneously acknowledging its limits. As Barker continues:

> … sovereignty carries the horrible stench of colonialism. It is incomplete, inaccurate, and troubled. But it has also been rearticulated to mean altogether different things by indigenous peoples. In its link to concepts of self-determination and self-government, it insists on the recognition of inherent rights to the respect for political affiliations that are historical and located and for the unique cultural identities that continue to find meaning in those histories and relations. (2005, 26)

This is especially true in the face of ambiguous and flexible legal concepts such as "quasi-sovereignty." Some authors have noted that the outright abandonment of these terms for those which are more "user-friendly," such as "self-determination" or "cultural autonomy" does not

resolve the issue of their legal status. Instead, it is a necessity to appeal to the Western lexicon of sovereignty because it is language that can be read against the legal precedents and which resonates with those in the international community (Cobb 2005, 122).

5.4. The Role of Contingency

Given these differences in usages of sovereignty, the final notable trend this study will consider is the role of historical contingency in defining sovereignty not because a plurality of indigenous authors emphasized this role when SCOTUS did not but because only one indigenous author, Barker, explicitly defines sovereignty as "historically contingent." The question that arises is whether or not other indigenous authors, and even if Supreme Court decisions, lend themselves to conceptualizing sovereignty as a contingent phenomenon that is has "no fixed meaning" (Barker 2005, 21).

Supreme Court opinions seem to rely on the opposite logic in viewing sovereignty by the very fact that Supreme Court opinions tend towards the principle of stare decisis; namely to rely on previous legal precedents. This principle would seem to imply that Indigenous sovereignty would be understood within American case law in a fixed manner; namely, that trial sovereignty can always be overridden by the sovereignty of the United States if necessary because previous treatise divested Native peoples of most sovereign powers. Each of the court decisions examined built on previous decisions.

It is difficult to draw the conclusion from only five Supreme Court decisions that United States legal interpretations of sovereignty do not shift within the court. It would be necessary to code other important Supreme Court decisions to provide a more accurate tracing of tribal sovereignty throughout Supreme Court decisions. That being said, this study found the Supreme

Court opinions did not explicitly define tribal sovereignty, or sovereignty writ large, as historically defined in the sense of changing throughout history due to factors external to the law. To borrow the language of Barker, the Supreme Court Justices did not seem to define sovereignty as emerging from specific cultural, social, and political locations of contestation and competing political agendas (2005, 21). Instead, the contestations and controversies brought before the court were filtered through a very particular narrative of Indigenous sovereignty as possessing some powers prior to engagement with the United States, but which were almost entirely ceded by treaty obligations such that a "trust doctrine" could be established that allowed the federal government overriding authority and pre-emption. Even in cases that explicitly clarified that Indian tribes retained aspects of sovereignty, those were "carved out" in the sense that they were defined only in terms of *not* being taken away by treaties, not existing in spite of them.

These interpretations and Court opinions also do not define sovereignty in any multi-faceted way by acknowledging that there might be multiple interpretations of "sovereignty." Instead, cases like *Worcester v. Georgia* use sovereignty as a neutral concept with certain powers contained therein, from which the Court must determine if those powers had been ceded by the tribes or not. In contrast, indigenous thinkers like Porter explicitly reject the idea of a "one size fits all" understanding of sovereignty that is the baseline for legal interpretation (2002, 101). Thus, there is potentially an important distinction between the American and Indian conceptions of sovereignty rooted in the very possibility of its changing meaning, as opposed to always relying on historical referents.

6. Conclusions

In undergoing a grounded theory analysis of select Native political texts and Supreme Court opinions, this study found major differences in the usage and definition of "sovereignty" between texts by Indian political theorists and major Supreme Court decisions that all sought to define the term. While the ability to generalize this finding beyond the number of texts analyzed is limited given the nature and scope of this qualitative analysis, this study does point to the importance of considering that there are unconsidered gaps in meanings of sovereignty that have major consequences for the relationship between tribal nations and the United States. These differences included defining culture in terms of sovereignty, emphasis on internal or external definitions of political sovereignty, the acknowledgment of problematic nature of particular terms and their historical origins, as well as differences in how sovereignty is defined as contingent or not.

6.1. Future Research

Future research could draw upon and improve this study by expanding the number of texts analyzed to include other Indian political texts, such as more Supreme Court decisions that include some mention of the scope or aspects of tribal sovereignty. For example, a grounded theory approach could be applied to *United States v. Kagama* (1886), *United States v. Sandoval* (1913), *Montana v. United States* (1981), *Merrion v. Jicarilla Apache Tribe* (1982), *Duro v. Reina* (1990), or *Nevada v. Hicks* (2001). These texts all include at least some mention of tribal sovereignty, but were not included in this study because my review of the literature did not point to these as major of cases from which to analyze the United States traditional of legal definitions of tribal sovereignty.

In addition, future research could expand beyond merely coding for definitions of "sovereign" and "sovereignty" to analyze broader historical trends of how tribal governance and political authority is understood in Supreme Court decisions that lack explicit mention of tribal sovereignty. For example, Native authors such as Barker, Kickingbird, and Porter identified other significant Supreme Court cases such as *Ex Parte Crow Dog (1883)* or *Lone Wolf v. Hitchcock* (1903) which were not included in this study because the term "sovereign" did not appear within them. The benefit of this expansion would be to see if there are more implicit definitions of tribal sovereignty, akin to the "unspoken assumptions" that the *Oliphant* decision held were a sufficient legal basis to divest certain sovereign powers from tribal nations.

Alternatively, a grounded theory approach could include legal texts addressing the sovereignty of other indigenous populations both within the United States as well as abroad. As this study only examined the views of indigenous populations within the continental United States, texts from both Native scholars as well as legal document that address the sovereignty of Native Hawaiians or Alaskan Native tribal entities or corporations could be included. Documents addressing the sovereignty or political authority of Aboriginal Australians, the First Nations of Canada, or the Māori of New Zealand might also prove fruitful for a grounded theory analysis. Analyzing similarities and differences in definitions of sovereignty between Native scholars of different historical traditions and locations might point to the unique role that various histories play in shaping conceptions of sovereignty.

6.2. Policy Recommendations

The findings of this study lend themselves to a multitude of possible directions for future policymaking, both sweeping and smaller in nature. As previously mentioned, the recognition of

the significance and political legitimacy of oral tradition can greatly alter how government figures interpret the terms and legacy of treaty obligations between the United States and tribal nations. The impact of this inclusion is well beyond the scope of this thesis, especially as that oral tradition is not easily accessible by researchers, but instead would require significant dialogue between government officials of both governments in what Coffey and Tsosie identify as an explicitly bilateral process (2001, 204).

On a smaller scale, the fact that this study at least points to the possibility of differences in conceptualizing tribal sovereignty in other political documents and texts suggests the importance of greater dialogue with tribal nations before other government reforms with tribal nations to ensure that the specific needs of tribal nations are met as well as ensuring the terms of their engagement is not over-determined by American views (Harding et al. 2012, 6-10). Different tribal nations have different needs, such as wanting increased or decreased federal involvement in their affairs, or differing views on whether their tribal nation actually agreed to the trust doctrine in contrast to Supreme Court decisions that lead to sweeping political doctrines that apply to all tribal nations (Smith 2005, 115-116).

More significantly, this study raises the importance of considering that policies passed by the United States might be written in the language of increase tribal sovereignty and self-determination, and thus employing a shared political vocabulary with the demands of Native peoples, but having a very different conception of sovereignty in mind. These gaps in conceptions of sovereignty can produce policy consequences that are very different than what Native peoples intended, as illustrated by modern policy failures such as questions of property rights for energy reform (Royster 2012, 117-120). Many authors have suggested particular policy reforms to address some of the material conditions of Native peoples that result from current

interpretations of their sovereignty. These policy reforms include: listing Tribal Nations within the United Nations Decolonization Committee or United Nations Trusteeship System (Eaglewoman 2012, 706), reforming laws related to tribal property ownership and trust status to allow greater control over its use for projects such as renewable energy (Royster 2012, 135-137), allowing tribal nations to pursue restructuring of their governments to have greater control over practical governance operations (Porter 1997, 93-95), and other practices.

Any specific reform might be improved by including dialogue with tribal communities and analysis of what is meant when a particular population demands a measure to increase their sovereignty. As grounded theory is frequently applied to documents such as interview or meeting transcripts, this could also be applied within the policy process to code and examine in greater detail the meaning of demands by tribal nations while employing a method to minimize external interpretation (Charmaz 2005, 510-514). This is not to represent grounded theory as a panacea for current political struggles nor as a window to perfectly look at indigenous meaning and intent, as neither is possible within grounded theory (Smith 2005, 114-116). Instead, this study suggests that grounded theory, or at least willingness to consider the frames under which claims of sovereignty are made, is an important supplement to legal analysis to account for the complexities and historical legacies that produce the current conditions of tribal sovereignty.

Supreme Court Citations

Duro v. Reina, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990).

Ex parte Crow Dog, 109 U.S. 556, 3 S. Ct. 396, 27 L. Ed. 1030 (1883).

Johnson's Lessee v. M'Intosh, 21 U.S. 543, 5 L. Ed. 681 (1823).

Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903).

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

Oliphant v. Suquamish Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

The Cherokee Nation v. The State of Georgia, 30 U.S. 1, 8 L. Ed. 25, 8 L. Ed. 2d 25 (1831).

United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886).

United States v. Sandoval, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913).

United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).

Worcester v. Georgia, 31 U.S. 515, 8 L. Ed. 483, 8 L. Ed. 2d 483 (1832).

Bibliography

Alcoff, Linda. 1991. “The Problem of Speaking for Others.” *Cultural Crit*ique 20:5–32. doi:10.2307/1354221.

Barker, Joanne. 2005. “For Whom Sovereignty Matters.” In *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, edited by Joanne Barker, 1-31. Lincoln: University of Nebraska Press.

Bowes, John P. 2009. *The Trail of Tears: Removal in the South*. New York: Infobase Publishing.

Cave, Alfred A. 2003. “Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830.” *Historian* 65 (6): 1330–53. doi:10.1111/j.0018-2370.2003.00055.x.

Charmaz, Kathy. 2005. “Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies.” In *The SAGE Handbook of Qualitative Research,* 3rd ed, edited by Norman K. Denzin and Yvonna S. Lincoln, 507-535. Thousand Oaks: Safe Publications, Inc.

———. 2008. “Grounded Theory as an Emergent Method.” In *Handbook of Emergency Methods*, edited by Sharlene Hesse-Biber and Patricia Leavy, 155-172. New York: The Guilford Press.

Cobb, Amanda J. 2005. “Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations.” *American Studies* 46 (3/4): 115–32.

Coffey, Wallace, and Rebecca A. Tsosie. 2001. *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*. SSRN Scholarly Paper ID 1401586. Rochester, NY: Social Science Research Network. http://papers.ssrn.com/abstract=1401586.

Croxton, Derek. 1999. "The Peace of Westphalia of 1648 and the Origins of Sovereignty." *The International History Review* 21 (3): 569–91. doi:10.1080/07075332.1999.9640869.

Deloria Jr., Vine and Clifford M. Lytle. 2005. "The Future of Indian Nations." In *Native American Sovereignty*, edited by John R. Wunder, 307-322. New York: Garland Publishing, Inc. Taylor & Francis e-Library edition.

Denzin, Norman K. and Yvonna S. Lincoln. 2005. "Introduction: The Discipline and Practice of Qualitative Research." In *The SAGE Handbook of Qualitative Research,* 3rd ed, edited by Norman K. Denzin and Yvonna S. Lincoln, 1-32. Thousand Oaks: Safe Publications, Inc.

Deudney, Daniel. 1996. "Binding Sovereigns: Authorities, Structures, and Geopolitics in Philadelphian Systems." In *State Sovereignty as a Social Construct*, edited by Thomas J. Biersteker and Cynthia Weber, 190-239. Cambridge: Cambridge University Press.

EagleWoman, Angelique Townsend. 2012. "Bringing Balance to Mid-North America: Restructuring the Sovereign Relationships between Tribal Nations and the United States." *University of Baltimore Law Review* 41: 671-707.

Endres, Danielle. 2009. "The Rhetoric of Nuclear Colonialism: Rhetorical Exclusion of American Indian Arguments in the Yucca Mountain Nuclear Waste Siting Decision." *Communication and Critical/Cultural Studies* 6 (1): 39–60. doi:10.1080/14791420802632103.

Fairbanks, Robert A. 1995. "Native American Sovereignty and Treaty Rights: Are They Historical Illusions?" *American Indian Law Revi*ew 20 (1): 141–49. doi:10.2307/20068787.

Grande, Sandy. 2004. *Red Pedagogy: Native American Social and Political Thought*. Lanham: Rowman & Littlefield.

Grey, Thomas C. 1978. "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought." *Stanford Law Review* 30 (5): 843. doi:10.2307/1228166.

Hannum, Hurst. 1998. "Sovereignty and Its Relevance to Native Americans in the Twenty-First Century." *American Indian Law Review* 23 (2): 487–95. doi:10.2307/20068898.

Harding, Anna, Barbara Harper, Dave Stone, Catherine O'Neill, Patricia Berger, Stuart Harris, and Jamie Donatuto. 2012. "Conducting Research with Tribal Communities: Sovereignty, Ethics, and Data-Sharing Issues," *Environmental Health Perspectives* 120(1):6-10. doi:10.1289/ehp.1103904.

Harjo, Joy and Stephen Strom. *Secrets from the Center of the World*. 1989. Tucson: University of Arizona Press.

Hsieh, Hsiu-Fang, and Sarah E. Shannon. 2005. "Three Approaches to Qualitative Content Analysis." *Qualitative Health Research* 15 (9): 1277–88. doi:10.1177/1049732305276687.

Jackson, Robert. 1999. "Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape." *Political Studies* 47 (3): 431–56. doi:10.1111/1467-9248.00211.

Kalyvas, Andreas. 2005. "Popular Sovereignty, Democracy, and the Constituent Power." *Constellations* 12 (2): 223-244. DOI: 10.1111/j.1351-0487.2005.00413.x

Kickingbird, Kirike, Lynn Kickingbird, Charles J. Chibitty, and Curtis Berkey. 2005. "Indian Sovereignty." In *Native American Sovereignty*, edited by John R. Wunder, 1-60. New York: Garland Publishing, Inc. Taylor & Francis e-Library edition.

Kuokkanen, Rauna. 2003. "Toward a New Relation of Hospitality in the Academy." *The American Indian Quarterly* 27 (1): 267–95. doi:10.1353/aiq.2004.0044.

Martin, Patricia Yancey, and Barry A. Turner. 1986. "Grounded Theory and Organizational Research." *The Journal of Applied Behavioral Science* 22 (2): 141–57. doi:10.1177/002188638602200207.

Oppenheim, Lassa F. 1912. *International Law: A Treatise. Vol. 1*. 2nd ed. http://www.gutenberg.org/files/41046/41046-h/41046-h.htm

Porter, Robert B. 1997. "Strengthening Tribal Sovereignty through Government Reform: What Are the Issues." *Kansas Journal of Law & Public Policy* 7: 72.

———. 2002. "Meaning of Indigenous Nation Sovereignty, The." *Arizona State Law Journal* 34: 75-112.

Prucha, Francis Paul. 1994. *American Indian Treaties: The History of a Political Anomaly*. Oakland: University of California Press.

Rifkin, Mark. 2009. "Indigenizing Agamben: Rethinking Sovereignty in Light of the 'Peculiar' Status of Native Peoples." *Cultural Critique* 73 (1): 88–124. doi:10.1353/cul.0.0049.

Royster, Judith V. 2008. "Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act." *Lewis & Clark Law Review* 12: 1065.

———. 2012. "Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures." *Stanford Environmental Law Journal* 31: 91.

Smith, Linda T. 2005. "On Tricky Ground: Researching the Native in the Age of Uncertainty." In *The SAGE Handbook of Qualitative Research,* 3rd ed, edited by Norman K. Denzin and Yvonna S. Lincoln, 85-107. Thousand Oaks: Safe Publications, Inc.

Starn, Orin. 2011. "Here Come the Anthros (Again): the Strange Marriage of Anthropology and Native America." *Cultural Anthropology* 26 (2): 179–204. doi:10.1111/j.1548-1360.2011.01094.x.

Suddaby, Roy. 2006. “From the Editors: What Grounded Theory Is Not.” *Academy of Management Journal* 49 (4): 633–42. doi:10.5465/AMJ.2006.22083020.

Tonasket, Mel, Ernest L. Stevens, and Katherine Whitehorn. 2005. “American Indian Declaration of Sovereignty.” In *Native American Sovereignty*, edited by John R. Wunder, 1-60. New York: Garland Publishing, Inc. Taylor & Francis e-Library edition.

Urquhart, Cathy, Hans Lehmann, and Michael D. Myers. 2010. “Putting the ‘theory’ Back into Grounded Theory: Guidelines for Grounded Theory Studies in Information Systems.” *Information Systems Journal* 20 (4): 357–81. doi:10.1111/j.1365-2575.2009.00328.x.

U.S. Department of the Interior, Census Office. 1894. “Indians Taxed and Indians Not Taxed in The United States (Except Alaska).” http://books.google.com/books/about/Report_on_Indians_taxed_and_Indians_not.html?id=KWkUAQAAMAAJ

Wight, Martin. 1977. *Systems of States*. Leicester: Leicester University Press.

Wildenthal, Bryan H. 2003. *Native American Sovereignty on Trial: A Handbook with Cases, Laws, and Documents*. ABC-CLIO.

Wunder, John R. 1996. Native American Sovereignty. New York: Garland Publishing, Inc. Taylor & Francis e-Library edition.