

# THE MAPS OF SOVEREIGNTY: A MEDITATION

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A few years ago, some students at my school formed a group to discuss Native American issues. One of their posters featured a multiple-choice question. I do not recall the exact words of either the question or the answers, but a paraphrase will do. The question was, "how many sovereign governments are there in the United States?" The first answer was one. The second answer was fifty-one. The third answer was fifty-two or fifty-three or thereabouts, adding Puerto Rico and such to the list. The fourth answer—the right answer—was a

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number in the high three digits, or fifty-some plus the number of American Indian tribes. The point was that Indian tribes, the first occupants of this land, must be included in the tally of sovereign governments that now share jurisdiction in that land.<sup>1</sup>

This poster bears three morals. The first is that the civics class vision of the American polity is wrong. We are not one nation, born in 1776. We are many nations, most much older than that. The majority of those nations are small and poor.<sup>2</sup> They are victims of centuries of war and plunder. But they are nations. They are not only nations metaphorically, or sociologically. They are nations by law. Like other nations, they legislate and adjudicate, manage public policy, and regulate private order.<sup>3</sup> This is a commonplace to those of us who spend some time studying American Indian law, but it often seems to surprise almost everybody else.

The second moral of the poster is more subtle. Tribal sovereignty does not exist only in the contemplation of Native Americans and their friends. It is recognized by the United States. Court decisions speak of it.<sup>4</sup> United States Indian policy has included expulsion, theft, murder, and forced assimilation.<sup>5</sup> But it has never wholly aban-

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<sup>1</sup> In fact, the poster might have sold its argument short. A strong body of opinion holds, after all, that the states of the union, despite our legal rhetoric, are only creatures of a unitary republic. See *infra* note 12 and accompanying text (discussing relation of theories of federalism to theories of sovereignty). The poster's vision of Indian sovereignty was surely more robust. See also *V. Deloria & C. Lytle, The Nations Within: The Past and Future of American Indian Sovereignty* 14 (1984) ("Indian tribes exercise in some respects more governing powers than . . . the states . . .").

<sup>2</sup> See D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 1-13 (2d ed. 1986).

<sup>3</sup> See C. Wilkinson, *American Indians, Time, and the Law* 62-63 (1987).

<sup>4</sup> Chief Justice Marshall first articulated the American judicial vision of Indian sovereignty in a pair of cases discussed at *infra* notes 75-88 and accompanying text. More recent cases affirming the sovereign status of Indian tribes include: *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (tribe has right to tax without approval of Secretary of the Interior); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribes possess civil regulatory jurisdiction over non-Indians on reservation); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (tribes possess sovereign immunity); *United States v. Wheeler*, 435 U.S. 313 (1978) (tribes are separate sovereigns for purposes of Constitution's double jeopardy clause); *Williams v. Lee*, 358 U.S. 217 (1959) (state courts have no jurisdiction over suit arising on reservation, even though brought by non-Indian against Indian).

Of course, the course of judicial decision has not always been supportive of Indian sovereignty or understanding of its requirements. A major line of cases in the late nineteenth and early twentieth century, corresponding to powerful assimilationist trends in Congress and the nation, retreated considerably from the early Marshall formulations. See C. Wilkinson, *supra* note 3, at 24-26. More recently, the Court's Indian jurisprudence has often been contradictory and confused. See *Pelcyger, Justices and Indians: Back to Basics*, 62 *Or. L. Rev.* 29 (1983). See also *infra* text accompanying notes 42-43 (discussing plenary power doctrine).

<sup>5</sup> See generally J. Olson & R. Wilson, *Native Americans in the Twentieth Century* (1984) (describing how tribal political and economical power was determined by policies of the fed-

doned the principle of legal recognition.<sup>6</sup>

Actually, the United States does more than admit Indian sovereignty. A body of United States law largely defines the shape of—and the considerable limits on—Indian self-rule. The federal government recognizes about 500 tribal governments.<sup>7</sup> The effective power of these governments depends on a jumble of federal law. Tribes that do not have federal recognition seek it. They realize that sovereignty means little without it. Some scholars argue that even the idea of the tribe as a basic unit of identity and governance, as opposed, say, to the kin group or village, was imposed on Indians from the outside.<sup>8</sup>

Maybe, then, tribal sovereignty is a sham. Maybe tribes are only agents, or subsidiary organs, of the national polity. But this judgment would be too hasty. Federal law speaks to Indian sovereignty. But so do treaties and agreements with the tribes.<sup>9</sup> Indian nations are not

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eral government and how tribal customs were assaulted by liberal reformers seeking acculturation of native Americans to European-American values); W. Washburn, *The Indian in America* (1975); W. Washburn, *Red Man's Land/White Man's Law: A Study of the Past and Present Status of the American Indian* (1971) (describing the change of U.S. policy from one of barriers between U.S. and Indian territories to the violation of treaties and forced removal from land previously promised).

<sup>6</sup> Two major periods in which United States policy swung in the direction of forced assimilation and detribalization were the late nineteenth to early twentieth centuries and the 1950s. Both efforts, however, were piecemeal and incomplete, and were eventually repudiated as the pendulum of United States policy swung back in the direction of government-to-government recognition. See J. Olson & R. Wilson, *supra* note 5, at 49-78, 131-56.

<sup>7</sup> D. Getches, D. Rosenfelt & C. Wilkinson, *supra* note 2, at 5.

<sup>8</sup> See, e.g., 2 Kroeber, *Nature of the Landholding Group*, *Ethnohistory* 303 (1955); see generally S. Cornell, *The Return of the Native* 71-86 (1988) (citing sources on pre-contact Indian political structure and discussing process of "tribalization").

<sup>9</sup> Treaties with the tribes predate the Constitution. During the nineteenth century, they were the primary legal instrument for relations between the United States and the Indians. Indian treaties have the same dignity as treaties with foreign nations, and are binding on the United States unless abrogated. See F. Cohen, *Handbook of Federal Indian Law* 62-63 (3d ed. 1982); see also C. Wilkinson, *supra* note 3, at 14-19, 100-05 (discussing treaty-making process and consequences); W. Washburn, *The Indian in America*, *supra* note 5, at 97-103 (same). "Indian treaties, by definition, implied a contractual relationship between two autonomous parties." *Id.* at 103.

Formal treaty making ended in 1871, largely because the House of Representatives did not want the Senate to have sole effective authority over Indian policy. See F. Cohen, *supra*, at 107; Wunder, *No More Treaties: The Resolution of 1871 and the Allocation of Indian Rights to their Homelands*, in *Working the Range* 39-56 (J. Wunder ed. 1985). The statute that ended treaty making expressly continued all obligations under existing treaties. Appropriations Act of March 3, 1871, Ch. 120, § 1, 16 Stat. 566, 546 (codified at 25 U.S.C. § 71 (1982)). Even after the end of formal treaty making, the government continued to enter into agreements with the tribes. These agreements have the same legal effect as treaties. Antoine v. Washington, 420 U.S. 194, 204 (1975).

Recently, there has been increased interest in reviving the treaty or agreement as the appropriate instrument for United States-Indian relations. See, e.g., V. Deloria, *Behind the Trail of Broken Treaties* (1974); Final Report and Legislative Recommendations: A Report of the Special Committee on Investigations of the Select Committee on Indian Affairs of the

creatures of the United States Constitution, and are not bound by it.<sup>10</sup> Historically and legally, they are distinct entities. The tribes' complex tie to the United States limits the exercise of their sovereignty. But the source of that sovereignty is not the United States but themselves.<sup>11</sup> American governance, including for that matter American federalism,<sup>12</sup> is usually explained by way of a general, more or less unified, constitutional vision. Indian sovereignty is an exception to that vision. It would not exist if Indians had not fought for it, and lived it.

And even if Indian sovereignty is partly constructed from the outside, that still does not disqualify it. All claims to sovereignty arise from a union of self-assertion and external perception. Legal communities, much like people, constantly construct each other as they construct themselves.

This brings me to the third message of the poster. Perhaps more remarkable than that the United States recognizes Indian sovereignty is that Native Americans, on the whole, recognize United States sovereignty. After all, they have every reason to see European settlement here as an illicit foreign incursion. Nevertheless, from colonial times, Native Americans saw in the settlers a corporate dignity very different from, say, undocumented aliens.<sup>13</sup> This was in part a pragmatic concession. But not entirely. Singly, Europeans could—and sometimes did—assimilate into Indian society.<sup>14</sup> As a group, however, they were

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United States Senate, S. Rep. No. 216, 101st Cong., 1st Sess. 17 (1989) ("We must promise the word of our nation again by entering into new agreements that both allow American Indians to run their own affairs and pledge permanent federal support for tribal governments"). Among the small steps in that direction has been the Indian Self-Determination and Education Assistance Act of 1975, under which tribes can contract directly with federal agencies for the provision of social services. 25 U.S.C. §§ 450a-n (1982).

<sup>10</sup> See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 168 (1982); *Talton v. Mayes*, 163 U.S. 376, 384 (1895).

<sup>11</sup> The classic formulation is Felix Cohen's:

Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation . . . . What is not expressly limited [by congressional action] remains within the domain of tribal sovereignty.

F. Cohen, *Handbook of Federal Indian Law* 122 (1st ed. 1942).

<sup>12</sup> For some contemporary accounts, see, e.g., W. Bennett, *American Theories of Federalism* (1964); Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425 (1987); Beer, *Federalism, Nationalism, and Democracy in America*, 72 *Am. Pol. Sci. Rev.* 9 (1978); Graglia, *In Defense of Federalism*, 6 *Harv. J.L. & Pub. Pol'y* 23 (1982); Stewart, *Federalism and Rights*, 19 *Ga. L. Rev.* 917 (1985).

<sup>13</sup> See *infra* notes 105-06 and accompanying text.

<sup>14</sup> See J. Axtell, *The White Indians, in The Invasion Within* 302-27 (1985); J. Heard,

themselves a tribe. Today, that tribe has spread across the continent, and most Native Americans are willing to respect the political map that is the result of that expansion.

To be sure, some Native Americans have denied the legitimacy of the United States. Understandably, many reject the broadest claims of United States authority. Nevertheless, the very importance of the idea of nation-to-nation relations in modern Native American political theory testifies to a willingness to live with, and in, the American nation.<sup>15</sup> More than that, most Indians, while not ceding their own nationhood, accept the rights and obligations of United States citizenship. Moreover, if Indian sovereignty is in part constructed by United States recognition, then maybe United States sovereignty is—in part—grounded on Indian willingness to return the favor.

This Article is a meditation on legal communities recognizing each other. It is about states<sup>16</sup> recognizing communities that are not states. It is also about those communities recognizing the state. The American Indian story is one model for such mutual recognition. It is also a special, even anomalous instance, and one of my tasks will be to explore that tension. But my interest is not just with Indian tribes. It is with any group that speaks its own law, that thinks of itself as juridically autonomous, as something other than a creature of the law of the state. The other example to which I will devote some attention is that of religious communities, or at least those bound up in obedience to religious law. But neither aboriginal people nor religious communities by any means exhaust the scope of the subject.

In this Article I share some thoughts about why states and other legal communities might recognize each other's legitimacy, authority, and juridical dignity. I also discuss the limits on such recognition. And I talk about its symmetries and asymmetries. Modern states are not like other communities. No amount of talk will change that. But those differences can be the occasion for, rather than an obstacle to, mutual recognition. Indeed, one of my main themes will be that sovereignty, and the relationship of sovereigns among sovereigns, can take forms more diverse, and subtle, than we usually imagine.

This Article belongs to a body of legal scholarship that refuses to

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White Into Red: A Study of the Assimilation of White Persons Captured by Indians (1973); Hallowell, *American Indians, White and Black: The Phenomenon of Transculturalization*, 4 *Current Anthropology* 519 (1963). Both contemporaries and historians have stressed that these conversions of Europeans to Indian ways were actually more common, at least in colonial times, than Indian conversions to European ways. See J. Axtell, *supra*, at 302-03, 372 n.4.

<sup>15</sup> See *infra* notes 105-06 and accompanying text.

<sup>16</sup> By "states," I am referring to countries or nation-states in the international sense. That will be my usual meaning in this essay, unless the context indicates otherwise.

limit the domain of law to the law of the state.<sup>17</sup> Given that literature, there is nothing new in the claim that non-state legal orders exist, or that they are worthy of study and respect. If I add anything, it is only by way of tone and emphasis, and certain reckless extrapolations, and by way of a particular focus on the logic of mutual recognition.

I also want to highlight, in the course of talking about the mutual recognition of legal orders, some of the ambivalences, or dialectic tensions, implicit in that enterprise. One of these tensions, already emphasized, is the interplay between self-affirmation and external recognition in the construction of a legal order. Another is the dance between legal rhetoric, which revels in the power of talk to shape truth, and social facts, which both resist the power of words and cannot ultimately be understood without them.

Maybe the most complex dialectic, and the most disturbing, is between legal recognition and simple humanity. It is tempting to treat recognition of other legal orders, on the one hand, and humane respect for their self-government and self-expression, on the other, as identical, or at least complementary. That assumption has a good deal going for it. The whole truth, however, is that the impulse of recognition is not quite that simple. Recognition can be the foundation for respect. But it can also accompany exploitation or oppression—the distancing of the other—rather than respect. Any full account of the dynamics of mutual recognition must take that dark side into account as well.<sup>18</sup>

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<sup>17</sup> The pioneer of this tradition, at least in its modern form, was Otto Gierke, a nineteenth century German scholar. See, e.g., O. Gierke, *Natural Law and the Theory of Society* (Barker trans. 1934); O. Gierke, *Political Theories of the Middle Age* (Maitland trans. 1900) [hereinafter *Middle Age*]. Among the other classic sources are: J. Figgis, *Churches in the Modern State* (1914); H. Krabbe, *The Modern Idea of the State* (G. Sabine & W. Shepard trans. 1922); H. Laski, *The Foundations of Sovereignty and Other Essays* (1921); H. Laski, *Studies in the Problem of Sovereignty* (1917) [hereinafter *Sovereignty*]. A small selection of the more recent literature would include H. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (1985); M. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975); Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 *J. Legal Pluralism* 1 (1981); Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 *U. Chi. L. Rev.* 567 (1983). My own most direct inspiration, though I differ with it in many details, is the work of Robert Cover, most particularly *Nomos and Narrative*, 97 *Harv. L. Rev.* 4 (1983). There is, of course, also a voluminous sociological and anthropological literature in which non-state forms of law are taken for granted. See generally L. Pospisil, *Anthropology of Law: A Comparative Theory* 97-106 (1971) (brief history of the idea of the multiplicity of legal systems in a society).

Some of the literature on legal pluralism concerns itself not only with non-state legal orders, but also with various forms of private ordering, informal justice, alternative dispute resolution, and decentralization. For myself, I do not necessarily think it is wise to treat all these phenomena under one rubric. Cf. *infra* Section II.C. (suggesting rough criteria for the identification of true non-state legal orders).

<sup>18</sup> This "dark side" of recognition is one of the cautions that Monroe Price, in his comment

In one sense, this essay is the product of very practical impulses. It seeks to help non-state orders find their place in the world—to enhance Native American self-rule and to extend the autonomy of religious practice from undue interference, for example. But recognition, as I stress later on, is both more and less than a practical legal tool for securing certain fixed rights. It is an idea beyond the control of any neat political agenda. And that is also part of the story.

### I. SOVEREIGNTY-TALK

Let me begin in the realm of talk. I have used the term sovereignty and will be using it repeatedly. The idea of sovereignty is central to public international law, which, in common with conventional political theory,<sup>19</sup> ascribes it only to states.<sup>20</sup> In invoking that same idea in describing the mutual recognition of state and non-state legal orders, however, I am not necessarily suggesting a change in international law. I am happy to treat international law as a distinct legal arena performing certain specialized functions, which might or might not need reformation. The legal encounter of state and non-state legal orders can take place under different rubrics, and in different arenas.

Why then, refer to sovereignty at all? Not because I am mainly interested in parsing one word. I have also used, and will continue to use, other terms that help to describe what I am getting at: legal autonomy, jurisdiction, and—my phrase, I think—juridical dignity. Nevertheless, there are at least three reasons to keep referring to sovereignty. The first reason is that sovereignty is, after all, the term conventionally used in the Native American context, which is one reference point for this essay.<sup>21</sup> That usage has, I think, as much claim to being normative as any other. The second reason is that the same tradition in legal and political theory that refuses to identify law with the law of the state, has also, in some of its manifestations, vigorously challenged the rigid identification of sovereignty with the state.<sup>22</sup> This line of thought seems to be worth perpetuating. The third reason is that sovereignty carries a special resonance. This resonance, admittedly, comes in part from the privileged use to which the word is put in international law and the modern theory of the state. But it is also

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to this essay, so eloquently stresses. The draft of this essay that Dean Price read when he prepared his Comment recognized the issue, but did not face it as squarely as I now attempt to.

<sup>19</sup> For some of the intellectual background, see H. Cohen, *Recent Theories of Sovereignty* 7-18 (1937).

<sup>20</sup> See I. Brownlie, *Principles of Public International Law* 80-81, 289-90 (3d ed. 1979).

<sup>21</sup> See C. Wilkinson, *supra* note 3, at 54-55 (discussing use of the term sovereignty in American Indian law).

<sup>22</sup> I am thinking in particular of the works of H. Laski, *supra* note 17.

a resonance—and a set of ideas and meaning—that those uses cannot, or should not, entirely appropriate.

Consider, then, sovereignty. Sovereignty, as an idea in relations among legal orders, is a general, potentially elastic, legal category. It flags certain types of legal arguments and conclusions. It captures a form of talk found in a variety of settings, of which public international law and American Indian law are only two of the most explicit examples. Sovereignty, whether it takes that name or some other name, is a socially constructed category. To say that, however, is not to say that it reduces to other, more primary, variables. Sovereignty is tied to power, cohesion, identity, culture, faith, community, and ethnicity, among other things. But, it is more than the sum of those parts. Moreover, those other variables are themselves, as often as not, socially constructed, in part out of the language of sovereignty.

#### A. *Sovereignty and Rights*

In my story of the poster on the walls of the Yale Law School, I contrasted issues of sovereignty to issues of government design. Another contrast exists between issues of sovereignty and issues of rights. Rights-talk is the typical work of constitutions and contracts. Sovereignty-talk is a distinct form of argument. It is the demand that one legal system recognize the prerogatives of another.<sup>23</sup> Tribal sovereignty is more than a right of association, or a right to contract. Similarly, religious autonomy is more than a right of free exercise, although it is handy, even sensible, to call it that. Respecting another legal order's autonomy does not require accepting the full extent of its claims. It does require, however, treating the other legal order as a legitimate occupant of sovereign space.

Rights can inhere in persons or in groups. Sovereignty, or at least sovereignty unalloyed by rights-talk, inheres in communities, in at least some form. This is nothing sacred or mysterious. Sovereignty-talk is not libertarianism. It does not abandon legal authority, but spreads it out. A corollary is that sovereignty involves the recog-

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<sup>23</sup> This proposition is not as simple as it sounds, even in the context of relations among states. Hans Kelsen argued that, from "the point of view of a cognition which is concerned with the validity of norms," no two legal systems can be "mutually independent in their validity"; either one must be subordinate to the other, or both must be subordinate to some higher legal order. H. Kelsen, *General Theory of Law and State* 407-08 (A. Wedberg trans. 1945). Whether Kelsen meant his thesis to apply in a factual as well as a formal sense is not clear. See I. Englund, *Religious Law in the Israel Legal System* 39-40 & n.40 (1975). My own view is that states (and other legal orders) can, as an exercise of their own legal imagination, search for those transcendent legal principles that would allow them to recognize and accommodate other legal orders. See Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 *Yale L.J.* 1191 (1987).



inition of some element of coercion, by some meaning of the word. The potential conflict between the individual and the group is one complication of sovereignty-talk. But it is precisely in sovereignty-talk that we should beware of choosing sides too quickly in that intractable conflict. For one sovereign to refuse to recognize another sovereign's dominion over a person often, after all, simply amounts to the first sovereign claiming that dominion for itself.

Rights-talk comes out of a given legal system. Sovereignty-talk requires legal systems to step—ever so partially—outside themselves. Rights tend to be discrete. They entail specific freedoms or privileges. Sovereignty is a more general, and a more dispersed, idea. It is less a grant of freedoms or privileges than the power to define freedoms and privileges. More important, it is the capacity to build an order of values and structures to sustain or change those values. Sovereignty, as I want to understand it here, is not indivisible, or unlimited. Nor is it necessarily homogenous. But, however divided, limited, and heterogeneous it is, it is a dynamic, organic whole.

### B. *Indian Bingo and Church Property*

Two examples might help flesh out these generalities. The first is from American Indian law. One recent line of cases has looked at the balance of authority between tribes and states of the union in the control of activities in Indian country. Does tribal law or state law govern fish and game policy on Indian land?<sup>24</sup> Do state alcohol laws apply?<sup>25</sup> Do state gambling laws apply? Often these cases involve specific statutes or other issues that are not my concern here. A more general question, though, is the extent to which tribal authority should be limited to those activities in which a tribe has traditionally engaged. Some opinions suggest it should. Thus, tribes may control hunting and fishing because tribes have always hunted and fished. But they do not have the same leeway in deciding alcohol policy.<sup>26</sup> And some courts have upheld state prohibition of high-stakes bingo, a source of revenue for many tribes, because bingo was not a "traditional Indian practice."<sup>27</sup> (The better authority, I should add, is

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<sup>24</sup> 24 See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

<sup>25</sup> See *Rice v. Rehner*, 463 U.S. 713 (1983).

<sup>26</sup> *Id.* at 724.

<sup>27</sup> See e.g., *Oklahoma v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 90 (Okla. 1985) ("Does state regulation of tribal bingo games conducted in Indian Country constitute per se an infringement upon Indian self-government? Here we are unable to ascertain that bingo is a traditional tribal activity or one involving essential tribal functions, and hence we must . . . give a negative answer."); see also *Penobscot Nation v. Stilphen*, 461 A.2d 478, 490 (Me. 1983)

otherwise.)<sup>28</sup>

This historical test forgets that true sovereignty is organic and self-defining. It entails the power to change—to create new realities.<sup>29</sup> The idea that one Parliament cannot bind another, or that government cannot contract away its police power, are emblems of this principle. Indian nations, too, if they are to be nations, cannot be treated as museum relics.<sup>30</sup> Their relationship to the United States implies, for better or worse, limits on their authority to regulate their affairs. But whatever those limits are, tribes cannot just be bearers of a set of rights minutely fixed in the concrete of history.

The problem of Indian bingo raises broader questions about the claims of history, and their relation to the claims of principle. It might seem strange that I have identified too slavish a devotion to history as a species of rights-talk. If anything, it is rights-talk that critics usually accuse of being too ahistorical. Moreover, history surely plays some role in the dynamics of how sovereigns recognize each other. I will return to these deep, unresolved issues later. For now, consider only that when rights-talk does look to history, it tends—for its own good reasons—to treat history as static, as a moment in the past that creates rights in the present. Think of contracts, or wills. In sovereignty-talk, however, history is alive. It is not the weight of the past, but a chain linking past and present.

My second example concerns the involvement of American courts in the internal disputes of religious groups. These disputes are often over the control of property or personnel. They are often between local churches and central church bodies, or between factions of local churches. They often turn on arguments about religious doctrine or practice. Long ago, the Supreme Court held that it would not—could not—decide for itself which side in a religious dispute had the better of a theological argument.<sup>31</sup> For years after that, the

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(interpreting Maine Indian Claims Settlement Act and holding that Beano has played no part in the Penobscot Nation's historical culture or development).

It is not uniquely Indian in character. It is not a traditional Indian practice and has no particular cultural importance for the Nation. Its only relationship to the Nation's 'internal tribal matters' consists in the fact that the games' proceeds are used to finance admittedly legitimate tribal services and programs.

Id.

<sup>28</sup> See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>29</sup> Much the same point is made in *C. Wilkinson*, *supra* note 3, at 68-75.

<sup>30</sup> See *R. Barsh & J. Henderson*, *The Road* 118 (1980). "[T]ribal self-government should not be identified with cultural fossilization. White self-government does not depend upon the preservation of 'pioneer culture.' Like all government, it continues to provide a process for mediating social, economic and cultural change. Self-government transcends culture; it is the right to choose culture." Id.

<sup>31</sup> *Watson v. Jones*, 80 U.S. 679 (1871); see also *Presbyterian Church v. Mary Elizabeth*

Court's approach was to defer to whichever organ of the church seemed to have the final say in the matter under church law. For hierarchical religions, this was the highest church body. For non-hierarchical religions, it was the local congregation.<sup>32</sup> The secular court's role, admittedly not always easy, was to decide whether a given religious community was hierarchical or congregational.

Recently, however, the Supreme Court has held that state courts also could opt to settle internal religious disputes by resort to so-called neutral principles of law.<sup>33</sup> The neutral principles approach also rejects judicial inquiry into religious doctrine. Rather than deferring to religious tribunals, however, it looks to secular criteria—to documents such as deeds and trusts—to settle the dispute. Put simply, the name on the deed controls the land.

The problem with this scheme, apart from its bruising of settled expectations, is that it too denies the collective, self-defining character of true legal orders.<sup>34</sup> It treats religious autonomy as a negative freedom—the right not to have secular courts decide religious orthodoxy. But it ignores the positive side of autonomy, the right to define, and to enforce, legal rubrics and rights apart from those provided by the secular state. A deed or a trust might govern the relation of a church to outsiders. It is, often, only the palest reflection of the internal legal architecture of a religious community.

These two examples—Indian bingo and church feuds—might seem unequal to the weight of my rhetoric about the nature of sovereignty. But the confrontation of sovereigns always mixes high rhetoric and low detail. Consider how states debate the mapping of waterways or the reach of antitrust laws or the right of set-off in suits by foreign banks.

Moreover, even these low details invite other questions. What is Indian sovereignty if its scope must be adjudicated by United States courts? Does religious autonomy mean anything if religious tribunals, even when their writ is respected, must resort to the civil sheriff to

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Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (formally constitutionalizing rejection of deviation-from-doctrine test in religious property disputes).

<sup>32</sup> See, e.g., Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich, 426 U.S. 696 (1976); Kedrooff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

<sup>33</sup> Jones v. Wolf, 443 U.S. 595, 602-06 (1979); see also *Presbyterian Church*, 393 U.S. 440 (suggesting application of “neutral principles of law” to church property dispute).

<sup>34</sup> “The neutral principles approach evinces a fixation upon secularism—in this context, judicial secularism—at the expense of the earlier commitment to institutional separation. Cases implementing this approach show how the secularist construction, although initially derived from—and often held to be synonymous with—the notion of separation of church and state, may drain the separation principle of much of its force.” Smith, Separation and the “Secular”: Reconstructing the Disestablishment Decision, 67 Tex. L. Rev. 955, 984-85 (1989).

enforce that writ? Or, from the other end of the telescope: What would Native American legal theory say about the reach of United States gaming laws? To what extent do definitions of property rights under religious law incorporate entitlements drawn from civil law? These issues will have to be revisited before this essay is complete.

### C. *More on Sovereignty and Rights*

There is more to the contrast between rights-talk and sovereignty-talk. Rights, as I have stated, are the creature of a legal system. Just as important, they serve the purposes of that legal system, even if they are libertarian purposes, even if they arise out of a theory of natural law. The recognition of another sovereign does not serve a purpose, as such, though purposes can be articulated for it. It is more of an existential encounter, a fact—if a socially constructed fact—of the world.

One consequence of the existential element in the encounter of sovereigns is that sovereignty has something of the arbitrary about it. The world political map is arbitrary.<sup>35</sup> It is not without thought, but it is still arbitrary. Similarly, there is something arbitrary about recognizing the sovereignty of Indian tribes, yet not that of other ethnic groups, or the autonomy of religion, yet not that of sports. None of these distinctions is totally arbitrary. Principled explanation is possible. But a certain element of the arbitrary must remain because any act of encounter is necessarily beyond the complete systematic ordering of either party to the encounter.

There is another side to this. If rights serve the purposes of a legal regime, how they are exercised is, in some sense, the burden of that regime. To allow a right is not a neutral act. It affirms—for good or ill—a set of values, the design of a legal landscape.

The recognition of sovereignty is another matter. It is not validation by permission. It is not even a calculation that the benefits of freedom outweigh its costs. On its own terms, it does not grant anything that would otherwise not exist. It does not compromise the legal landscape of the sovereign doing the recognizing. It is only a confession that the world contains many legal landscapes.

The recognition of another's sovereignty is not necessarily more liberating than the recognition of another's rights. It can be less liberating. But it is liberating in a different way. Recognition is empowering, even mutually empowering. It is, for legal communities, something like a human being's passage out of infancy—not the disin-

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<sup>35</sup> See C. Beitz, *Political Theory and International Relations* 136-43 (1979).

tegration of self but its sharper definition in a world of other selves. Sovereigns do intervene in each other's affairs. But it is the intervention of strangers. Its source is not the simple calculus of governance, but the complicated ethics of encounter.<sup>36</sup> It is, when done right, like one person on the street stopping another from beating her child. The dark complication here—part of the dialectic tension I spoke about at the start—is that the existential encounter can also detach itself completely from any sense of order or principle. Sometimes, it takes the form of hate and warfare. At its worst, it is not like protecting a stranger's child, but more like accosting the stranger with her child.

#### D. Connections

I have been stressing the contrast between sovereignty and rights. But these two forms of talk also connect. Rights can be a metaphor for sovereignty and sovereignty can be a metaphor for rights. Or the two forms of talk can merge.<sup>37</sup> More commonly, one form of talk builds upon the other. For example, public international law posits a universal legal order in which the relations of sovereign states can be regulated through a system of rights.<sup>38</sup> Similarly, private international law—choice of law—posits that one legal system can judge and enforce individual rights created in another.

There are yet more involved examples. Consider the metaphor of the "wall of separation" between church and state. This image symbolizes the core of sovereignty-talk in our consideration of the legal status of religion in America. It recalls the intellectual and political history of the European ecclesiastical and civil polities.<sup>39</sup> It invokes homegrown ideas about the nature and limits of the two kingdoms.<sup>40</sup> Today, the metaphor of a wall of separation necessarily implies a domain—a distinct legal self—on the other side of the

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<sup>36</sup> But see L. Brilmayer, *Justifying International Acts* (1989) (arguing for a "vertical" view of international law, in which a state's conduct toward outsiders would be judged according to the same theoretical framework that governs its conduct toward its own people).

<sup>37</sup> An exquisite example is found in abortion law. Is *Roe v. Wade*, 410 U.S. 113 (1973), about a woman's right to control her own body? Or is it, as some recent scholarship has suggested, about recognizing a pregnant woman as a caring, autonomous, decision maker charged with shepherding that miniature legal community consisting of herself and her unborn child? See, e.g., R. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* (1988).

<sup>38</sup> Restatement (Third) of the Foreign Relations Law of the United States § 101 (1987) ("International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.").

<sup>39</sup> See *supra* note 48 and accompanying text.

<sup>40</sup> See M. Howe, *The Garden and the Wilderness* (1965).

wall.<sup>41</sup> It affirms the sovereign status of religious communities. At stake is more than a set of freedoms. The wall of separation is the civil state's forgoing of interest in a whole department of human life. It is the state's admission that what goes in that department is the duty, and the burden, of some other set of authorities.

Yet on top of sovereignty-talk, our law has built a system of rights—rights connected in important ways to more standard rights such as freedom of speech, freedom of association, and equal protection. This interplay of sovereignty-talk and rights-talk creates certain confusions and difficulties. But it also regularizes and regulates the protection of religious autonomy in a way that sovereignty-talk by itself might not.

American Indian sovereignty, by contrast, is not accompanied by a well-developed scheme of rights. One result is a perception that the treatment of Indians by the United States is only a matter of existential encounter—or political whim. That perception has crystallized in the infamous “plenary power” doctrine in American Indian law, under which courts defer to congressional regulation of Indian policy much as they do to the executive's conduct of foreign affairs.<sup>42</sup> Another result, however, is a crisper, purer, more deliberate articulation of the meaning of sovereignty. The United States recognizes the power of Indian tribes to regulate, to tax, to hear civil suits, to imprison (within limits), to assign the custody of children—in sum, to

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<sup>41</sup> See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *United States v. Ballard*, 322 U.S. 78 (1944). Note that the above list includes free exercise clause as well as establishment clause and church property cases. To my mind, the “wall of separation” metaphor has relevance in all these contexts.

<sup>42</sup> The classic cases are *United States v. Kagama*, 118 U.S. 375 (1886) (upholding Major Crimes Act, which established federal jurisdiction for the punishment of certain crimes committed by Indians in Indian country) and *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (upholding right of Congress to abrogate Indian treaties: “We must presume that Congress acted in perfect good faith . . . . In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.”); see also *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984) (“[a]ll aspects of Indian sovereignty are subject to defeasance by Congress”); cf. *Damrosch, Foreign States and the Constitution*, 73 Va. L. Rev. 483 (1987) (discussing and defending version of plenary power doctrine in foreign affairs). In recent years, the Court has narrowed and qualified the plenary power doctrine. See, e.g., *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (plenary power “does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny”); *Morton v. Mancari*, 417 U.S. 535 (1974) (recognizing plenary power but subjecting federal Indian preference legislation to reasonableness test as against equal protection claim). See generally *Newton, Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984) (plenary power and its pervasiveness in the regulation of federal Indian law).

impose their will. The great question in Indian law, which I do not want to try to resolve in this Article, is whether we can hope to regulate political whim without diluting that legal, existential recognition.<sup>43</sup>

## II. THE STATE AND OTHER LEGAL ORDERS

The remainder of this Article asks why states and other legal orders might recognize each other. My goal is to suggest some objective normative truths. I will not, however, try to find that objectivity through some detached, Archimedean perspective. Rather, I will seek a normative stance that begins in each legal order itself as it tries to make—construct—the best sense it can of the legal universe. The method, in other words, is to find truth from the inside out rather than the outside in. In pursuing that method, this part of the essay deals with the state's recognition of other orders. The next part will—much more briefly and tentatively—consider the question in reverse.

### A. *Of State Exclusivism*

From the point of view of the state—indeed, from other points of view as well—everything I have said so far might appear to have a certain air of unreality about it. The reason is a deep-seated idea that I will call state exclusivism. State exclusivism is roughly the following set of descriptive and prescriptive propositions: The world divides into a set of territorially defined states. These states are distinct. They do not overlap. They are in legal contemplation equal. Each state has sole control over its own domain, and all true sovereign authority is vested in them. If aboriginal peoples or religious communions enter this picture, it is only as groups within the state, or as mediators between the state and the citizen. They might, for example, be the source of customary law, but only if the state's positive law so provides.

State exclusivism does not stand alone in our legal thought. But it is a powerful and pervasive idea. My task is to argue that it is wrong. It does not, even from the point of view of the state itself, correctly capture the dialectic of legal rhetoric and social necessity.

Ironically enough, state exclusivism is both an obstacle and a first step to the state's recognition of non-state legal orders. I said

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<sup>43</sup> Many commentators argue that the plenary power doctrine is in tension with the doctrine of Indian sovereignty. The possibility I raise in the text is that, despite the very different tones and political purposes of the cases announcing the two strands of Indian jurisprudence, there is in fact a deeper connection between them than we might like to admit.

earlier that recognizing another sovereign is like stepping out of infancy into an awareness of other selves. But state exclusivism is a strong, first step in that direction. It rejects the conceit, common in history, that there is nothing—or nothing worth seeing—outside the sovereign self. Next to that, the next step—recognizing legal orders other than the state—might not be so difficult. The trick is to sustain the insight of other selves, but to stretch it, and unfetter it.

The first thing, then, to notice about state exclusivism is its cultural and historical contingency. Many aboriginal societies are not organized in rigid territorial fashion. Some recognize claims to the use of land for specific purposes, but not dominion over land to the exclusion of others.<sup>44</sup>

Even for centuries of European history, states routinely recognized other juridical orders.<sup>45</sup> Indeed, before the rise of modernity, “the state in the full modern sense—that is, the secular state existing in a system of secular states—had not yet come into being.”<sup>46</sup> Some of the entities that co-existed with the state were territorial. Others were not. Some rose out of feudalism. Others, such as self-governing cities, were often a break with feudalism. Some were at the core of European political society. Others, such as the autonomous communities of Jews, were at its edge.<sup>47</sup> Some abided entirely within one state. Others, such as the Church, were international.<sup>48</sup>

We can be anachronistic about all this, and see it through the lens of state exclusivism, but that would distort history. Medieval political thought, for example, was not grounded in modern theories of sovereignty, but in more organic notions of corporate and hierarchical association.<sup>49</sup> Moreover, the various autonomous legal orders

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<sup>44</sup> See generally H. Driver, *Indians of North America* ch. 16 (2d ed. 1969) (discussing property and inheritance).

<sup>45</sup> See H. Berman, *Law and Revolution* (1983); M. Bloch, *Feudal Society* (1961); G. Poggi, *The Development of the Modern State* (1978); B. Tierney, *Religion, Law, and the Growth of Constitutional Thought 1150-50* (1982).

<sup>46</sup> See H. Berman, *supra* note 45, at 114. “Instead, there were various types of secular power, including feudal lordships and autonomous municipal governments as well as emerging territorial states, and their interrelationships were strongly affected by the fact that all of their members, including their rulers, were also subject in many respects to an overarching ecclesiastical state.” *Id.*

<sup>47</sup> For general accounts of the history of Jewish self-government, see *Autonomism, Autonomy, and Autonomy, Judicial*, in 3 *Encyclopedia Judaica* 919-31 (1972); Ben-Sasson, *The Middle Ages*, in *A History of the Jewish People* (H. Ben-Sasson ed. 1976) [hereinafter *Jewish People*]; Finkelstein, *Jewish Self-Government in the Middle Ages* (1924).

<sup>48</sup> Some historians argue that the role of the Church as a countervailing legal authority was crucial to the development of Western ideas of legal right and limited government. See B. Tierney, *supra* note 45, at 10; H. Berman, *supra* note 45.

<sup>49</sup> H. Berman, *supra* note 45; B. de Jouvenel, *Sovereignty: An Inquiry into the Political Good* 171-73 (J. Huntington trans. 1957); B. Tierney, *supra* note 45, at 19-34; G. Poggi, *supra*



in the tapestry of pre-modern Europe did not fit into a single mold. They differed from each other, and from the state, both in their self-understanding and in the types of communities they embodied. Some were tied to the central state in a complementary or coordinate relationship and became increasingly so as time progressed. But even that did not imply that they were subsumed by it. Historians speak, for example, of the "dualism" of even the post-feudal, but pre-modern, "polity of the estates," in many European countries. The ruler—emperor or king—and the estates—representing certain elite social classes—were distinct power centers, separate and mutually acknowledged. By agreement, they joined to form the polity. "[B]ut even during the agreement's duration they remain distinct, each exercising powers of its own, and differing in this from the 'organs' of the mature, 'unitary' modern state . . . . [The Estates] would address problems of rule as partners, as self-standing possessors of rights and faculties, not as submissive dependents."<sup>50</sup>

Not only does state exclusivism not account for arrangements such as these, but the eventual consolidation of the unitary central state helped beget state exclusivism as a justifying ideology.<sup>51</sup> That process of consolidation—still by no means complete—took a long time. As recently as the nineteenth century, local tribunals in Great Britain, for example, could claim a degree of juridical dignity that we would today think exotic.<sup>52</sup> The nineteenth century also saw the great battle over the meaning of American federalism. Among the theoreticians of that battle were writers who, to reconcile federalism with state exclusivism, pressed the view that the states of the union are not true sovereigns.<sup>53</sup> Their reason, simple enough, was that there could

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note 45, at 20-35. O. Gierke, *Middle Age*, supra note 17, is also useful, but probably too idealized to be entirely reliable.

<sup>50</sup> G. Poggi, supra note 45, at 48.

<sup>51</sup> For some accounts of these developments, see B. de Jouvenel, supra note 49, at 169-214; C. McIlwain, *The Growth of Political Thought in the West* (1932); C. Merriam, *History of Theories of Sovereignty Since Rousseau* (1900); G. Poggi, supra note 45; Q. Skinner, *The Foundations of Modern Political Thought* (1978); J. Strayer, *On the Medieval Origins of the Modern State* (1970). Historians debate whether the modern theory of the state should be traced in the first instance to Renaissance thinkers such as Bodin and Machiavelli, or to earlier intellectual and social movements in the High Middle Ages. That debate is well beyond the scope of this essay.

<sup>52</sup> See H. Arthurs, supra note 17, at 13-49; A. Manchester, *A Modern Legal History of England and Wales 1750-1950*, at 111-25, 150-60 (1980).

<sup>53</sup> See, e.g., 1 J. Burgess, *Political Science and Comparative Constitutional Law* 79-80 (1891) ("there is no such thing as a federal state; and . . . what is really meant by the phrase is a dual system of government under a common sovereignty"); id. at 107-08 (the formation of the United States Constitution "cannot be scientifically comprehended except upon the principle that the convention of 1787 assumed constituent powers, i.e., assumed to be the representative organization of the American state, the sovereign in the whole system"); W. Willoughby, *An*

only be one sovereign within any given territory.

More to our point, perhaps, the eighteenth and nineteenth centuries also saw the Jews of Europe, by consent or compulsion, trade away autonomy for emancipation.<sup>54</sup> As one French advocate of emancipation put it, "The Jews should be denied everything as a nation, but granted everything as individuals."<sup>55</sup> And in that same era, not coincidentally, the status of American Indians crystallized in that striking phrase that seems to at once accept and reject state exclusivism: "domestic dependent nation."<sup>56</sup>

Examination of the Nature of the State 244-45 (1896) ("There is thus no middle ground. Sovereignty is indivisible, and either the central power is sovereign and the individual members not, or vice versa.").

In the Federal State a true central State is created, the several units are legally and constitutionally united, and Sovereignty—the power of ultimately determining its own legal competence—resides in the federal body. In the Confederacy, on the other hand, the individual States retain their character as States, and their relations to each other are of an international or treaty character. Consequently, no central State is created, and Sovereignty lies wholly within such individual political units . . . . Thus, if we take the position that a national State was created by the American people in 1789, we must consider them to have become a united People before that time and to have destroyed their former individual states when they established the presented Federal State.

*Id.* at 253-55; cf. Amar, *supra* note 12 (sovereignty lies only in the people of the United States and functions as a limit on both the state and federal governments).

Defenders of the thesis of legal pluralism, on the other hand, tended to point to federal states as evidence for their arguments. See, e.g., H. Laski, A Note on Sovereignty and Federalism, in *Sovereignty*, *supra* note 17, at 267-75. Conventional American legal doctrine tended, at least in its rhetoric, to support the pluralists. See, e.g., T. Cooley, A Treatise on Constitutional Limitations 2 & n.2 (3d ed. 1874) (quoting *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858)):

The powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.

*Id.*; W. Wilson, *Political Sovereignty*, in *An Old Master and Other Essays* 93 (1893); Willis, *The Doctrine of Sovereignty under the United States Constitution*, 15 Va. L. Rev. 437 (1929).

The technical jurisprudential arguments surveyed in this footnote overlap with, but are by no means identical to, the more functional and historical approaches taken by some of the sources cited in *supra* note 12. My own view is not necessarily sympathetic to claims of state sovereignty. See *supra* notes 1 & 12. My reasons, however, have little to do with the sort of absolutist dichotomies found in authors such as Burgess and Willoughby.

<sup>54</sup> See A. Hertzberg, *The French Enlightenment and the Jews* (1968); J. Katz, *Out of the Ghetto: The Social Background of Jewish Emancipation* (1973); M. Sachar, *The Course of Modern Jewish History* (1958); Etinger, *The Modern Period*, in *Jewish People*, *supra* note 47, at 727-858; Stillschweig, *Nationalism and Autonomy Among Eastern European Jewry: Origin and Historical Development Up to 1939*, in 6 *Historia Judaica* 27-68 (1944).

<sup>55</sup> Comte de Clermont-Tonnerre on December 2, 1789, in a debate in the National Assembly.

<sup>56</sup> See *infra* notes 75-88 and accompanying text.

To say that state exclusivism is contingent does not, by itself, prove it wrong. Such a theory might still be the best account of a mature legal imagination. But history can justify shifting the burden of proof. The question for this age is thus why we should imagine that state exclusivism is right. To pursue that question I want to canvass four overlapping species of argument, some more obvious than others. The first is analytic, and relies on extrapolations from legal positivism. The second is more empirical, though grounded in conventional accounts of sovereignty. The third is ideological, taking its inspiration from the connection of the modern state to modern liberalism. The fourth is political and psychological.

### 1. Logic

The first argument is that state exclusivism is just a corollary of a more general legal positivism. Now, put aside for the moment the historical myopia of this claim. Put aside also any deeper doubts about legal positivism itself. The question remains whether the argument has any merit.

Legal positivism takes many forms.<sup>57</sup> It is, at least, the proposition that law is not identical to morality. It can also be a rejection of the idea of natural law. In some variations, it is the proposition that the law of any legal system must be identifiable by formal, substance-independent rules of recognition. None of these ideas requires state exclusivism.

Legal positivists also sometimes argue that a true legal system requires certain kinds of institutional trappings, or must exercise certain powers of sanction. These conditions would put limits on the range of non-state legal orders that could be accorded serious juridical dignity. But it would not exclude them all, or exclude them in principle.

If any variation on the positivism theme is germane here, it might be the idea of exclusivity. Mature legal systems do not overlap. They are exclusive of each other, and each is exclusive in its own domain. For this to be true, the argument might go, there must be some single, clear method for dividing the world into distinct zones of authority. Territoriality is not the only such method, but it does do the trick. More important, once the world is divided territorially, there is simply no room left for anybody else without treading on one of those territorial divisions.

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<sup>57</sup> See generally Coleman, *Negative and Positive Positivism*, 11 *J. Legal Stud.* 139 (1982) (each form of positivism is dependent on the particular substantive conditions of legality that each theory sets out).

Exclusivity is important. The problem is that state exclusivism does not, by itself, provide it. Consider, for example, some classic choice of law problems: If two Swedes sign a contract in Iowa, does Swedish law or Iowa law apply? If two friends from Maine get into a car accident while on vacation in Chad, which law governs whether the passenger can sue the driver for negligence? Simple lines on a map cannot solve these problems. The truth is that states, in the contemplation of both choice of law and international law, are more than territorial entities. Their jurisdiction is grounded in a rough mixture of territorial and personal criteria. Put another way, it matters both where things happen and to whom they happen. Moreover, even when choice of law was more wed to territorial dogmas than it is now, those very dogmas included doctrines and unstated assumptions that were not by any means natural, unmediated extrapolations from the brute fact of territorial division.<sup>58</sup>

Of course, none of this is to deny that legal systems can, by responsible effort, try to articulate rules that will draw jurisdictional lines between themselves and other legal systems. But those lines cannot just be lines on a map. At the very least, therefore, pure territorialism loses the virtue of simplicity that might commend it to the positivist mind. And if the lines that divide states from each other are not just lines on a map, then we need at least to entertain the possibility of drawing the sorts of conceptual lines that would allocate jurisdiction between states and types of legal orders and arrangements.

So far, I have challenged the view that territorial division of sovereigns, even if conceptually unnecessary, is sufficient, and therefore serves the imperative of legal exclusivity. A different claim, of course, might be that territorial lines, even if insufficient, are still necessary to the allocation of sovereign jurisdiction. But this claim also has problems.<sup>59</sup>

Certainly, there is utility to territorialism. States would not exist if there were not. The definition of some legal questions, such as rights to real property, seem exquisitely suited to jurisdictional allocation along territorial lines. But the decision of other questions, including personal status, seem as well suited, or even better suited, to jurisdictional allocation according to other criteria. Enforcement jurisdiction—which is admittedly central to some forms of positivism—

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<sup>58</sup> See W. Cook, *The Logical and Legal Bases of Conflict of Laws* (1942).

<sup>59</sup> Hans Kelsen argued that any legal system is necessarily defined in terms of four "spheres of validity": territorial, temporal, personal, and material. See H. Kelsen, *supra* note 23, at 42-43. The question here, however, is not whether every legal order must, in principle, have territorial extension, but whether the world must be divided into mutually exclusive territorial jurisdictions.

also seems peculiarly amenable to territorial division. But this seems at best to be a matter of degree. Most important, though, even if territorial division is in some deep sense necessary to the definition of legal orders, that does not in itself exclude the possibility of overlapping territorial jurisdictions whose relationship is further defined by conceptual lines other than territory.<sup>60</sup> Indeed, contemporary forms of positivism, which focus less on the imperative commands of the ruler, and more on rules of recognition that structure the legal order's self-consciousness of who is to rule it and how,<sup>61</sup> would seem particularly amenable to just such a possibility.

## 2. Experience

A second argument in favor of state exclusivism would admit its historical and cultural contingency, but would assert that, for better or worse, state exclusivism is true because it conforms to the facts of today's world. In the blend of description and prescription—or the dialectic of rhetoric and reality—that is legal discourse, this sort of claim is in bounds. But it will not do. State exclusivism requires some set of criteria that both admits all states into the family of legitimate, sovereign legal orders, and excludes all non-state normative communities from that family. As I will try to show, however, it is hard to pin down any sensible, non-trivial criteria that can do that job.

One version of the argument from cold, hard reality simply would depend on the conventional legal doctrine of states. There are two problems here, however. The first problem is that the conventional legal doctrine of states does often recognize non-state legal orders, albeit with complex and contradictory formulations. Consider the role of religious law in countries like Israel<sup>62</sup> or India. Consider

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<sup>60</sup> In one sense [it is] logically necessary that the sovereignty should be indivisible, [namely in the sense that] it would be self-contradictory to hold that there could be more than one final decision on any legal question; but it is neither logically nor causally necessary that the sovereign should be indivisible in the sense that every legal question should be finally decided by one and the same legal authority.

W. Rees, *The Theory of Sovereignty Restated*, in *Philosophy, Politics, and Society* 56 (1956).

<sup>61</sup> See H. Hart, *The Concept of Law* (1961).

<sup>62</sup> See generally I. Englard, *supra* note 23. Englard's theoretical discussion in Chapter 2 is particularly notable. He distinguishes between two viewpoints on the relation of Israeli secular law and Jewish religious law: the "dogmatic" and the "extra-dogmatic" or "factual." The dogmatic viewpoint insists that "the law of the state is a unitary and exclusive system" and "religious law has no normative validity unless and to the extent that it is recognized by state law." The "extra-dogmatic" viewpoint recognizes the co-existence and relativity of state law and religious law. *Id.* at 43. Moreover, there is "no logical inconsistency between unity of system dogmatically and plurality of systems factually." *Id.* at 39. This construct, however, is little different from the one that, given the jurisprudential scheme in which Englard is operat-

the role of indigenous legal systems in many post-colonial regimes in Africa and elsewhere.<sup>63</sup> Consider, most particularly, the status of Indian tribes and—as I argued earlier—religious communities in United States law. Each of these instances can, like the examples from history, be recomposed through the lens of state exclusivism. But, again, that would distort the truth. Once we accept these instances for what they are, they must open the way to a general admission that sovereignty—and its incidents—can come in many forms.

All the above examples are, of course, from the municipal law of states rather than from international law. As I argued at the start, however, I see no reason to give international law a privileged place in this conversation. Nevertheless even international law does not fully support state exclusivism. It has always had quaint exceptions, like the Knights of Malta.<sup>64</sup> More recently, it has come close to recognizing non-state entities, including revolutionary movements, as bona fide subjects of international law.<sup>65</sup> Even the status of aboriginal peoples is becoming a subject of international legal concern.<sup>66</sup> I do not want to make too much of any of this. Some of these changes are only

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ing, he would apply to the legal encounter of two states. *Id.* at 37-38, 41-42. See also *supra* note 23 (discussing Kelsen's view of the relationship of legal orders).

<sup>63</sup> See generally M. Hooker, *Legal Pluralism: Introduction to Colonial and Neo-Colonial Laws* (1975) (discussing the role of religious and indigenous legal systems, including Hindu law, Islamic law, African Law, Malay Adat law, and Chinese Customary law in colonial and post-colonial regimes in Africa, Asia, and elsewhere).

<sup>64</sup> The Sovereign Military Hospitaller Order of St. John of Jerusalem, of Rhodes, and of Malta is, according to at least one account:

an international person, a subject of international law, and is governed in accordance with its own Code of Laws, approved by the Holy See. The Order's sovereignty, resulting from official recognition by the Holy See in the first place, but also by other subjects of international law, including numerous sovereign states, does not depend on territory, though the Order did once hold territory, as described in its official appellation, in sovereign possession. This sovereignty however is not be taken in a plenary sense, in that in practice the Order does not exercise all the attributes of sovereignty in the present circumstance of its existence.

H. Cardinale, *The Orders of Knighthood, Awards and the Holy See: A Historical, Juridical, and Practical Compendium* 82 (1983). The Order is recognized by the United Nations and the Council of Europe, though not by the United States. *Id.* at 94. Orthodox international law scholars also tend to be skeptical. See I. Brownlie, *supra* note 20, at 68; D. Getches, D. Rosenfelt & C. Wilkinson, *supra* note 2 at 13.

<sup>65</sup> Various such movements have obtained observer status in international bodies, and the recent effort of the Palestine Liberation Organization to constitute itself as something like a state-in-exile is a major subject of current legal and political debate. Some of the debate is captured in Friedlander, *The PLO and The Rule of Law: A Reply to Dr. Anis Kassim*, 10 *Den. J. Int'l L. & Pol'y* 221 (1981); Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 *Den. J. Int'l L. & Pol'y* 1, 33 (1980); Levine, *A Landmark on the Road to Legal Chaos: Recognition of the PLO As a Menace to World Public Order*, 10 *Den. J. Int'l L. & Pol'y* 243 (1981).

<sup>66</sup> For an account of recent developments, see Comment, *Consent and Cooperation*, 22 *Harv. C.R.-C.L. L. Rev.* 507 (1987).

the product of a more general trend to recognize non-state actors (as opposed to non-state sovereigns) in international law.<sup>67</sup> Moreover, the main direction of international law remains in the other direction. Nevertheless, these developments do suggest the glimmer of an insight that there is something else out there that needs to be accommodated.<sup>68</sup>

The more serious defect in the argument from conventional legal doctrine, however, is that, even from a descriptive point of view, there is no reason to accept standard legal doctrine at face value. My method here, as I have said, is to take the view of a state seeking to map the legal universe from the inside out. For that process, however, to rely only on the consensus of states is circular. It assumes the conclusion it is trying to test. The fact remains that many non-state entities think of themselves as legally autonomous. The task of objective inquiry, even from the inside out, is to assess those claims. It might turn out that these non-state entities do not meet some objective test of legal identity. Or their sense of legal order might be entirely metaphorical, or internal. They might not require or deserve the recognition of others. But all this needs further argument.

One objective test might lie in the sociology of raw power. But invoking raw power is a tricky affair. Some states have a good deal of raw power. Others have almost none. Some entities other than states, lawless terrorist groups among them, can exert substantial power. More fundamentally, the issue of power is precisely where the interplay of normative discourse and social reality is most ambiguous. Sovereignty has something to do with power. But sovereignty as a legal category is most urgent precisely when the realities of power are otherwise. The sovereignty of the Soviet Union is less of an issue than the sovereignty of Afghanistan. The sovereignty of the United States is less of an issue than the sovereignty of Panama. The same might be said about the autonomy of Indian tribes or religious associations. The power of Indian tribes or most religious associations is generally less than the power of states. That is surely important. It helps confirm that sovereignty is not a uniform category and that relations among sovereigns are not in all respects symmetric. But the difference is not so categorical, and certainly not so normatively significant, as to decide the issue once and for all.

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<sup>67</sup> See I. Brownlie, *supra* note 20, at 518-99; Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *Am. U.L. Rev.* 1 (1982).

<sup>68</sup> I should again emphasize, however, that I am not arguing that international law, *qua* international law, needs to embrace non-state legal orders in order for them to secure their place on the legal map.

Another place to look for an objective test supporting state exclusivism is to the more formal criteria of sovereignty that, historically, helped shape and justify state exclusivism in the first place. Of these, the most important is the notion that sovereign states have absolute, comprehensive juridical authority within their jurisdiction, and are subject to no other sovereign power.<sup>69</sup> Now, this notion of absolute power is of course contrary to the entire spirit of the picture I am trying to draw in this essay. It is also contrary to the traditions of thought on which I am drawing. But for the purpose of the task at hand, which begins, remember, with the perspective of states themselves, it is an eminently useful deconstructive foil.

Consider, then, that absolute juridical authority might be understood in both an internal and an external sense. In an internal sense, it is, according to most modern thinkers, wrong (or tautological) as a description of the state. Modern theories of government are grounded, not in absolute authority, but in limitations on authority and divisions of powers. Indeed, good arguments have been raised for dropping sovereignty entirely from the lexicon of political theory.

Things might look more promising when we turn to considering the external sense of absolute authority. But, again, the proposition does not hold up. What does it mean for a legal order to have absolute juridical authority as against other legal orders? One possibility is that its members are not subject to any other law. Admittedly, members of aboriginal and religious communities are subject to the law of the state in many respects, even in nations that recognize the right of those communities to self-government. But that is only a consequence of cross-cutting principles of jurisdiction. Is it any different from residents of one state being subject, under certain conditions, to the laws of another?

The second way a legal order might have absolute authority as against other legal orders is if it is not bound in a subordinate relationship to another legal order. But the very existence of international law itself suggests that states do not have this sort of absolute authority. Indeed, a good deal of the theoretical agitation over the meaning of international law and its relation to municipal law has swirled around exactly that issue. Even apart from the general regime of international law, many states are bound up in arrangements that clearly limit their absolute authority. The most conspicuous of these is the European Community. The conventional view is that states in such arrangements do not lose their sovereignty, but retain it in di-

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<sup>69</sup> See generally B. de Jouvenel, *supra* note 49; F. Cohen, *supra* note 9; Benn, *Sovereignty*, in 7 *Encyclopedia of Philosophy* 501 (P. Edwards ed. 1967).



minated form.<sup>70</sup> Once that principle is admitted, however, the line between states and non-state orders once again looks much more difficult to draw, at least in the definitive version required by state exclusivism.

A third sense in which a legal order might be independent of other legal orders is if it can control its own jurisdiction. But this form of absolute authority is, again, found in neither states nor non-state legal orders. Indeed, for one legal order to determine for itself the jurisdiction of another is in some sense the very definition of the existential encounter of legal orders.

The last sense in which a legal order might have absolute authority is in determining its own law. By that criterion, however, both states and non-state legal orders seem to qualify. The United States might determine the effective limits of Native American and religious autonomy, but it does not authoritatively decide questions of aboriginal or religious law. And that, as much as anything, seems to be crucial, if not sufficient, evidence of its recognition of the essential sovereignty of those communities.

### 3. The Liberal State

A more substantive defense of state exclusivism than either of the two discussed so far is that it is ideologically inseparable from the larger historical forces that have shaped the modern age. Western civilization, after all, is no longer either aboriginal or medieval, and has no wish to be.

In its most general form, this argument says little. Recognizing non-state legal orders as part of a richer, more fluid picture of reality does not require a return to pre-modern models. The unitary state is a worthwhile invention. It is part of the economic, political, and moral life of the age. The question is why the state must imagine that it rules alone.

One variant of the argument, however, deserves more notice. That is the claim that state exclusivism is one pillar—even if the least pretty pillar—in the modern liberal theory of government and the person.<sup>71</sup>

The writings on non-state legal orders that I invoked at the beginning of this essay tend to treat them as organic, corporate realities.

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<sup>70</sup> See M. Janis, *An Introduction to International Law* 122 (1988) (suggesting that distinction between legal orders that retain their sovereignty, even though they have delegated some powers, and legal orders that do not, is a matter of degree).

<sup>71</sup> I have in mind here some of the usual suspects: B. Ackerman, *Social Justice in the Liberal State* (1980); J. Rawls, *A Theory of Justice* (1971).

From the point of view of liberal theory, however, that might be precisely the problem. In modern liberal theory, the basic unit is not the organic association, and certainly not the state, but the person. Liberal theory, especially in recent versions, recognizes that persons vary in their beliefs, commitments, and plans. It appreciates that they will associate with others of like mind to pursue those beliefs, commitments, and plans. It concedes that the texture of such associations is often deeper and thicker than that of the state itself. The state, however, exists just so that persons with different interests can live together in security and equality. It affords the thin, neutral framework that reconciles or mediates conflicting claims and aspirations. That framework is a system of rights, including the allocation of scarce resources and a guarantee of personal dignity and freedom.

For all this to work, however, the state must be in charge. It must guard the line between public law and personal life. Liberal theory knows that the state disappoints the beliefs and aspirations of some of its members by denying juridical dignity to their thickly textured associations. But that is a cost we all must pay for living together in one political communion.

Of course, many modern states at best mock the liberal ideal. Some are theocracies. Some are economic or racial oligarchies. Some are simple tyrannies. Even the best states fall short of the ideal in one way or another. None of this is the fault of liberal theory. It does suggest some skepticism about the division in that theory between the state as thin, regulating envelope and other communities as thick, but juridically empty, bearers of life plans. United States Catholics, for example, might share more, culturally and even ideologically, with other Americans than they do with other Catholics. Liberalism assumes that the job of the United States is to see to it that Catholics, Protestants, and Jews can join equitably and peacefully in one American polity. It is just as possible, however, that one job of the Catholic Church is to see to it that United States Catholics, Eastern European Catholics, and African Catholics can join equitably and peacefully in one Catholic polity. Or, maybe, both propositions are true.

The deeper point here is this: If there were a single, world state, the liberal vision of one thin but exclusive legal order might make sense. But liberal theory sometimes forgets that every actual state is surrounded by other, distinct, legal orders. If nothing else, it is surrounded by other states. The subjects of those other legal orders have their own social contract, their own political conversation, their own allocative calculus, their own reconciliation of personal hopes and plans. In the absence of a single world legal order, every legal com-

munity—including the liberal state—must define its boundaries. It must distinguish between insiders and outsiders. To draw those lines simply on territorial boundaries is not necessarily liberal at all. It is even less liberal to ignore the possibility that some persons might be citizens of the state, and be the subjects of other, distinct, sovereign, political orders as well. There has been much bashing of liberal theory recently. That is not my intention here. Rights-talk is important. The liberal ambition is important. But it is at least a sign of some hubris to think that a single, organizing framework, a single overarching order, can allocate the world's material and legal resources. Recognizing a jumble of legal orders—even if that jumble consists only of states, especially if it is not so limited—is less neat, and less efficacious. It deprives the liberal state of certain powers and of a certain degree of responsibility. But it is also a token of liberal adulthood.

Moreover, even if the state recognizes other juridical communities, that does not exhaust its role. Sovereignty-talk is not empty talk. The liberal state can still play a mediating, even a regulating influence. It can protect the sovereignty of others. It can assert its own claims. It can extend its good offices. It can try to make sense of exactly what it means for non-state legal orders to exist, and how its jurisdiction and theirs can co-exist, and even coordinate. It can, in other words, still be a sovereign, among other sovereigns.

#### 4. The Therapeutic State

The last defense of state exclusivism I want to discuss is the most cynical, but maybe the most subtle. This argument takes seriously, as I may not have sufficiently until now, the notion of finding truth from the inside out. The claim of the argument is that states really only recognize other states for two reasons. The first reason is that other states insist on recognition, and have the power to back that insistence. I have already said some things about the ambiguities of power in sovereignty-talk, and I am for now content to leave it at that.

The second reason is the more interesting. States recognize other states to ground and universalize their own pretensions. At one time, the King of England claimed also to be the King of France.<sup>72</sup> Now,

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<sup>72</sup> Edward III claimed the French crown in 1337 through his mother Isabella, daughter of Philip IV of France. He formally adopted the title King of France in 1340. He gave up the title in 1360, but then resumed it in 1369. See Gillingham, *The Early Middle Ages*, in *The Oxford Illustrated History of Britain* 192, 199 (K. Morgan ed. 1984); *Handbook of British Chronology* 39, 40 (F. Powicke, D. Greenway, S. Porter, I. Roy & E. Fryde eds. 1986). British monarchs continued to style themselves King (or Queen) of France until 1801, when Parliament dropped the title during the reign of George III on the occasion of formal Union with Ireland. *Id.* at 47. At the same time, the arms of France were finally removed from the British

states know that their legitimacy rests on morally insecure foundations. Thus, the United Kingdom recognizes the sovereignty, jurisdiction, and territorial integrity of France in part to confirm its own sovereignty, jurisdiction and territorial integrity. State exclusivism is, in that sense, a group hug. It is no wonder that public international law is so obsessed with the principle of the equality of sovereign states.<sup>73</sup> The point of all this, according to the argument in question, is that states do not need to recognize non-state legal orders; to do so would not serve the same self-asserting purpose as recognizing other states.

I ignore whether this analysis even tries for the brand of objectivity that I am seeking. The real problem is that it puts too many strictures even on subjective social construction. Like the other arguments I discussed, it simply takes for granted the special status of states and state exclusivism in sovereignty-talk.

In the first years after Europeans discovered the American continents, many Europeans argued that the native Americans, because they were heathens, could assert no claims at all over the lands on which they lived. This doctrine helped justify the worst excesses of the conquest of America. The legal theory that eventually prevailed, however, was that of Franciscus de Victoria, the fifteenth-century pioneer of the law of nations. Victoria's account insisted that the Indians, by virtue of possession, held sovereign title to their land, and that only a just war could extinguish that title.<sup>74</sup>

The practical benefits of Victoria's ideas might, under the circumstances, have been slight. But those ideas also served to clarify, for the Europeans themselves, the basis of their authority over their own lands. In rethinking Indian sovereignty, Victoria also rethought European sovereignty. The magic of social construction is this: Europeans, if they recognized Indian sovereignty, did not do so to legitimate their own authority. But, having recognized Indian sovereignty, they necessarily changed the terms by which their own authority would have to be legitimated from then on.

More generally, every act of recognition is also an act of self-definition, and even of self-legitimation. When the United States recognizes Indian sovereignty today, it does so in part to confirm both

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(now the United Kingdom's) coat of arms to make room for the arms of Ireland. See G. Briggs, *National Heraldry of the World* xiii (1974).

<sup>73</sup> See I. Brownlie, *supra* note 20, at 287-91.

<sup>74</sup> This is a simplification of a complex slice of legal and social history. See Williams, *The Medieval and Renaissance Origins of the American Indian in Western Legal Thought*, 57 *S. Cal. L. Rev.* 1, 70-71 (1983). See generally Cohen, *Original Indian Title*, 32 *Minn. L. Rev.* 28 (1947) (examining the conflict between federal land grants and original Indian titles).

the logic and the limits of its own claims to the land. When the United States recognizes some autonomy for religious communities, it confirms the logic and the limits of its own identity as a secular state. These self-definitions are not as neat or symmetric as that by which the United Kingdom recognizes France. But that might be part of the point.

I have already emphasized that non-state legal orders are different from states. Nor are they all the same as each other. Different legal orders arise from different theories, claim different jurisdictions, and relate in different ways to other legal orders. But sovereignty-talk, freed from absolutist straitjackets, does not require absolute symmetry. Human beings have a tendency to equate parity with sameness and difference with subordination. To grow out of that tendency, however, is part of the same process of maturity that leads us from infancy into adulthood.

There is, of course, a dark side here as well, as Dean Price so compellingly suggests in his Comment.<sup>75</sup> Recognition can simply be a tool with which to create legal categories to facilitate exploitation. But we still need to remember two things: First, exploitation and depredation are possible even without facilitating legal categories. And it is at least some sign of civilization that we think we need such categories. Second, sovereignty-talk, as I have emphasized, has a life of its own. Whatever its origins in a particular context, it can reassert itself down the line, and be a vehicle for genuine respect, and genuine autonomy, as well as formal recognition.

### B. *Of John Marshall and the Cherokee*

I have discussed why a state might recognize another legal order, or rather, why there are no good reasons that it should not. But how would it go about it? One place to look are the United States Supreme Court opinions that first brought into focus, at least insofar as United States law is concerned, the status of Indian nations. As noted, the Indian example is not typical. It is, for instance, a more formalized, more institutionalized, more self-conscious doctrine than that regulating the relationship of the United States to religious groups. It is also a particularly ironic example. The experience of Indians, after all, has been that inspired legal talk is too often the companion, willingly or not, of genocide.

Nevertheless, the early Indian cases merit attention. *Cherokee*

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<sup>75</sup> Price, *Indian-Federal Regulations From the Inside Out: A Comment on Perry Dane's Meditation*, 12 *Cardozo L. Rev.* 1007 (1991).

*Nation v. The State of Georgia*<sup>76</sup> and *Worcester v. Georgia*<sup>77</sup> both arose out of the efforts of the State of Georgia to subjugate the Cherokee nation, one of the so-called civilized Eastern tribes that had settled down to a highly westernized, but still separate and self-governing, existence on lands left to it in the state by treaty. The upshot of the struggle, of course, despite the results of the litigation, was the removal of the Cherokee westward in the infamous "trail of tears."

In *Cherokee Nation*, the Cherokee brought an original suit in the Supreme Court seeking to enjoin the enforcement of certain laws of the state of Georgia. They invoked that heading of Supreme Court jurisdiction that allowed foreign nations to sue states directly in the Court. The Cherokee claimed that they were "a foreign state, not owing allegiance to the United States, nor to any State of this Union, nor to any prince, potentate or State, other than their own."<sup>78</sup> Chief Justice Marshall held that, strictly speaking, the Cherokee were not a "foreign nation" and dismissed the suit. He pointed out that the Cherokee occupied a territory to which the United States asserted title. He argued that the Cherokee "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."<sup>79</sup>

Nevertheless, Marshall was obviously sympathetic to the actual merits of the Cherokees' case. The Indians, he wrote, "are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the land they occupy."<sup>80</sup> More important, he recognized that they were, if not a foreign nation for purposes of the Supreme Court's original jurisdiction, nonetheless a nation. "They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war . . . ."<sup>81</sup>

The most important lesson worth noting here is that territorial positivism does not exhaust the possibilities of sovereignty-talk. Not all sovereigns are the same. Not all relations among sovereigns are symmetric. Nevertheless, the relationship of sovereigns differs from the relationship of a sovereign to its citizens. Marshall, in describing

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<sup>76</sup> 30 U.S. (5 Pet.) 1 (1831).

<sup>77</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>78</sup> *Cherokee Nation*, 30 U.S. (5 Pet.) at 3.

<sup>79</sup> *Id.* at 17. For a different view of the "great father" image, see *infra* note 109. In one of Marshall's least artful metaphors, he also wrote that the relation of Indians "to the United States resembles that of a ward to his guardian." *Cherokee Nation*, 30 U.S. at 17.

<sup>80</sup> *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

<sup>81</sup> *Id.* at 18.

the “peculiar”<sup>82</sup> relation of Indians to the United States, fashioned the phrase “domestic dependant nation.”<sup>83</sup> The wonder of that phrase lies precisely in Marshall’s willingness to construct it, to string together those three words and give them meaning. “Domestic dependant nation” is a problematic category. One can wish for a picture of the relationship that was fine-tuned differently. Nonetheless, Marshall still succeeded in recognizing the power of law-talk, and sovereignty-talk as a species of law-talk, to reflect complex realities, and to create them.<sup>84</sup>

The substantive issues raised in *Cherokee Nation* finally came back to the Court in *Worcester*. This time, Marshall fully supported the merits of the Indian claim. He found the legislative efforts of the State of Georgia to be invalid. The case, in part, was about federalism, about the exclusive power of the federal government to deal with the Indians, whether for good or for ill. But it also recognized the independent status of the Indians.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.<sup>85</sup>

In confirming the sovereign status of the Cherokee, Marshall considered the reality of their self-government. He considered the treaties

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<sup>82</sup> *Id.* at 17.

<sup>83</sup> *Id.* at 17.

<sup>84</sup> The struggle between state exclusivism and its alternatives is even more apparent in the other opinions in the case. Justice Thompson dissented, although his views probably came closest to Marshall’s. He argued that any self-governing community could properly be considered a foreign nation. His model, intriguingly, was the idea of “tributary and feudatory” states already known to the law of nations. *Id.* at 53. Those words may have sounded anachronistic even in 1831. That, however, is only testimony to the poverty of our less anachronistic discourse.

Justice Johnson, who concurred, was also willing to be anachronistic. He compared the Indians to the Israelites in the desert. “Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them.” *Id.* at 27 (Johnson, J., concurring). But he could not in the end see his way around the state positivist claim of the United States to the land on which the Indians lived. “They have in Europe sovereign and demi-sovereign states and states of doubtful sovereignty. But this [Indian] state, if it be a state, is still a grade below them all . . .” *Id.* at 26-27. Justice Baldwin, who could only refer to the Cherokee’s territory as “an allotment of hunting-grounds” could not even go that far. For him, state exclusivism had prevailed. *Id.* at 31 (Baldwin, J., concurring).

<sup>85</sup> 31 U.S. (6 Pet.) at 559.

into which they entered with the United States, and emphasized that only nations can engage in relations by treaty. And he considered the history of both warfare and cooperation between Indians and Europeans. The colonial charters included the right, "upon just causes, to invade and destroy the natives . . . . The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war."<sup>86</sup> The recognition of another sovereign, as the existential encounter of legal strangers is, necessarily, a literal knife's edge away from warfare.

Marshall, as in the *Cherokee Nation* case, talked about the special relationship of the Indians and the United States. But no longer were the Indians unique. Legal categories did exist.

[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to selfgovernment, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as selfgovernment and independent authority are left in the administration of the state.'<sup>87</sup>

The Cherokee were not only a distinct, sovereign, nation. They also occupied their "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."<sup>88</sup> Georgia's effort to impose its law on the Cherokee was an illegitimate "extra-territorial"<sup>89</sup> act.

Considering these words, though, the question naturally arises: How would Marshall have drawn a map of Georgia, that is to say a real cartographer's map? Would it have included the lands of the Cherokee nation? Or would Marshall have drawn the Georgia state lines around the Cherokee nation? I suspect that Marshall might have insisted on drawing two maps. In one, Georgia and the Cherokee nation would be separate states. In the other, they would not. To say that the Cherokee were "extra-territorial" was, I think, for Marshall both an exercise in the imagery of state exclusivism and, also, a

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<sup>86</sup> Id. at 545.

<sup>87</sup> Id. at 561. Compare this formulation to Justice Thompson's in the *Cherokee Nation* case.

<sup>88</sup> Id.

<sup>89</sup> Id.



transformation of that imagery. The Cherokee could be both inside and outside Georgia. They can (I am less certain that Marshall would agree with this) be both inside and outside the United States. That willingness to draw two maps, or three maps or four maps is, as much as anything, the surest sign of sovereignty-talk at its most mature, its most expansive, its most real. Indeed, I would be willing to generalize from Marshall's procedure: Sovereignty-talk, at its best, comprehends the willingness and the ability to hold, in tandem, apparently contradictory images of the relationship between self and other. It is the ability to insist on absolute dominion, and yet also recognize the dominion of others, or to comprehend the possibilities of equality even while also comprehending a relationship of hierarchy. It is an exercise of craft—legal craft—in which these different images all find their respective places and their appropriate contexts. It is the epistemic courage to see that these images need not be reduced one to the other, or to some single compromise position that is unfaithful to them all.

### C. *Of Limits and Principles*

I have stressed the expansive, flexible, potential of sovereignty-talk. But where does it end? International law sets criteria for when a putative state should get the recognition of other states. Should similar criteria be at work in the recognition of legal orders other than states? Are there different criteria? These questions vex any effort to treat an expanded sovereignty-talk as more than an academic game.

One instinct, apparent in some of the literature on legal pluralism on which this essay builds, is to reject, in principle at least, any limits on the concept of a legal order. In this view, any association, group, or institution can be a full-fledged legal regime. But this is unfaithful to the internal structure of legal orders themselves. More particularly, it will not do as an account of how the state might bring itself to recognize other legal orders. Simply put, it demands either too much or too little from the state. An unlimited account of non-state sovereignty might require the state to dissolve. This would be demanding too much. More likely, it will dissolve into a version of ordinary rights-talk. That would be demanding too little. As long as the state is legitimate, in its own eyes and the eyes of others, it will define the rights and duties of its members. Sovereignty-talk—the insight that not all persons are for all purposes members of the state's legal order—can transcend that equation, but it does not deny it. There must, therefore, be some way to tell a true competing sovereign from any other assemblage. There must be some way for the state to bring itself to encounter other legal orders without abandoning its own

identity as a legal order. If every social order that the state confronts is a legal order, there is no legal order. If every legal thought is law, there is no law.

In the end, to be true both to the state and to the other legal orders that the state might recognize, there must be limits. But must those limits still be reduced to explicit criteria? Another instinct would rely on the existential encounter of legal orders to prove itself, on its own terms. This idea is attractive, but would probably ultimately come up empty.

Nonetheless, any effort to talk about criteria must proceed with caution. There are at least two reasons for this. The first derives from something I have stressed before: the heterogeneity of legal orders. If different legal orders arise from different theories, claim different jurisdictions, and relate in different ways to other legal orders, then they might not all be amenable to the same tests for their existence. The criteria for the existence of a state are stringent. Only some of these criteria might be necessary for the existence of an Indian nation. Even fewer criteria, or different criteria, might be relevant to religious groups.

The second caution has to do with the criteria themselves. Any set of considerations can only be pointers, or markers. They define classes of cases. But not every member of the class must meet all the criteria. More important, as I insisted earlier, sovereignty is more than the sum of its parts. Sovereignty has a life of its own. It creates as well as reflects reality. The result might not be purely ineffable. But there is an element of dialectic, and an irreducible core of indeterminateness—what I earlier called an element of the arbitrary—that is as characteristic of sovereignty-talk as any set of criteria.

With these cautions in mind, let me suggest, in a cursory way, a few markers of legal order. In each instance, though, I will spend at least part of my time pointing out doubts and complexities. Some of these markers are drawn from the literature on legal pluralism. Others are extrapolations from, or reworkings of, the more conventional criteria of standard legal and political theory with which I wrestled earlier. And yet others are suggested by the special, but still emblematic, examples around which much of this essay has been organized: Indian nations and religious legal orders. These criteria do not, I should emphasize, add up to a test. They are, at best, only an aid to sovereignty-talk.

### 1. Commitment

One marker of sovereignty is commitment, and the will to put

that commitment to the test. One reason the King of England no longer claims also to be the king of France is that the French would not allow it. Commitment can emerge through resistance to the violence of the state. But it can come in tamer forms as well. It is a resolve to live one's own law, and to suffer the consequences.

Commitment, however, like power, is a normatively ambivalent idea. Commitment must play some role in any general account of the existence of other legal orders. But it cannot be a standard against which the continued life of any given legal order should be judged. We do not go around invading other countries, and then congratulating those who resist. When Nazi Germany swept through Europe, some nations resisted less forcefully than others. That does not mean they deserved to be invaded. Cowards and pacifists can be sovereign too.

A related issue is something that choice of law scholars call the problem of *renvoi*. Many non-state legal orders recognize the authority of the state, and are even willing to let its commands prevail when in conflict with their own. That, by itself, is no reason to insist that those commands do prevail.

## 2. Distinctiveness

The second marker is distinctiveness. In any legal order, disagreements abound about the meaning and wisdom of specific norms. Those disagreements are part of the dynamic of legal conversation. There is a difference, however, between disagreements in a legal system and divisions among legal systems. That difference can be subtle. When, for example, does a heretical sect become a separate faith? For the state engaged in the task of recognizing other legal orders, however, the task is a bit simpler. A distinctive legal order thinks of itself as such. It has its own texts, or takes the texts of others in a way that makes them its own. It is less interested in the state's legal truth than in its own.

Legal distinctiveness, however, is not the same as cultural uniqueness. We expect that states will influence each other, that they will borrow—or have thrust on them—aspects of each other's culture.<sup>90</sup> We even expect that they will share a common civilization. Non-state legal orders need not be held to a more purist vision. This is particularly relevant to Native Americans. Indian sovereignty does

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<sup>90</sup> Of particular note is the phenomenon of legal reception, in which one legal system borrows legal doctrines, or entire bodies of law, from another. See, e.g., A. Watson, *The Evolution of Law* (1985).

not depend on hermetic isolation from the broader culture.<sup>91</sup> That attitude, indeed, is the denial of sovereignty.<sup>92</sup> Many Native Americans are almost totally assimilated into the prevailing culture. But something still calls them to their own nationhood. Some anthropologists suggest a functional interpretation of that call.<sup>93</sup> But we need not romanticize the sense of legal and national self to respect it, and comply with it. Indeed, the social construction of identity and the social construction of sovereignty should be seen as parallel, inter-locked processes.

### 3. Generality

A third mark of a true *nomos* is related to distinctiveness. It is some degree of generality, or comprehensiveness. Legal orders are heterogeneous. Not all legal orders claim the same scope. But there are no single-issue sovereigns. A legal order, whether thick or thin, whether deferential or not to other legal orders, is a fabric, a set of

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<sup>91</sup> This observation is one of the foundations of contemporary Indian political and legal activism. See, e.g., R. Barsh & J. Henderson, *supra* note 30, at 118; V. Deloria, *Custer Died for Your Sins* 78-92 (1969); M. Dorris, *Indians on the Shelf*, in *The American Indian and the Problem of History* 98, 98-105 (C. Martin ed. 1987); see also *supra* note 30 and accompanying text (discussing sovereign power to change).

<sup>92</sup> In a recent important article, Judith Resnik discusses *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in which the Supreme Court held that federal courts did not have jurisdiction, outside the criminal context, to enforce the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1982), which holds the tribes to a set of obligations similar to that found in the Bill of Rights. Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989). The *Santa Clara* case arose out of a challenge to a tribal rule that created a patrilineal definition of tribal membership. The rule in question, it turns out, was relatively new, and might have been enacted in response to pressure by the United States to reduce the number of persons eligible for federal Indian benefits. *Id.* at 712-25. Resnik concludes that the case is harder than it appeared to be to the Court, although she does not argue that it was wrongly decided. *Id.* at 727.

The emergence of a codified, written, non-discretionary, gender-based membership rule is linked to the Pueblo's decision to organize under guidance of the Department of the Interior, is linked to the Pueblo as a recipient of federal funds, and is linked to the Pueblo as situated in a United States culture that has made patrilineal and patriarchal rules so familiar that, to some, they seem uncontroversial.

*Id.* at 725. The problem with Resnik's account, it seems to me, is that it does not take seriously enough the normative, indeed counterfactual, character of sovereignty. Legal "otherness" cannot be reduced to social and political "otherness." The Pueblo have an interest in their rule, regardless of its origins, and the United States has good reasons not to interfere, regardless of its own past interferences.

<sup>93</sup> See, e.g., K. Blu, *The Lumbee Problem: The Making of an American Indian People* (1980). Recent anthropological literature has emphasized the plastic, socially constructed, often functional, character of ethnic and cultural identity and mobilization. See, e.g., C. Young, *The Politics of Cultural Pluralism* 98-139 (1976); *Ethnic Groups and Boundaries* (F. Barth ed. 1969); Hanson, *The Making of the Maori: Culture Invention and Its Logic*, 91 *Am. Anthropologist* 890 (1989); Nagata, *What is a Malay? Situational Selection of Ethnic Identity in a Plural Society*, 2 *Am. Ethnologist* 331 (1974).

connected parts. If it were not, it would simply be a private association inside some other legal order.

The criterion of comprehensiveness is important in part because it is so often the mark of religious legal orders. United States constitutional law has had a difficult time trying to define religion for purposes of the free exercise and establishment clauses. At one time, religion could be defined in terms of the presence of certain beliefs.<sup>94</sup> That no longer seems right. The current approach looks more to the questions that a putative religion is seeking to answer and to the role it plays in its members' lives.<sup>95</sup> One aspect of that inquiry is the notion of comprehensiveness.<sup>96</sup> This might be because religion just happens to be, by nature comprehensive. Or it might be because the religion clauses serve, in part, as the vehicle for recognizing a variety of competing legal orders. Or, as seems most likely, it is because our constitutional doctrine is stuck somewhere between these two accounts.

#### 4. History

The next criterion is history. I spoke earlier about the pitfalls of history. In rights-talk, history is the episodic framework in which allocations, exchanges, and invasions of rights take place. That view of history, correct in its own context, leaves no breathing space for true autonomy. But history also plays a role—a different role—in sovereignty-talk. There is a nineteenth-century English case in which the City of London tried to defend one of its juridical privileges against the encroachment of state exclusivism.<sup>97</sup> The basis for one of its arguments was the splendid myth that refugees from the Trojan wars founded London at the dawn of English history. One point of that claim was to invoke what Pocock has in other contexts called the myth of the ancient constitution.<sup>98</sup> The privileges of London existed from time immemorial, and were, for that reason alone, valid, perfect, and beyond change. The other point, however, was simply to assert that the city, and its juridical identity, predated the larger polity, and was not merely ancillary to it. That argument lost and state exclusivism prevailed. Nonetheless, its resonance is unmistakable.

Similarly, the observation in the American Indian context that

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<sup>94</sup> "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Davis v. Beason*, 133 U.S. 333, 342 (1890).

<sup>95</sup> See Note, *Toward a Constitutional Definition of Religion*, 91 *Harv. L. Rev.* 1056 (1978).

<sup>96</sup> *Malnak v. Yogi*, 592 F.2d 197, 208-09 (3d Cir. 1979) (Adams, J., concurring).

<sup>97</sup> *Mayor and Aldermen of London v. Cox*, 2 L.R.-E. & I. App. 239 (H.L. 1867).

<sup>98</sup> J. Pocock, *The Ancient Constitution and the Feudal Law* (1957).

the Indians were here first counts for something. It confirms their separateness. It confirms the idea that limits on their sovereignty are withdrawals of something they had rather than failures to grant something that need not have been. History confirms the dimensionality of a legal order, its extension. In that sense, it plays something of the same role as physical extension—borders—do in the encounter of states. Lines in time, like lines in space, can trace the boundary between two legal orders. They can impress on one legal order the need to recognize the other.

The risk here is to turn history into a universal solvent. The historical claims of American Indians do distinguish them from other ethnic groups. Claims of until now unrecognized tribes are rightly judged in part by history.

Religion, though, seems another matter. United States legal doctrine generally rejects discrimination between old and new religions.<sup>99</sup> This is in part because of the influence of rights-talk, which, when it does not freeze history, abstracts it away. It is also in part because the history of religion as a whole substitutes, analytically, for the history of any particular religion. And it is in part because the nature of religious autonomy, at least as our law usually understands it, does not call for the strictures of history. Nevertheless, even in the context of religion, there is something to be said for history. Maybe religions need time to prove themselves to be true legal orders. Maybe religions have a natural history, and must outgrow their founding before they get their sense of center, their organic identity. Maybe, just maybe, the evolution from cult to faith requires time.

## 5. Land

The last element of legal order I want to discuss might seem, given the thrust of this Article, the most unexpected. That element is land, what I have called physical extension. I have argued against state exclusivism. But there is something to the idea that land counts. Legal orders take up space as well as time. Land can be the arena in which they define themselves. It can help draw the boundaries by

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<sup>99</sup> See, e.g., *Welsh v. United States*, 398 U.S. 333 (1970); see generally *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) (“beliefs holding the same important position for members of one of the new religions as the traditional faith holds for more orthodox believers are entitled to the same treatment as the traditional beliefs”). The scholarly literature also tends to assume the need to develop principles that protect old and new religions equally. See, e.g., Laycock, *A Survey of Religious Liberty in the United States*, 47 *Ohio St. L.J.* 409, 437-39 (1986); Note, *Defining “Religion” in the First Amendment: a Functional Approach*, 74 *Cornell L. Rev.* 532 (1989). Whether judicial practice has lived up to these ideals is, of course, a different question.

which a legal community defines itself against other legal orders. It can provide the envelope within which a legal order takes dominion. The sheer finitude of any given parcel of land demands that a legal community take stock of itself, define rules of recognition, and allocate rights and resources. The finitude of land puts inherent limits on the uncontrolled explosion of legal orders.

The importance of land even to legal pluralists might not be evident except for the lesson of experiences such as that of the American Indian. Native Americans cherish the land. They also know its import for their struggle for survival and autonomy. However small a reservation is, however poor it is, it is a stake on which to build sovereignty. Claims to land, and to control over land, are central to American Indian law. Efforts to destroy Indian sovereignty have focused on land—taking it, dividing it, or colonizing it.

To say that land counts is not, however, to retreat to state exclusivism. First, it is not to insist on exclusive dominion. Just as John Marshall could draw two maps of Georgia, for example, we can draw two maps of the United States. In one, Indian reservations are within the boundaries of the states and the United States. In the other, they are not. Similarly, Indian rights on land outside formal reservation borders need not be reduced to all-or-nothing choices. Recent cases, for example, have weighed, and often rejected, Indian efforts to limit development of some sites on putatively public lands when such development would interfere with Indian religious practices or doctrines.<sup>100</sup> One possibility usually ignored in those cases is that Indians, by treaties, or history, would have a continuing easement for certain purposes even on land that for other purposes is no longer theirs.<sup>101</sup> Without the illusions of state exclusivism, that sort of argument would be easier to make.

Second, to say that land counts is not to say that its borders must always be definitively, formally, defined. Consider Amish country, or Mormon country. Consider the efforts of both Amish and Mormons to find a land that, in some sense, they could call their own. Consider various Hasidic enclaves in the suburbs of New York. Even Indian country, in United States law, is a vaguer doctrine than the uninitiated might suppose.<sup>102</sup>

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<sup>100</sup> The most important recent such case is *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

<sup>101</sup> At least one commentator has recently made an argument along related lines. See Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 *Cath. U.L. Rev.* 705 (1989).

<sup>102</sup> See generally *Solem v. Bartlett*, 465 U.S. 463 (1984) (diminishment of Indian lands will not be sanctioned unless Congress clearly evinces an intent to change reservation boundaries);

Third, the idea that land counts, once that idea is let loose from state exclusivism, can be stretched, even to its breaking point. Land can focus autonomy without exhausting it. Consider debates over the efforts of religious groups to tear down or alter their buildings contrary to secular landmark laws.<sup>103</sup> Land can be somewhere else. Consider the role of the state of Israel in the life of Jews. Land can even be a metaphor. Consider again the "wall of separation" between church and state. The physicality of that image cannot be a coincidence.

Treating land as a metaphor is the breaking point of the idea. But it also recalls yet again the dialectic of sovereignty-talk, the ways in which it both reflects and creates reality. Religious history is too full of concern for sacred space for the idea of a wall between church and state to be entirely metaphorical.<sup>104</sup> But, as metaphor, it reshapes that history, and reflects and creates a new reality.

### III. OTHER LEGAL ORDERS AND THE STATE

To recognize legal communities other than the state is also to realize that recognition can flow two ways. Why should non-state legal orders recognize the state? Why should religious communities, whose first loyalty is to a transcendent reality, accord any legitimacy to secular governments? Why should Indian nations, who have been the victims of genocidal warfare, treat the state with anything more than passive resistance?

This set of issues is, I believe, more difficult than the question of why the state should recognize the juridical dignity of other legal orders. My strategy in asking why the state should recognize non-state legal orders was to assume a normative stance that, though it sought objectivity, rooted itself in the state itself. I argued, as I put it, from the inside out. That strategy was fruitful for two reasons. First,

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Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (diminishment of Indian reservation was upheld where congressional intent was clear); *De Coteau v. District County Court*, 420 U.S. 425 (1975) (same).

<sup>103</sup> See *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, No. 86-2848 (S.D.N.Y. Dec. 13, 1989) (LEXIS Genfed library, Dist file) (upholding New York landmark statute as against facial and as applied challenge by church seeking to build office tower on part of its site).

<sup>104</sup> The "sanctuary" movement represents one recent effort to invoke the literal, territorial, meaning of the "wall of separation." See *United States v. de Aguilar*, 871 F.2d 1436, *aff'd*, 883 F.2d 662 (9th Cir. 1989); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989); *United States v. Merkt*, 794 F.2d 950, 954-57 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987). For one negative appraisal, see Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. Cin. L. Rev. 747 (1986).



although I adopted the internal stance of the state, I did not have to distinguish among states. I assumed that all states were, for my purposes, the same. This assumption might not have been entirely correct. Consider, for example, the internal normative stance of Islamic republics. But, because of the homogenizing influence of the international legal regime, it should not have been too far off the mark. The second advantage was that I could exploit state exclusivism as both a foil and a launching point. Rather than begin at the beginning, I asked how a state already committed to recognizing other states could justify not recognizing legal orders that happen not to be states.

Neither of these advantages, however, is available this time. First, it makes no sense to treat all non-state legal orders as if they were the same. Thus, no single internal stance is available. No single argument will work. Second, while I could shift the burden of proof in asking why states should recognize non-state legal orders, that is not possible in asking why non-state legal orders should recognize the state. Religions are particularly likely to believe that they speak God's word and exercise God's dominion, and that all other putative legal orders are mere pretenders.

Rather than attempt the impossible, then, I will simply offer a few observations. First, I will suggest some arguments that will not do. Second, I will offer one example of how a non-state legal order has functioned through its recognition of the state. Finally, I will end where I began, with the special example of Native Americans.

#### A. *The Wrong Roads*

For a non-state legal order to recognize the state is not to accept all its pretensions. It is not to accept state exclusivism and all that it implies. It does require, however, treating the state as a legitimate source of legal authority. It also requires taking seriously the territorial foundations of the state. It requires the recognition that within a state's territory, some accommodation—though not necessarily a total accommodation—must be reached with the legal order that it creates.

The arguments that fail to reach these conclusions are, unfortunately, the most common. The state, for instance, does not impress simply by the power that it wields. These might be reasons for acquiescence, but not necessarily for recognition.

It also will not do to point to religions and other non-state legal orders whose own ideology automatically welcomes the state. These religions, for example, concede that the state, or some secular government, must rule the earthly kingdom while the community of saints

concerns itself with the heavenly kingdom. But not all religions take this view. Many would find the bifurcation alien.

Another fallible argument is the liberal grounding of legal orders in some form of social contract. Non-state communities might accept the need for a social contract. They probably accept the need for government and legal order. But they also might contend that they themselves embody just such a legal order—or at least would if the state were not always getting in their way. The defender of the state might reply that a single, overarching, structure of government is necessary to accommodate persons and communities with widely divergent interests and ideologies. But the non-state legal order can rejoin that without a world government, no state provides that overarching structure.

### B. *The Law of the Kingdom is the Law*

The striking fact, then, is that most non-state legal orders do recognize the state. This might only be a testimony of the times, but the roots of that recognition go back to long before modernity. Moreover, even legal orders that claim the broadest range of jurisdiction—that contain, for example, their own bodies of contract, tort, and property law—will often be willing to defer to the legal order of the state.

Consider, in particular, the Jewish law doctrine of *dina de-malkhuta dina*—“the law of the kingdom is the law”—on which several papers at this conference have focused. The doctrine recognizes that the law of non-Jewish governments is binding. More important, it recognizes that such law is binding on Jews, and can in many contexts validly override any contrary provision of Jewish substantive law. This doctrine was first elaborated upon in Talmudic times, after both the destruction of the Jewish Commonwealth and the erosion of Jewish autonomy in the Babylonian diaspora. Thus, the doctrine must find its roots, at least in part, in pragmatic concerns and survival instincts. On the other hand, Jewish law already had an elaborate set of principles regulating accommodation with illegitimate authority. If pragmatism were all that were involved, *dina de-malkhuta dina* might not have been necessary at all.

The reasons for *dina de-malkhuta dina* did not begin to be articulated until well after Talmudic times. There are several possible explanations—I base myself here on the secondary literature<sup>105</sup> and on

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<sup>105</sup> *Dina de-Malkhuta dina*, in 6 *Encyclopedia Judaica* 51 (1972); G. Graff, *Separation of Church and State: dina de-Malkhuta dina in Jewish Law, 1750-1848, 10-12* (1985).

the papers presented at this conference. I will not survey them all. But at least two are worth looking at. One explanation is grounded in the duty of non-Jews, under Jewish law, to establish a government. This explanation is interesting for two reasons. First, it asserts the primacy of Jewish law even as it recognizes the legitimacy of non-Jewish sovereigns. One lesson here, again, is that sovereignty-talk can go on at many levels. Jewish law can claim to speak God's universal voice. It can claim to bind non-Jews, and does so claim, at least to a minimal set of conditions called the seven Noachide commandments. Yet it can also recognize other legal orders that are both embedded in that larger structure and autonomous from it. Recall, again, John Marshall's view of the Cherokee.

The second interesting aspect of this explanation of *dina de-malkhuta dina* is that the obligation of non-Jews to establish a government would bind Jews to obey that government. This might seem a bit of a leap, but it is very much a part of the argument's structure. Secular legal orders, though they might be legitimated by a universal obligation arising out of Jewish law, are not agents of Jewish law. They are coordinate legal orders, with a juridical dignity all their own. To the extent that they claim a certain jurisdiction, and to the extent that jurisdiction is legitimate, they must bind all who come within it. It does not require state exclusivism to admit that the legal order that states establish is largely, even if not exclusively, territorial. Jews could in principle claim blanket immunity from the law of the state. But that would compromise the very principle of jurisdiction that gives the state the authority to establish the law for anyone at all.

Another explanation for *dina de-malkhuta dina* is contractual. Jews, along with the other occupants of the land, consent to the legal order, either explicitly or implicitly, by living in the land. They are therefore bound to that legal order. This might seem like a version of the liberal argument for the state. But there are differences. In particular, the contractual vision of *dina de-malkhuta dina* retains a central role for Jewish legal order. If that legal order places some matters outside the scope of contract, it can place them outside the scope of the social contract. If it purports to monitor the fairness of contracts, it can monitor the fairness of the social contract. Nevertheless, common elements remain. The most important, perhaps, is the insight that the advantages of a legal order are a reciprocal affair. To enter a legal order is to take it seriously, to accept both its burdens and its benefits.

For the reasons I have already discussed, I have no wish to generalize from *dina de-malkhuta dina* to some more general account of

why non-state legal orders might, in some fashion at least, recognize the state. But some possible principles do emerge. First, any legal order must ask itself this question: What exactly is going on, legally speaking, in the world outside the legal order's own immediate community? Is there any law there? Maybe not. That was the view that many Europeans took of the state of the American continent. Maybe, in some sense, a universal law—presumably the legal order's own version of universal law—governs. Even if that is true, however, it only refines the question. What exactly is going on, day-to-day, out there? If the universal law cannot provide the day by day structure of governance for the rest of the world, what does? One plausible answer is the state. The next question then becomes: if the state is a legitimate, autonomous, legal order, what is the status of the state's territorial pretensions? Its claim to exclusivity might be misguided and illegitimate. But what rightful authority does it have? What are the consequences of living in the state and taking advantage of the legal order that it provides? The answers to these questions might look something like a doctrine of recognition.

### C. *The Law of the Land is the Law*

But what about Native Americans? According to my account of *dina de-malkhuta dina* and its implications, a plausible Native American response might be this: We have no problem recognizing legal orders other than our own. We are perfectly willing to acknowledge the legitimacy of the nations of Europe, Asia, and Africa. But, surely, conquest is different. Occupied nations do not have to acknowledge the rights of their occupier. Moreover, although many years have passed, this land remains occupied territory.

There might be no good answer to this hypothetical argument. What is striking, though, is how rarely it is heard. Indeed, most "radical" Native American theorists and activists insist, not on the illegitimacy of the United States, but on true nation-to-nation relations with it.<sup>106</sup>

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<sup>106</sup> This is apparent even in the manifestos of militant Native American organizations, most predominantly the American Indian movements that were active in the late 1960s and early 1970s. See *The Twenty Points*, in *Akwesane Notes, Trail of Broken Treaties: B.I.A., I'm Not Your Indian Anymore* 63, 70 (1974) (demanding, among other things, that the United States resume contracting treaties with the Indian nations, and that relations between Native Americans and the United States be governed by a treaty); *Proposed General Principles for United Native Americans*, *Warpath*, Fall 1968, at 4 (insisting that "Indian tribal territories . . . have not yet been legally incorporated into the United States in a full sense" and that "[w]e recognize the brotherhood of all Indian peoples without regard to the whiteman's boundary lines," but also describing Indian tribes as "domestic dependent nations" and "associated free states" of the United States). See, e.g., *Critical Issues in Native North America* (W. Churchill ed.

When European settlers first came to North America, Indians as often as not accepted them. More important, the Indians treated the Europeans as a distinct, self-governing people, as though they were another tribe.<sup>107</sup> Again, one reason for this was surely pragmatic—warfare was costly, as some tribes discovered. Nevertheless, there were other considerations. Precisely because the Indians did not have a rigidly territorial view of governance, they could tolerate newcomers establishing their own polity on the land. Moreover, trade dealings with the Europeans were possible and—from the Indian point of view—highly beneficial. Europeans could also be allies against other Indians. And the coming of the Europeans was, in some instances, thought to have spiritual significance.

Finally, the question that arises for any legal order must have been posed: Who are these people outside the immediate community? By what order do they live? Does it make sense to think of them as part of the existing order? The only possible conclusion, except for that non-trivial number of Europeans who assimilated into Indian society, was that Europeans were a distinct tribe, members of a distinct order. Indeed, the Indians seem to have been much more determined to affirm the “Otherness” of the Europeans than the Europeans were in affirming the otherness of the Indians.<sup>108</sup>

As European settlement increased, and colonial history passed into United States history, relations between Europeans and Indians took many turns. But through it all, the same question must have recurred: Who are these people? At one time, Indians could say, “now go back to the country from whence you came. We do not want your presents, and we do not want you to come into our country.”<sup>109</sup> But going back became progressively more difficult, partly because there was no land to which to go. The only possible answer was that

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1989); National Lawyers Guild Committee on Native American Struggles, *Rethinking Indian Law* (1982). Consider one emblematic incident: In May 1974, a group of Mohawk Indians took over 612 acres in upstate New York and claimed it as the independent, sovereign state of Ganieneh. They left only after much turmoil, violence, and intricate negotiations. Like other Indian activists, they declared their prior dispossession from the land illegitimate and appealed to the principles of international law. See G. Landsman, *Sovereignty and Symbol* 25-39 (1988). At the same time, however, the Ganieneh activists sought to establish foreign relations with the United States, and insisted (at least nominally) on negotiating with its representatives rather than those of the State of New York.

<sup>107</sup> For some accounts of early contact, see, e.g., J. Axtell, *The Invasion Within* (1985); J. Axtell, *After Columbus* (1986); W. Washburn, *Red Man's Land/White Man's Law*, *supra* note 5; T. Todorov, *The Conquest of America* (1984).

<sup>108</sup> See Drinnon, *The Metaphysics of Dancing Tribes*, in *The American Indian and the Problem of History* 106, 108 (C. Martin ed. 1987).

<sup>109</sup> *Native American Testimony: An Anthology of Indian & White Relations* 47 (P. Nabokov ed. 1978).

the Europeans formed a community, a legal order, a government. That legal order might have been unjust. It might have been at war with Indian nations. But it existed.<sup>110</sup> In the early nineteenth century, Tekamthi (Tecumesh), a charismatic Shawnee warrior and strategist, first articulated a strongly territorial, nationalist, vision of an armed, united Indian polity rejecting European encroachment on the land. Even Tekamthi, however, conceded that at least part of the country was already lost.<sup>111</sup>

Today, Native Americans must again ask the same question: Who are these people? They are not simply the forward army of some foreign regime. They are, for better or worse, a people at home on the land.

What I am suggesting is not just the acknowledgment of superior power. As noted, power can justify acquiescence. It cannot justify recognition. What is at stake is the same existential encounter that I have been stressing all along, and the same effort to construct legal categories that both reflect and shape that encounter. "Who are these people" is, for any legal order looking at the world, the great question of existential encounter. Consider also that these issues in some sense transcend questions of justice. The histories that give birth to legal orders are not always just. But history, whether just or not, must stake its claim.

I have tried to provide an explanation of why today's Indians might recognize the sovereign status of the United States. But what else would lead them to recognize the jurisdiction of the United States—at least its partial jurisdiction—over them? This is the most difficult question. Nevertheless, in thinking through the implications of their encounter with the United States legal order, Native Americans must consider that the United States is part of a larger world legal regime with territorial pretensions. In their most extreme form, these pretensions are worth rejecting. Toned down, however, they make some sense. Indians might argue that their reservations, at least, are outside the reach of United States law. But that contention might, in turn, simply freeze into place too limited a view of Native American claims outside the reservation. The better route, is that of the double, or even triple map, in which multiple legal realities coexist.

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<sup>110</sup> One emblem of this recognition, much misunderstood, is the term "Great Father," by which Indian delegates addressed the President of the United States. The term did not imply subordination. It was, however, a diplomatic metaphor, confirming the authority of the President and his power to grant gifts and favors. H. Viola, *Diplomats in Buckskins* 94 (1981).

<sup>111</sup> B. Gilbert, *God Gave Us This Country* (1989).

There is yet one other argument for Native Americans to recognize the United States. They might be drawn to its ideological promise. United States citizenship can make sense as part of a social contract in which Indians want to participate. It also can make sense as yet another ingredient in the social construction of Native American cultural, political, and legal reality.

Note that none of this requires the negation of Indian nationhood or legal order. Different sovereigns can coexist. The membership of different legal communities can overlap. Once again, only our myths keep us from thinking otherwise.

Some more or less general principles: The arguments by which a non-state legal order might recognize the state are not the same as the arguments by which the state might recognize a non-state legal order. But there are resemblances. More important, the process of recognition (as opposed to the arguments that move it along) has certain important common elements. One is the willingness to ask the sort of questions that open up the possibility of encounter, questions like "who are we to tell them what to do?" or "what is going on out there?" Another is the willingness to answer these questions through multiple, even apparently contradictory images. The United States is a territorial jurisdiction in a world territorial system, and yet its territory also contains other sovereigns. Jewish law is divine and absolute, and yet secular legal systems can exercise a form of legitimate jurisdiction that can smuggle itself even into Jewish law itself. Indian nations are true sovereigns whose history predates that of any European invader. And yet even their definition of that sovereignty admits that their lands are also now occupied by another to whom they must in some ways answer.

To draw a multiplicity of maps, or recognize a multiplicity of other sovereigns, or understand the variety of ways in which sovereign selves can define their relations with each other, is complicated business. But it is not mystical or unrealistic. Indeed, I would posit that it is less mystical, more realistic, more the ordinary stuff of legal craft, than an approach in which all reality is reduced to a single map, and all relations to one or two fixed categories, stubborn and impoverished.

#### IV. CONCLUSION

I spoke at the beginning about the dialectics of recognition. There is, as I said, an interplay between self-affirmation and external recognition. But that interplay is not only between self-affirmation and recognition by others of that self. It is also between self-affirma-

tion and recognition by the self of others. In making contact, we define ourselves and transcend ourselves.

There is also an interplay between rhetoric and reality. But the demands of reality are not only the pressure of hard facts constraining talk. They are also found in the logic of talk itself, as it reflects and shapes reality. What does it mean to say that sovereignty-talk is socially constructed? It does not mean that sovereignty is artificial, as opposed to real. It does not mean that if we dig deeper we will see that sovereignty-talk stands for something else. It does not mean that sovereignty-talk is only an excuse for not engaging in some other form of talk. It does not mean that sovereignty-talk can be manipulated to serve any possible end. What it does mean is that sovereignty is not a natural category, in the sense of something that exists apart from how we viewed it. It means that sovereignty, like other legal categories, is the product of will as well as cognition.

Finally, I have worried about the dialectic between recognition and simple respect. I have discussed violence in this essay, but have not emphasized it. Not because violence is unimportant. The American Indian example is important if only to show the relevance of violence to human affairs, and to the encounter of legal orders. Violence and sovereignty-talk are closely linked enterprises. I have stressed that the possibility of violence can be both a ground for, and a consequence of, sovereignty-talk. Nevertheless, law is at its best when it can stylize conflict, and give shape to the potential reality of respectful recognition. And that, I submit, is worth notice as well.