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Sovereignty, Property, and Indigeneity:

The Relationship Between Aboriginal North America and the Modern State in Historical and Geographical Context

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Submitted for the degree of Doctor of Philosophy

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I hereby declare that this thesis has not been and will not be submitted in whole or in part to another university for the award of any other degree.

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<u>Summary</u>

Accounting for indigenous forms of sovereignty poses difficult problems for the discipline of International Relations, which is framed by the story of the modern, territorial European state. Most attempts to conceptualize Aboriginal nations in the international system confirm the modern state as the benchmark for sovereignty. In this dissertation I address the problem of how to incorporate Aboriginal peoples into IR *without* granting the modern European state as the only legitimate form of sovereignty.

I proceed through an examination of key moments in the European colonization of the Americas, from first contact through the geographic isolation of indigenous peoples onto reservations. In each case it is demonstrated that the assumption of "formal" sovereignty – based on recognition, and with insufficient regard for historical context – underpinning conventional IR accounts of colonialism is inadequate to theorize colonialism. I argue that colonialism is not a story of political-legal recognition (sovereignty), but of political-economic social relations – specifically the appropriation of land (property).

My contribution to the discipline is two-fold. First, I contribute to a richer understanding of sovereignty. Establishing sovereignty over territory in the New World allowed the English (and then American) state to set the legal, political and cultural framework for the private acquisition of land. Second, rather than using indigenous nations only as a foil for modern sovereignty, or as victims in a narrative of colonial domination, I make the case for incorporating the political agency of Indigenous communities into IR's account of colonialism. Far from the passive victims implied by conventional IR, they were central to a dynamic history of resistance and compromise, and their interactions with Europeans shaped modern sovereignty in lasting ways.

Contents

Introduction

Research Question

The modern system of international relations is dominated by sovereign, territorial nation-states, but it also subsumes "pre-modern," non-state forms of sovereignty. Accounting for such forms poses difficult problems for a discipline framed by the story of European state sovereignty. Indigenous peoples historically have not adopted the territorial nation-state that the discipline of International Relations (IR) conventionally views as the form of sovereignty required to enter the international sphere.[1] The IR community — long guided by a commitment to the state as the main unit of analysis — has tended to ignore Aboriginal experiences or dismiss them as a matter for domestic politics or anthropology

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[1] The terminological considerations here are complex and politically charged. How to refer to the people who lived in North America before European contact? In the social sciences, the convention has long been to use the term *Amerindian,* although it appears much less frequently in the recent scholarship, and rarely if ever in humanities scholarship. With the obvious exception of direct quotations, I have chosen not to use that term, nor related forms such as *Native American*, largely because of their colonial resonances; as well, they seem to normalize the very conflation of racial identity and state citizenship that this project challenges. When an adjective is called for, I have typically used *indigenous*, as in this sentence. The noun form is trickier. I like the term *First Nations* — which has recently acquired a high level of currency in Canada – because it is consistent with one of the main themes of this dissertation, namely the need to distinguish between nations and states, and so I do use it occasionally, usually when referring specifically to indigenous political entities. In the US, the term *Indian* has long been – and remains – likely the most widely used, by Indians and non-Indians alike, even though its popularity is decreasing due to its colonial associations. In an act of rhetorical reappropriation, political radicals such as the American Indian Movement began using the term. I also use the noun forms *Indigenous peoples* or *Aboriginal peoples*, because these are among the most widely used terms of self-identification at this time, and also the most-used in international venues. I never use *Aboriginals* for the admittedly subjective reason that (to my ear at least) it sounds less respectful, perhaps because it echoes *Aborigines*, which was long used to describe the original peoples of Australia and is now considered insensitive or even offensive. My decision not to choose one term exclusively was made in large part precisely because the issue of terminology is so politically sensitive and I feel more comfortable aspiring to a restless meta-critical stance regarding terminology than I do with choosing one imperfect option among many.

   Who exactly "Indigenous peoples" refers to is itself the subject of a complex literature. The United Nations Working Definition of Indigenous Peoples is widely cited, and it is consistent with how I intend the term: "Indigenous populations are composed of the existing descendants of peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, and by conquest, settlement, or other means, reduced then to a non-dominant or colonial situation; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form a part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant" (quoted in Wilmer 1993:216) .

on the grounds that indigenous communities are not sovereign international actors. While this is a superficially elegant solution to the problem of accounting for Aboriginal peoples, it really just begs the question — "proving" indigenous nations are not sovereign international actors by assuming they are not — and is profoundly Eurocentric. It is less an analysis of Aboriginal forms of sovereignty than it is a disciplinary self-definition that excludes them.

A number of attempts to address Aboriginal experiences in IR have followed a distinctive logic, according to which it is argued that traditional indigenous communities have a status *equivalent to* states. This approach, commonly associated with a liberal discourse of recognition, rights, and national self-determination, actually reproduces the Eurocentric norm of sovereignty by confirming the nation-state form as the benchmark for legitimacy. To put it another way, both traditional IR, which excludes indigenous forms of sovereignty from IR, as well as liberal attempts to include them through an appeal to equivalency, are united in invoking the modern territorial state as the standard for sovereignty. How is it possible to bring Aboriginal peoples into IR *without* granting the modern European state as the only legitimate form of sovereignty? That is this dissertation's main research question. I address this question through a theoretically controlled historical reconstruction of key moments[2] in the European colonization of the Americas, from first European contact until most remaining Aboriginal peoples had been isolated on reservations in the early twentieth century. The dissertation is organized to highlight the evolution of land appropriation through a series of consecutive different modes.

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[2] Here and throughout, I use the term "moment" as per Jindrich Zeleny (1980), who defines it as "one of the elements of a complex conceptual entity" (xi).

I employ a synthesis of two related strands of historical-materialist theory to challenge the standard IR portrayal of colonialism as sovereignty (political-legal relations). Instead I show colonialism as the alienation and expropriation of land (political-economic relations). I consider the economic and political dimensions of sovereignty together. I situate these political-economic relations in a "frontier" colonial context, where the establishment of state sovereignty could not happen as organically as it did in Europe. The process involved attempts to project certain practices onto a space that was not already ordered for them. The resulting contradictions and slippages highlight aspects of state sovereignty that are commonly overlooked in the IR literature. As a result, this project is able to address the historical imposition of the state on Indigenous peoples from, so to speak, both sides: it restores the agency of Indigenous peoples to our account and at the same time offers new insights into sovereignty.

To date, the best attempts to address my research question followed the indigenous turn in IR, in works by Marshall Beier, Neta Crawford, Paul Keal, Kerena Shaw, Makere Stewart-Harawiwa, and Franke Wilmer, among others. Far from granting the nation-state as the only legitimate form of sovereignty, these writers set out to challenge the positivist certainties of mainstream IR by mounting a full-on attack on the authority of state sovereignty. They draw upon constructivist and post-structuralist IR theories, sometimes blended with traditional indigenous forms of knowledge, to challenge the very notion of sovereignty, typically by portraying it as fundamentally a story of recognition. Because sovereignty is achieved through international recognition, and recognition is effectively controlled by the most powerful states in the system, sovereignty enforces the normative international consensus. Or (to modify Alexander Wendt's famous argument that "anarchy is what states make of it"), sovereignty is what the most powerful states say it is (Wendt

1992). The works associated with the indigenous turn in IR enrich the field by rectifying empirical omissions, and illuminating the inter-subjective social construction and reproduction of norms that determine what is "legitimate" sovereignty. But they also open up new problems. They demonstrate that to address our research question adequately is more than just a matter of rebalancing our emphasis to include "less state." The constructivist emphasis on denying the authority of the modern sovereign state has a depoliticizing effect, and prevents substantial new insights into how Aboriginal interactions with Europeans shaped the modern state's evolution as a real world-historical entity — one whose power, influence and authority cannot be wished away.[3]

I argue there is an assumption of *formal* sovereignty built into the traditional IR account of colonialism, and shared by liberal and constructivist critics alike. By "formal" I mean the conventional understanding of sovereignty based on political-legal recognition, and with insufficient regard for historical context.[4] The assumption of formal sovereignty

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[3] An incisive critique of social constructivism in international legal theory can be found in Bowring (2010). Surveying the recent constructivist literature in IR theory, with an emphasis on law (and in particular Christian Reus-Smit's *The Politics of International Law*), he shows that constructivist theory is fundamentally idealist and inherently apolitical, springing as it does from the same root as Habermas' "linguistic turn." Bowring contrasts constructivists' commitment to normative and ideational structures with the work of the scientific realists, which is based upon the much stronger foundational assumption that social structures such as nations have a real and objective existence. Bowring cites approvingly China Miéville, who has synthesized historical-materialist approaches to IR and international law, and who criticizes constructivism, in which "the structures of everyday life that surround us — such as international law — are deemed the accretions of ideas....This is a radically idealist philosophy, privileging abstract concepts over the specific historical context in which certain ideas take hold, and how" (quoted in Bowring 2010:111).

  Teschke and Heine's chapter in Mark Rupert and Hazel Smith's collection *Historical Materialism and Globalization* defends Marxist IR against the attacks, levelled by social constructivism and neo-Weberian historical sociology, that it is unable to account for the role of the state and for change in the system of inter-state relations because of its reductive economic structuralism. The authors show how constructivist and NWHS approaches distort the work of both Marx and Weber, and how Marxist dialectics provide "a coherent approach for conceptualizing the nexus between conscious agency and institutions on the one hand, and the nexus between political authority and economic forces on the other....[as well as for] theorizing international change" (2002: 156-166).

[4] An illustrative example of this view is found in James (1986), for whom sovereignty is a straightforward matter of fact; it either exists or it does not, with constitutional independence being its main attribute. "Sovereignty," he writes, "while it does not usually end in formalities, always starts there" (143). Although he does not specifically address indigenous appeals for formal recognition, James does posit that membership in the United Nations is evidence of, rather than a criterion for, sovereignty. In other words, if a state has

conceals political-economic relations, and it excludes non-state forms of sovereignty. Discussions in the IR literature of the expansion and universalization of the state form, and its confrontation with non-state indigenous nations, cannot be placed outside this assumption of sovereignty-as-recognition. On it rests the view that the establishment of modern state sovereignty in the New World was essentially a binary phenomenon: it did not exist, and then it did. In contrast, I argue that the establishment of state sovereignty in North America was a complex, uneven, and politically contested phenomenon. It was relational and dynamic, rather than formal and static.[5] To substantiate this thesis mandates the adoption of a theoretical approach that allows us to move beyond formal sovereignty by neither taking the state form for granted, nor dispensing with it altogether. It cannot simply point to "external" or formal qualities, such as the authority to govern or recognition by other states in the international system. It must instead open up the "internal" social relations and contradictions that drove and shaped the expansion of the state form. An analysis framed by formal sovereignty has little to say about such forces, which include political conflict between Europeans and First Nations, tensions between individual colonists and their states, and class antagonisms. From European contact at the end of the

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achieved legal sovereignty, recognition and rights in international law follow from there. In this way, indigenous nations — by definition non-state entities — can never be sovereign international actors.

[5] My emphasis on a relational narrative is particularly important because I am drawing on historical materialism to theorize indigenous history, a potentially fruitful but traditionally fraught combination. As Ward Churchill (1996) argues, "the dialectical theoretical methodology adopted by Marx stands — at least in principle — in as stark an oppositional contrast, and for all the same reasons, to the predominant and predominating tradition of linear and nonrelational European logic (exemplified by John Locke, David Hume, and Sir Isaac Newton) as do indigenous systems of knowledge. It follows from this that there should be a solid conceptual intersection between Marx, Marxism, and indigenous peoples" (462-463). However, Churchill continues, Marxism abandons a truly dialectical, or relational, perspective to the extent it assumes the primacy of humanity over nature. This can be contrasted with traditional Aboriginal philosophies, which rest upon a view of the universe as an interrelational whole; "the whole can never be understood without a knowledge of the function and meaning of each of the parts, while the parts cannot be understood other than in the context of the whole….Far from engendering some sense of 'natural' human dominion over other relations, the indigenous view virtually requires a human behavior geared to keeping humanity *within* nature, maintaining relational balance" (461-464).

fifteenth century until the turn of the twentieth century, the peoples indigenous to the territory that is now Canada and the United States lost almost all their land. It was a period of violent dispossession and tenacious resistance, coloured by intense inter-imperial rivalries, ultimately entailing the loss of millions of Aboriginal lives and the extinction of cultures.[6] Examining this history through the lens of formal sovereignty makes this politically contested, culturally complex and geographically uneven process appear to have been both timeless and bloodless.

My theoretical approach is a synthesis of two complementary historical-materialist theories. First is the notion of the separation of the political and the economic in capitalism, which I extend to the international level, positing the separation between sovereignty and property as the equivalent in IR. Second, because contrasting indigenous forms of political organization with European state sovereignty highlights a set of interesting questions about the role of property — specifically land — in constituting sovereignty, I turn to spatial analysis. This synthetic methodology allows me to develop and sustain two positions. First, sovereignty and property are deeply linked. The modern state was literally grounded in property; establishing sovereignty over territory in the New World allowed the English (and then American) state to set the legal, political, and cultural framework for the private acquisition of land.[7] This took the form of the privatization and commodification of land. Aboriginal systems of landed property rights, in which land could be subject to multiple

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[6] While exact population figures remain elusive, it is commonly calculated that at least 90 percent of the indigenous population was killed. James Tully writes, "the Aboriginal population of what is now commonly called the United States and Canada was reduced from 8 to 12 million in 1600 to half a million by 1900, when the genocide subsided" (1995:19). Ward Churchill cites the work of historical anthropologist Henry F. Dobyns and US Census Bureau reports to argue that total hemispheric Aboriginal population was reduced by an estimated 90 percent, from a peak of 125 million (1997:1). Also cf. Stannard, 1992 on the case of Mexico.

[7] On this point I am inspired by James C. Scott's *Seeing Like a State* (1998), which argues that various major schemes led by "modernist" centralizing states and intended to improve the human condition have actually been oppressive because they undermine local knowledge and autonomy. Scott specifically mentions rationalized land measurement and land tenure.

and overlapping ownerships, were replaced with one in which land was subject to exclusive ownership and could be privately transferred at law. Second, there was a specifically *spatial* character to the new form of land tenure, which was based on territorial exclusivity. Simply put, a functionally organized system of land rights was replaced by a spatially organized one.

Beyond Formal Sovereignty: My Core Theoretical Methodology

To make an argument involving Indigenous peoples using the tools of IR poses complex and interesting theoretical problems. It necessarily involves taking a double stance, in that it also requires a critical interrogation of some of IR's core approaches and assumptions. For our purpose, the most important of these is the focus on state sovereignty. The assumption of "formal" sovereignty, which I critique here, is a product of mainstream IR's more general focus on sovereignty, or inter-state relations, to the exclusion of property, or social relations.

According to Wood (1981), historical materialism rests on the key insight that each mode of production has its own specific logic, or laws of motion. (An idea reflected in my thesis that we must view the imposition of the modern state form on indigenous peoples of North America in social and geographical context.) An insistence on historical specificity also underpins groundbreaking work by Brenner (2003). Brenner argues that capitalism is best understood as a social system based upon social property relations between producers and non-producers. Under capitalism, producers have lost direct access to their means of subsistence — unlike producers in a feudal system, they are no longer required to hand over a portion of what they produce to a lord — and thus they must trade their labour and the

products of their labour through the market system. This means producers have both economic freedom and political freedom. Surplus production is no longer extracted from them using direct force or political coercion; instead this process is mediated through the market system. Wood and Brenner portray capitalism as fundamentally a system of *social-property relations*. Thus, capitalism is not only an economic system but a political one as well, and the core of the interrelation between the economic and the political is social-property relations.[8] The specific form of political authority associated with capitalism is the modern state.

This insight regarding the connection between capitalism and the modern state is the nexus that connects the Wood-Brenner thesis with the argument I develop in this dissertation. If, following Wood and Brenner, the origin of capitalism entails fundamentally a shift from direct extraction (as in the relationship between lord and serf) to economic exploitation, this gets at what is for our purposes the distinguishing characteristic of the modern state as it emerged out of sixteenth- and seventeenth-century England: the separation between the political and the economic. This is what distinguishes it from the feudal state, in which property was not owned privately, but rather held by the Crown — thus the feudal monarch enjoyed both *ownership* and *political control* over the nation's

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[8] See also Rosenberg 1994 and Teschke 2003. Wood identifies the object of her theoretical stance as "practical, to illuminate the terrain of struggle by viewing modes of production not as abstract structures but as they actually confront people who must act in relation to them" (1995:25). On the question of agency, Wood highlights E.P. Thompson's work as a touchstone within the historical-materialist literature because, she argues, Thompson is almost uniquely able to overcome the gap between the economistic determinism of structural Marxists and a vaguely theorized humanism. His work shows that "the economic" is always inherently social and political, because accumulation and exploitation are based on human relations. According to Wood, Thompson effectively addresses the core problem of how to reconcile the "laws of motion" of a mode of production with human agency. She accuses Thompson's structuralist critics, most prominently Althusser, of being essentially ahistorical, while Thompson sees "historical determinations, structured processes with human agencies" (1995:78). The emphasis on historical specificity and human agency (in this case of Aboriginal peoples), finds parallels in this dissertation.

territory.[9] If we concretize that concept by making "the political" and "the economic" refer to more specific historical forms, we can say that they refer to the separation between (state) sovereignty and (private) property. This is how I translate and apply the Wood-Brenner thesis to IR. It follows from this that mainstream IR's state-centrism results in a near-total focus on sovereignty, to the exclusion of property. It includes power relations *between* states, but excludes power relations *across and within* states.

In the context of a modernizing Europe, state sovereignty and private property not only rose coincidentally, *they both took the form of territorial exclusivity*. When the nation-state emerged in the sixteenth and seventeenth centuries, the idea of a distinctly public realm emerged with it. This produced a double movement, in which private-property owners attempted to establish a private sphere free from the power of the state (the Crown and later Parliament). The modern state, as Roepke writes in a classic article, entailed two meanings of sovereignty: "on one hand it means the independence and freedom of one State from all others, that is, a relationship as it exists between states. On the other hand, it denotes the supreme and absolute power of the State within its borders and *vis-a-vis* other centres of power" (1954:249-50; also see Aoki 1995). This phenomenon — the coincidental rise of the sovereign state and the sovereign, rights-bearing individual — was a fundamental characteristic of the modernizing state. In the immediate post-feudal context, the most important form of property was land. Therefore, to assert private-property rights was essentially a matter of keeping the Crown off of private *land* (Anderson 1986; also see Horwitz 1982). Thus the separation between sovereignty and property was underpinned

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[9] The conceptual distinction between property and sovereignty is complicated by the vernacular use of the terms, in which "property" often refers to an area of land, or when we say, for example, that Alaska "belongs" to the United States. At the risk of repetition, in this dissertation I conceptualize the separation between *property* (private ownership) and *sovereignty* (authority to govern) as IR's particular version of the separation between the private sphere of individual contractual freedom ("the economic") and the public sphere of government authority and regulation ("the political").

fundamentally by spatial assumptions.[10]

This insight takes on even greater significance when we examine Aboriginal forms of sovereignty. Some of the most significant differences between European and Aboriginal forms of sovereignty had to do with landed property. In medieval Europe — as in Aboriginal societies — land was considered fundamentally inalienable; it was not for sale, and not seen as a source of potential profit. But as markets emerged in modernizing England, land was re-imagined as marketable property. It became, in the legal terminology, *alienable*, meaning it could be privately transferred at law. In this historical context, landed property developed as exclusionary space in land (with the property owner's rights legally protected from state encroachment and the state also providing police protection against intrusion by others). These two linked characteristics — that it was exclusionary space and that it was subject to private legal transfer — combined to make land function as a commodity. The commodification of land coincided with the emergence of the modern state: from the origins of the state, land, like any other commodity, could be a source of profit. In contrast, in traditional indigenous societies, land was often subject to multiple, non-exclusive forms of ownership, and not subject to purchase; that is, it was never commodified. In order to build this into our account, I start with Wood's understanding of the separation between the political and the economic. I then add a spatial dimension by drawing on complementary work by David Harvey.

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[10] An interesting parallel can be found with the work of the legal realists, who argued that the separation between public and private realms in orthodox legal thought advantaged private property owners. See, for example, Cohen (1954), Hale (1943), Singer (1992). The territorially bounded sovereign state has been privileged within IR in roughly the same way. (As Elkins (1995) notes, state sovereignty and private ownership both rest on a view of property that assigns rights to an owner.) And, just as the modern state and modern notions of property were both articulated as exclusive space, so the Anglo-American legal tradition is "strongly based on geographically defined sovereigns" (Aoki 1996:fn 1300).

David Harvey and Space as Social Relations

In the simplest terms, a geographically informed approach to my topic is appropriate because colonialism is about space; as Cole Harris describes it, colonialism's "geographical core" is "the displacement of people from their land and its repossession by others" (2002:xxiv).[11] We benefit from highlighting fundamental spatial features of colonialism, such as frontiers and reservations, in addition to historicizing the state by examining how the relationship between state, culture, and economy have been conceptualized over *time*, and also over the surface of the globe. But a spatial lens is not on its own sufficient to move beyond an assumption of the formal state. In fact, the reality that sovereignty and property are forms of social relations is masked by an assumption of empty space. Spatial theory may allow us to avoid a naturalized statism, but also carries with it the danger of reducing space itself to the purely formal level, in this way merely reproducing the assumption of empty space. To avoid these problems — to move beyond the formal state — we must begin with the assumption that space is relational, not static. In other words, we must not see space as essentially empty, without people occupying it; the concept of *space* as a category allows for a "focus on actually lived experiences entailed attention to the spaces where these experiences take place" (Davies and Niemann 2002:559).

The version of spatial social relations I employ here conceptualizes space in two senses: both the *physical space* of geography, and *ideas about* space (see Poovey 1995:27). It does not refer to space in the narrow geometric sense, nor in the sense of a "fixed

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[11] Also see Edward Said: "Underlying social space are territories, lands, geographical domains, the actual geographical underpinnings of the imperial, and also the cultural contest. To think about distant places, to colonize them, to populate or depopulate them: all of this occurs on, about or because of land. The actual geographical possession of land is what empire in the final analysis is all about….Imperialism and the culture associated with it affirm both the primacy of geography and an ideology about control of territory" (1994:78).

container" of politics and economics; rather it refers to a dynamic and ever-mutating site of social relations. When applied to the concept of the state, it allows us to consider each state in historical and geographic context. The spatial theory I use in this study is based on work by Harvey (1999; 2001; 2009) and Lefebvre (1991, 2009). [12]

The first major idea I take from Harvey (2009) is the distinction between absolute space and relative space. Absolute space is fixed, unchangeable, and continuous. In the logic of absolute space, a person or a place occupies a unique and exclusive place — space is how the individuality of people and places are identified. No two people can ever share the exact location in absolute space and time. At the social level, "absolute space is the exclusionary space of private property in land and other bounded entities," including states (134; also see Harvey 1999:338-339). What Harvey describes as the logic of absolute space underpins the "container" approach within conventional IR: a state, for example, is identified by its unique position on a map. Absolute space is thus the space of private property. There is one additional implication of absolute space: it is "clearly distinguishable from time. Spatial ordering is one thing. Absolute time unfolding on a linear line stretching to an infinite future is another. History, from this perspective, has to be construed as distinct from Geography" (2009:134).

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[12] Interest in Lefebvre's work on everyday life, the city and urban life, and sociospatial theory has been growing for several decades. David Harvey in particular deserves credit for introducing Lefebvre to a wide audience through the discipline of geography. His work can be seen to build on themes developed within neo-Gramscian IR. Indeed, Soja claimed that "the step from Gramsci to Lefebvre is primarily one of explicitness and emphasis regarding the spatialization" of modern capitalist society (Soja 1989:90). Yet Lefebvre's writings on state formation and state theory — in particular the four-volume *De L'Etat* published in the late 1970s — remain largely unknown in Anglo-American IR, largely because there is no English translation of key works. Neil Brenner and Stuart Elden have made huge recent advances in making Lefebvre's state theory available in English. Their edited volume of English translations of Lefebvre's writings on the state, *State, Space, World: Lefebvre and the Survival of Capitalism,* (2009) is particularly important. I wish to express my gratitude for their generous collegiality in making advance portions this book available to me in manuscript form.

This is a fundamental difference between absolute space and *relative* space: relative space is the space of change, process, and motion. In this way, relative space — which we might call the Einsteinian counterpart to Euclidean absolute space — cannot be understood separately from time. For Harvey this is the key theoretical linkage between geography and historical materialism: "all geography is historical geography and all history is geographical history." (2009:135).[13] This demands a terminological shift from the "absolute space" and "absolute time" to "relative space-time." Whereas no one can occupy exactly the same space at exactly the same time as anyone else, many people can be in the same place relative to someone else at the same time. Moreover, the concept of relative space-time allows the analyst to consider each state in historical and spatial context.[14] By adding historical and geographical specificity, we can avoid the trap of seeing the state as an ideal type or pure essence and keep the concepts of absolute space and relative space-time in dialectical tension.

While the terminology of absolute space and relative space-time are specific to Harvey, Henri Lefebvre developed similar insights, writing, for example, "the space of property cannot be established without its corollary: state space" (Lefebvre 2009:249). Lefebvre's notion of abstract space is particularly useful to understanding how the conceptual abstraction of the nation state acquired sufficient authority to influence social

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[13] Harvey also includes "relational space," by which he means the space of dreams and memories.

[14] The concept of relative space-time should not seen as "better than" that of absolute space. There is a danger, as Harvey notes, of viewing spatial concepts in purely relational terms: if the state is seen as nothing more than a political idea, a social relation with no basis in material reality, the logical conclusion is to assume that we can make it disappear simply by not thinking about it. (2009:272) This approach of dismissing the state as irrelevant — if the state is merely a construct, it can be banished by discursive fiat — has been famously employed recently by Hardt and Negri in *Empire*. Nonetheless, we can still recognize that the dominance of the absolute theory of space and time exerts a powerful disciplinary force by providing a simple way to identify, define and distinguish — and thus control — its population. "The modern state," Harvey asserts, "could not be what it is without" the hegemony of the absolute theory of space and time; that dominance is a "'condition of possibility' for the perpetuation of capitalist and state powers" (2009:270).

relations. According to Lefebvre's complementary work, the territorial nation-state is neither eternally fixed (as per neo-realist IR), nor only-recently eroding (as per most contemporary non-realists), but constantly being reconfigured[16] (cf. Lefebvre 1991; Brenner 1997; Elden 2004:211-245). Capitalism's distinctive spatiality entails the production of geographically uneven development by producing *abstract space*, which is driven by three simultaneous characteristics: it is homogenizing; it is fragmented; and it is hierarchical. The expansion of the inter-state system as I am describing it was superficially paradoxical. On the one hand it was *homogenizing*, taking a Western European model of political organization, the nation-state, and implementing it globally (if unevenly). At the same time, the very process of homogenization was based upon *fragmentation*, in that it involved systematically marking divisions, lines of inclusion and exclusion in the form of national borders. In *De L'Etat*, Lefebvre writes:

> "capitalistic space is simultaneously homogenous and fractured. Isn't this absurd, impossible? No. On the one hand, this space is homogenous because within it, all is equivalent, exchangeable, interchangeable; because it is a space that is bought and sold, and exchange can only occur between units that are equivalent, interchangeable. On the other hand, this space is fractured because it is processed in the form of lots and parcels, and sold on this basis; it is thus fragmented. These aspects of capitalistic space are shaped both within the realm of the commodity, in which everything is equivalent, and within the realm of the State, in which everything is controlled." (2009:233)

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[16] Echoing Marx's account of the contradictions between the city and the countryside, Lefebvre developed his concept of social space in part through the explorations of urbanization. At first this engagement with Marx's work on the city was quite direct, as the title to Lefebvre's 1972 book *La Pensée marxiste et la ville* makes clear. Key concepts within the urban *problematique,* which Lefebvre developed in subsequent books, included the struggle for control over "the right to the city," and the need for an "urban revolution." These concepts remind us that for Lefebvre spatiality is highly political and closely related to class struggle. But equally importantly, we must keep in mind that "urban" did not refer narrowly to cities, but as a kind of metaphor for the spatialization of modern capitalism and in particular the way its core social relations of production are reproduced through state planning. The notion of a "planned" economy, which is central to Lefebvre's concept of state space, should not be confused with a centrally planned economy, although that is one example of the phenomenon to which Lefebvre refers. The survival of modern capitalism, according to Lefebvre, rests on a socially mystified spatiality, a set of spatial arrangements obscured by ideology.

The state produces homogeneity, equivalence, while the market tends to fracture. Space is fractured through exchange. In other words, the state and the market perform contradictory functions, but ultimately work together to produce capitalistic space.

The apparent paradox between homogenization and fragmentation can further be explained with reference to the principle of "functional equivalence," which was imported from Euclidean geometry into political theory by Thomas Hobbes. As used by Hobbes, "functional equivalence" holds that every subject of the state is a theoretically equivalent unit. This way of thinking repudiated the early-modern ideas of divinely assigned social roles or "stations." It was adopted by Adam Smith, for whom it formed the basis of *homo economicus*, and thus geometric formalism became foundational to classical political economy (Poovey 1995:29). Lefebvre holds that the "principle of equivalence" is a foundational strategy of the production of modern state spatiality. Equivalence in this case does not imply *equality* — in fact, quite the contrary — but rather a formal designation that incorporates space into the realm of the commodity. Space that is both homogenous and fragmented is exchangeable, meaning it can be bought and sold in a market system. Functional equivalence extends the realm of the commodity, and allows commodities to be measured in terms of exchange value:

> Marx argues in the first chapter of *Capital* vol. 1 that proponents of free trade and mercantilism alike "operate under the assumption that 'value and its magnitude arise from their mode of expression as exchange-value,' whereas Marx argues that 'the form of value, that is the expression of the value of a commodity, arises from the nature of commodity-value.' In other words, by representing the exchangibility of commodities as a natural attribute of the object, and thus as the source or ground of value, both mercantilists and free traders fail to consider the multiform, potentially antagonistic social relations that produce heterogeneous commodities — chief among them the commodity labour-power — that can be exchanged as if they were equal." (Kazanjian 2003:213)

The reason equivalence does not mean "equality" arises from the fact that, in the global context, the relations between states are governed by the principle of uneven development: the more industrialized and urbanized countries make best use of new technologies, exert relatively greater influence over global finance, and dominate political discourse.

As the modern territorial state form spread, it carried with it a range of key spatial assumptions regarding property. A classical liberal notion of property rights allowed land to be abstracted onto documents, subject to exclusive individual ownership, and easily exchangeable. Land claims were made contingent on improving the land. Membership in a political community was assumed to take the form of exclusive citizenship and arise from residency within a territorial state. Such basic assumptions were incompatible with indigenous understandings of landed property and political authority. These modern concepts acted as technologies of appropriation. They allowed for the transformation of land tenure in North America from a functionally organized system to a spatially organized one. This was the framework through which land was commodified; it could then be acquired by whites.

This process, while ultimately overwhelming, was not inexorable. It was politically and militarily contested, and complicated by the implications of projecting state practices onto a space that was not already ordered for them. For example, in the metropolis, owning land was a relatively straightforward sign of social and political status. In the colonial context, however, a number of complications — regarding the relative status of different forms of land tenure, of indigenous vs. settler property rights, of different types of settler interests, among others — could not be avoided. As a result, judges were required to make rulings over land rights in societies for which the common law had not been designed (Buck, McLaren, and Wright 2001:21). The resulting social, political, and cultural

contradictions and tensions produced an overall process that was highly dynamic. The colonial expansion of the state form was not unidirectional; while English assumptions about space, property, and sovereignty were the leading edge of colonial expansion, interactions with Indigenous peoples and with European colonial rivals shaped these assumptions in lasting ways. The modern state form — following Lefebvre, we can call this "state space" — spread geographically across North America behind a dynamic frontier. This was not a state border, but rather a zone in which the state had not yet established its own property-rights regime. The movement was driven by the actions of private settlers, who pushed beyond the limits of government regulation but then had their land claims retroactively protected by technologies supplied by the state, such as laws, surveys, maps, and official records. On these issues, two books from outside of the IR cannon are important resources for me: Stuart Banner's *How the Indians Lost Their Land* and John Weaver's *The Great Land Rush*.

Banner, a legal scholar, provides a revisionist account of the transfer of land from Indigenous peoples into white hands. He begins with the claim that previous scholars have overemphasized the direct taking of land by force, and failed to account for the many ways in which land acquisition occurred through purchase or treaty. He outlines shifts in legal and economic regimes in the United States from first contact until the early twentieth century as colonists advanced steadily westward, claiming indigenous land as they went.[17]

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[17] Banner's subsequent (2007) monograph, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska*, expands his geographical scope, using a specifically spatial approach. It is a comparative survey of colonial land appropriation across the Pacific. Of particular note is Banner's case study of the Mahele of 1845-1855, a land-reform process in the then-independent kingdom of Hawaii. The fundamental consequence of this process was to reorganize the indigenous system of property rights to make it the same as European property regimes. The native Hawaiians did this to themselves as a preemptive move made in the knowledge that they were about to be colonized. Banner suggests that the Mahele was designed to convert land into a legal form that would be recognized by a colonial government, and in this way ensure that local elites would be able to protect their personal land after annexation by the United States.

Banner argues that it was often easier to buy land than to take it, especially early in the colonial period, when the first colonists were outnumbered and vulnerable. This attention to the real material conditions of claiming land — and the historical and archival evidence he mounts in defense of his thesis — help me develop and support to my argument that property and sovereignty were deeply connected. The legal artifacts, including deeds, letters, and court records cited by Banner give depth to the argument that taking control of Aboriginal land was not simply a matter of declaring formal sovereignty, nor was it pure force, but a dynamic combination of the two. Banner's thick description of shifting historic regimes and regional variation helps disrupt the view that colonialism was primarily a matter of legal-political recognition. Aboriginal dispossession was the common result, but the process through which this occurred was not universal across time and space. At the same time, he attributes much of these differences to discrete (often idiosyncratic) decisions made by local colonial officials. These individual decisions accrued over time, meaning that the system of land tenure we know now can be seen as the accumulation of many small decisions, instead of any broad strategy. As a result, Banner's narrative plays up the importance of contingency, or chance, in determining the evolution of colonial policies, often downplaying the agency of First Nations in shaping events. Along the same lines, Banner does not offer nearly as much historical detail about Indian forms of political and social organization as he does about European laws and mores. My approach differs from his in numerous ways, including my greater emphasis on: the international context; the need to theorize the state; and the agency of Aboriginal peoples.

Weaver's path-breaking book, which sits at the intersection of post-colonial and geographic history, shows how the global spread of the market economy dovetailed with imperial expansion to lead to the appropriation of enormous areas of land during the early

modern and modern periods. Weaver uses a regional-comparative approach, focusing on the experiences in the US, Canada, Australia, New Zealand and South Africa, all of which were originally British settler colonies. *The Great Land Rush* contains impressive historical detail, but perhaps the most powerful claim is also the most sweeping. As signaled by the book's subtitle, Weaver argues that a fundamental element of "the making of the modern world" was the conversion of common lands into private property.

Summary and Structure of the Argument

If sovereignty really were fundamentally a matter of recognizing universal criteria, indigenous nations might enjoy a much different status in international politics than they do now. Before contact, and into the early colonial period, indigenous communities organized themselves in well-established and sophisticated political structures.[18] These entities controlled territories, practised self-government, and conducted foreign relations with each other using various forms of trade and diplomacy (Deloria and Lytle 1984; Richter 2001; Warren 2005). It is true that Aboriginal societies did not share with European modernity the concept of state citizenship defined by residency within an exclusive territory; nationhood generally was constituted by a complex of ideas centred on a particular concept of the people, which was a spiritual as well as a political conception, and entailed fundamentally different understandings of political authority and the land (Deloria and Lytle 1984; Overstall 2005). Still, they shared enough of the same basic formal characteristics of European nations that some contemporaneous European political thinkers actually argued

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[18] There was great diversity — cultural, spiritual, linguistic, technological, political, economic, agricultural, architectural — across the indigenous societies of North America. It would be a major mistake to imagine a homogenous "Aboriginal" society. Still, they did have in common some variety of holistic spiritual philosophy, and certain assumptions about a people's relationship to land followed from this (Churchill 1996).

they met European criteria for nationhood (Keal 2003). Therefore the defining differences between traditional Aboriginal forms of sovereignty and modern state sovereignty must be based on something other than recognition. This argument is illustrated through an account of the historical establishment of sovereignty in a context where it could not happen as organically as it did in modernizing Europe. In North America, First Nations resisted intrusions onto their land with force and tenacity. Moreover, European colonization of North America constituted an attempt to project certain practices onto a space that was not already ordered for them.

Incorporating property into an IR analysis unsettles the traditional story of sovereignty as a "formal" matter based on recognition. The pursuit of property — specifically, land — was the reason English colonists crossed the ocean in the first place. Establishing sovereignty in the form of the modern state created the conditions of possibility, and provided a range of supports, for the private appropriation of land. At the same time, property functioned as a relational support for the more abstract notion of sovereignty. Viewed in purely formal terms — as they are in mainstream IR theory — sovereignty and property appear separate and unconnected. A social-relations approach reveals them to be profoundly connected.

The idea of empty, geometric space actually masks the reality that sovereignty and property are social relations. Adding space to our analytical framework may allow us to move beyond the formal state — but only if we understand space itself to be *relational*, not static nor empty. Our concern is with people occupying space and relating to others. From a critical geographical perspective, the state is neither natural and eternal nor a false construct. It is dialectically constituted by diverse moments of technologies, ideas, social relations, production, relations to nature, and the politics of daily life. The state appears as a

coherent entity, independent from other states and from the economy and civil society. It is reified — both as a tangible object and our understanding of it as a container of power — through material objects and real social relations, from maps, borders, armies, "national" economies and so on. This understanding of the relationship between absolute space and relative space-time, taken from Harvey, helps explain the imposition of the modern state form, with its logic of exclusive sovereignty and exclusive private property. Indigenous nations did not have fixed, exclusive territorial boundaries, and thus no clear definition in absolute space and time, while the modern state that emerged in England in the seventeenth and eighteenth centuries was entirely consistent with the logic of absolute space. The ideas and culture associated with absolute space exerted powerful disciplining force in support of the state.

I develop these points over four historical chapters. The first of these, chapter 3, contrasts the English and Iberian views of indigenous land rights: the English were much more concerned with owning land, while Spanish colonists were relatively more interested in extracting minerals and metals from under the land — and so relatively more interested in indigenous labour than land *per se*. My critical target in this chapter is the commonly accepted notion that colonial interactions with Indigenous peoples occurred between them and a generic "Europe." This is what I call the "European state" thesis of conventional IR. It underpins the assumption of formal sovereignty because it posits a "state" that is completely removed from cultural or historical context. Contrary to this argument, different European powers interacted with the peoples they encountered in the New World in different ways. There were different forms of modern state in Europe, and the specific moments of state formation were unevenly timed, with economic ambitions, culture, and domestic social relations accounting for most of the variations between different imperial

systems.

Chapter 4 extends my critique of the assumption of formal sovereignty. It shows how indigenous-settler relations on the ground were not determined by formal sovereignty or nationality, but were shaped fundamentally by the real material conditions of defining and claiming property in the New World. Colonists' attitudes and practices toward land claiming and ownership were in tension both with those of indigenous peoples, as well as with the official positions of their home state. Unlike the Spanish or the French, most British colonial settlers were "free agents," representing neither the state nor the church. This freedom meant that, while the ideas that English settlers carried with them — notably those reflecting an early-modern English obsession with land — remained influential, they often underwent severe mutations upon contact with Indigenous peoples in the colonial context.

As settlers were forced to reconcile their ideas with the challenges of the frontier, they increasingly contradicted official policy, sometimes taking by force land that their government had acknowledged as belonging to first peoples; sometimes buying indigenous land that the Crown believed they already owned as a spoil of discovery. Shortly after contact, when colonists were most vulnerable, they tended to combine dramatic declarations of imperial dominance with *de facto* recognitions of Aboriginal land ownership. As time went on, and Europeans became more powerful, they transformed power into right: their methods for taking Aboriginal land actually become both subtler and more brazen, but in all cases the methods of appropriation were protected by a shield of legality. This chapter also introduces the Aboriginal perspective, contrasting indigenous forms of land tenure with European ones and exploring why First Nations would choose to sell some of their land.

Chapter 5, which deals with the period after American secession brought the British colonial period to a close and Aboriginal nations were becoming "internal" rather than "external" nations, takes up the issue of the separation between the political and the economic. Revolutionary American governments attempted to assert control over the allocation of land on the frontier by putting land allocation in government hands. Just as before, land transfer was structured through a series of contracts; now, however, control over land transfers was centralized in the state. Land was transferred out of Aboriginal hands through contracts, but these no longer took the form of sales between individuals, and instead took the form of sales between sovereigns; that is, as treaties.

Over the course of several decades in the early nineteenth century, the US state forcibly removed most remaining Indigenous people to land west of the Mississippi, a process that was formally legitimized through the use of treaties. US government acquisition of Aboriginal land was *always* structured as a series of voluntary transactions. But Aboriginal consent, as expressed through treaties, became *purely* formal, not meaningful. The process for appropriating land always included both consent and coercion. Chapter 6 addresses these issues, and also contains a detailed case-study of the Muskogee nation, which I use as an example of the effects of European contact on indigenous governance structures and practices: First Nations experienced intense pressure to abandon traditional indigenous governance structures by the requirements of dealing with nation-state governments (Warren 2005).

My main contribution the literature is twofold. First, I help restore to International Relations the experiences of many people who have long been ignored by the discipline in large part because it would be theoretically inconvenient to include them. In addition to this moral imperative to add indigenous experiences to our account of history, I also make an

empirical case: we cannot achieve a full understanding of sovereignty if Aboriginal people are excluded, or if they appear only as victims in a narrative of colonial domination. Far from the passive victims implied by conventional IR — and no less by some sympathetic critical scholars — they were central to a dynamic history of resistance and compromise, and their interactions with Europeans shaped modern sovereignty.

2. Review of the Literature

This chapter helps establish the problem I am trying to solve, and, crucially, how others have tried to solve this problem and come up short. Because indigenous nations historically have not adopted the state form the IR orthodoxy takes for granted, the discipline has a meagre theoretical vocabulary to explain their experiences, and they have typically been ignored altogether or else dismissed as a matter for domestic political analysis or anthropology (Brown 2000; Dunne 1997, 1998; Keal 2003; Shaw 2008; Wilmer 1993).[19] As I show in this chapter, addressing this long-standing omission requires doing more than just adding indigenous people to our story. Certain deep-rooted assumptions in IR form structural impediments to the inclusion of Aboriginal forms of sovereignty. The chapter begins by establishing the problem in the literature. Whereas mainstream IR excludes Aboriginal forms of sovereignty entirely by failing to historicize the modern state, the historical approach of the English School is itself inadequate in that it confirms the state as the natural constitutive unit of the international system. I then show how others have attempted to address this problem, focusing on the authors associated with the indigenous

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[19] A number of works by scholars outside the field of IR have placed indigenous case studies in the international context. These include two recent books by Latin Americanists, Alison Brysk's *From Tribal Village to Global Village* (2000) and Nicholas P. Higgins' *Understanding the Chiapas Rebellion* (2004). Higgins' book is valuable because of its historical argument tracing the assimilation of the Maya Indians into the modern Mexican state. Ronald Niezen's *The Origins of Indigenism* also emphasizes the role of international cooperation among indigenous peoples — Niezen uses the phrase "international indigenism" to describe the global phenomenon in question — in pursuing human rights (Niezen 2003). As with books by Keal (2003) and Wilmer (1993), which are discussed in more detail elsewhere in this chapter, Niezen largely accepts the liberal notion that indigenous activists should pursue rights and recognition by international institutions. The anthropologist Edward H. Spicer had embarked on one of the few major studies that theorized indigenous nations as stateless nations in an international context. Spicer's book project, *Enduring Peoples; or, Ten Against the State*, a study of how ten nations — including three nations indigenous to North America and the Lowland Mayas — survived within modern states, remained unfinished after his death, although his chapter on the Yaquis was published posthumously (Spicer 1994). There is also a rising literature on indigenous issues in international law, notably Robert Williams' towering *The American Indian in Western Legal Thought* (1990), a book that is referenced and discussed in several chapters below (See also Green and Dickason 1989; Venne 1998; Anaya 2004).

turn in IR. They attempted to overcome the absence of indigeneity in IR with approaches that emphasize the social construction and reproduction of norms that determine what is "legitimate" sovereignty. I work through the key works in this approach, highlighting their success but critiquing these approaches for the fact that, while they do incorporate more indigenous experiences into the literature, their emphasis on denying the authority of the modern sovereign state has a depoliticizing effect. They are unable to offer substantial new insights into how Aboriginal interactions with Europeans shaped the modern state's evolution as a real world-historical entity. Finally, I review how some authors have borrowed from critical geography to challenge the state-centrism in international theory. This last section provides important context for my use of David Harvey's work.

Many IR scholars would presumably defend the absence of indigenous nations and issues from the field on the grounds that they are not an important part of world politics. This is true, but only if by world politics we mean IR's traditional concerns such as war, trade regimes, and state diplomacy — concerns that share a particular theoretical foundation, namely the assumption that the international system is naturally and essentially a system of inter-state relations. IR's self-definition naturalizes and legitimizes the state form by making the sovereign state the pre-condition for analyzing international relations. Thus the exclusion of indigenous nations from IR is self-imposed and self-perpetuating (Shaw 2008:60). Yet on the face of it, IR's embedded statism may seem perfectly reasonable: does the nation-state's status as the main currency in International Relations (the scholarly discipline) not merely reflect its equivalent place in international relations (the subject of inquiry)? The state is the key constituent part of the international system, and therefore is it not only logical for the same to be true of the field that examines that

system? Assumptions such as these characterize efforts to use a natural-sciences approach to theorizing within the social sciences — an approach in which the goal is a disinterested explanation of eternal forces. Historically IR's scientific aspirations experienced a sharp rise after the discipline's mid-century behavioral turn, which triggered a decades-long drift towards pseudo-scientific positivism, during which time structure superceded historical context as a central concern and organizing principle in analyses of international politics (Smith, Booth, and Zalewski 1996). This positivist momentum reached its logical conclusion with the advent of neo-realism.

A-historical, state-centric neo-realism has provided for at least a generation the dominant methodological paradigm in IR, and so a critical engagement with that approach has been at the centre of many recent debates in IR theory; indeed, critical approaches to IR theory have "defined their identity through a series of challenges to neo-realism" (Linklater 1998:15). The immediacy and awareness of large-scale change seen in the years after the Cold War did generate a renewed interest in historical approaches to IR, part of a larger post-positivist reorientation (Halperin 2004). A growing number of critical IR theorists have demonstrated neo-realism's ahistorical state-centrism to be a closed loop of "self-referential logic" (Teschke 2003:13). That the states system is not natural and eternal — and therefore the centrality of the state in IR no simple reflection of reality — has been demonstrated by historical materialists, historical sociologists, and constructivists in IR. Introducing a historical dimension into IR is necessary if we are to develop an account of the historical problem at issue in this project. The English School does add such an element, and this body of work stands as the most sustained attempt to come to terms with the historical expansion of the European states system as a historical

phenomenon. The English School's account of the colonization of North America is the canonical one in IR.

The English School defines itself against realism's core claim that the conflict between states is endemic to the international system, positing instead the existence of an international *society* of states. International *society* is not the same as international *system*. According to Bull, an international *system* is merely one in which states interact, such that they "behave — at least in some measure — as parts of a whole" (1996:13). As Chris Brown writes, to "refer to an international *society* is simply a way of drawing attention to the (posited) norm-governed relations between states" (Brown 2001:89). The emphasis in that sentence is in the original: Brown is distinguishing between an international *society* and international *system*. However, his use of the word "states" is equally instructive — the English School is as committed to the state form as realist IR is, and assumes the legitimacy of the state as the main form of political organization in international relations.[21] The resulting absence of indigenous nations from international society is deeply ironic. Realism's skepticism regarding the possibility of inter-state cooperation emphasizes the fundamentally Hobbesian character of nation-states, which are by their nature engaged in an endless conflict of all against all. For this reason the English School refers to realism as the Hobbesian tradition in IR, attacking it in part because this tradition excludes certain questions from its analysis. Hedley Bull's canonical *The Anarchical Society,* for example, attempts to "demonstrate that there is more to

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[21] For discussions of the English School that question the "utility in thinking about world politics in terms of a society of states alone" see the contributions from Paul Williams, Jacqui True, Matthew Paterson and Alex Belllamy in Bellamy, ed, (2005:286). Scholars such as Martin Wight, for example, consider the European states system as one among numerous historical examples of international societies (Wight 1977).

international relations than the realist admits" (Linklater 1998:105). Yet *The Anarchical Society* begins by establishing "the existence of states" as "the starting point of international relations" and fundamental condition for his analysis. To the extent the English School's critique of realism's exclusionary stance is framed in this way, it is guilty of an equally exclusionary logic: it marginalizes non-state units such as Aboriginal nations as being unworthy of study in international relations, and further, "asserts the primacy of the society that these states form as the universal form of the international. In doing so, it also reinscribes a particular modern, European form of social-political organization as the universal norm" (Shaw 2008:61).

According to the English School, international society appeared in early modern Europe, when a society of sovereign but equal states was first established, and then spread outward, eventually encompassing the entire world. The classic text articulating this argument is *The Expansion of International Society* (Bull and Watson 1984). Bull and Watson are clear that international society was a society of *European* states. As Bull (in Bull and Watson 1984) writes, international society was not realized until all of the world's "numerous and extremely diverse political entities….had come to resemble one another, at least to the extent that they were all, in some comparable sense, states" (121). In other words, the realization of international *society* was impossible before the presence of states. An important phase in this development was "the entry of non-European states into international society" (115). But this was not a matter of the European state appearing and then being exported, rather, "the evolution of the European system of inter-state relations and the expansion of Europe across the globe were simultaneous processes, which influenced and affected each other." When the European powers' colonial adventures across the Atlantic began, the European states system was still a residue of the Christian

empire; they were not yet secular; and the doctrines of internal and external sovereignty of states, the balance of power, and the equal rights of states had yet to be formulated (1984: 6-7).

These authors provide well-needed historical perspective; unlike (neo)realists, they do not take the system of inter-state relations to be timeless. Yet their narrative remains resolutely Eurocentric. For Bull and Watson, the simultaneous evolution and expansion of the European system of inter-state relations began in the late fifteenth century. This happens to be the moment of European contact with the Aboriginal people of North America (Columbus first crossed the Atlantic in 1492), yet even despite this historical coincidence Bull and Watson do not address the reality that the expansion of the European states system entailed conflict with Aboriginal societies. This omission is attributable to indigenous societies' not having adopted the state form. Bull and Watson write that "the expanding Europeans, on their part, as they encountered Amerindian [peoples] …did not always seek to subjugate or colonize them, which in any case they were not capable of doing on a general scale before the nineteenth century, but rather sought to trade with them, to convert them to Christianity, and in some case to join in military alliances. There was thus a disposition on the part of European states to enter into relations of a peaceful and permanent nature with particular non-European powers" (1984:117). While there is some truth to these claims, neither side in this relationship was "moved by common interests…they were not able to invoke a common and agreed set of rules to this end, such as came later to be assumed as the basis of international intercourse over the world as a whole. They were not able to appeal to established international universal international institutions — diplomatic conventions, forms of international law, principles of hierarchy, or customs of war — such as did facilitate exchanges within the various regional

international systems" (118). There could not be any conception of a "coexistence of equal sovereign states…between Christian and Amerindian" nations because that idea was not yet a reality in inter-imperial relations, let alone those between Europe and the rest of the world. Secular internationalist institutions had not yet emerged; instead there was natural law. As Bull concedes, natural law was merely a "conceptual or theoretical" basis for international cooperation, and an inherently European one at that (120). An "actual international society" did not emerge until "European states and the various independent political communities with which they were involved in a common international system came to perceive common interests in a structure of coexistence and cooperation, and tacitly or explicitly to consent to common rules and institutions." This phenomenon — manifest in such developments as the exchange of diplomats, the adoption of treaties based in international law, and multilateral conferences — was true to the extent that the political entities coming together were *states* (120).

Paul Keal's *European Conquest and the Rights of Indigenous Peoples* is a rigorous but sympathetic book-length critique of the omission of the role of indigenous people from the English School's account of the expansion of international society. He bases his critique of the English School's unjustifiably sanguine view of the expansion of the sovereign state largely in *moral* terms, arguing that modern-day states that have unresolved indigenous land claims are morally illegitimate, every bit as much as states that abuse human rights. Since the exclusion and dispossession of indigenous peoples was inherent to the historical expansion of international society, its moral legitimacy is questionable, and normative arguments about improving international society should be based on expanding its benefits and protections to include non-state groups (Keal 2003). Keal echoes the argument made by several English School authors that before international society emerged, and international

law along with it, the guiding philosophical framework for international relations was natural law, which provided at least a potential foundation for universal equality of individuals. Keal writes:

> The development of the states system and consequently of international society meant a progressive denial by Europeans to non-Europeans of the rights they accorded themselves. Whereas natural law theories were once a basis for drawing disparate cultures and political entities together, the development of a state-centric international society divided them. (2003:34)

In this passage Keal usefully modifies (if only in passing) the English School's claims for the earliest conceptions of international society, by making it explicit that the advent of the modern state had the effect of excluding non-state actors. In contrast, English School authors such as Bull and Watson remain constrained by a commitment to the sovereign territorial nation state in both theoretical and normative terms, portraying it as the basis for international cooperation.

Keal argues that self-determination must be de-linked from statehood. In this way, indigenous peoples would achieve formal recognition as "peoples" under international law; combined with land rights, he argues this move would safeguard Indigenous peoples' status as culturally distinct, non-state groups. But such an approach — more broadly associated with a liberal discourse of recognition, rights, and self-determination — actually reproduces a Eurocentric norm of sovereignty by confirming the nation-state form as the benchmark for legitimacy.

Franke Wilmer, whose *The Indigenous Voice in World Politics* was one of the first book-length arguments in favour of including indigenous issues in IR, makes a similar case for extending recognition to indigenous nations (1993). Wilmer attacks (neo)realism's myopic emphasis on power politics at the expense of normative concerns. Since indigenous

communities lack the military or economic capacities that define realism's frame of reference — or even "the international attribute of sovereign equality that enables even the poorest Third World states to participate in global discourse affecting their future" — they are excluded from consideration (20).

The value of this argument is obscured by Wilmer's problematic analysis of the international system, and of IR as a discipline. She describes realism as a theoretical anachronism, "an historical paradigm, accurately describing the basis and configuration of world politics from the sixteenth to the early twentieth centuries" (196). In the twentieth century, Wilmer argues, international relations have moved away from a narrow focus on power and conquest, and become more open to normative issues in general, and to the goal of self-determination in particular. It is important to clarify that Wilmer does not see a decline in political conflict, only that the grounds for political struggle were no longer "power and its tangible manifestations" to "normative issues and the values allocated through international institutions" (40). Wilmer echoes the English School's narrative when she posits a 500-year process of evolving "normative consensus among international elites," which results in "system stability" being valued more highly that it would otherwise be, which "in turn, makes it more likely that the core will accommodate and adapt to noncore views and assertions" (27). The basis for the evolving normative consensus is the shared experience of Europeans, which gives rise to a worldview often called "modernity" (6). Putting aside its apparent logical circularity, Wilmer's argument is problematic because it credits the relative decline of power (and rise of norms) with creating openings for indigenous activism. These real-world changes, Wilmer argues, then revealed realist IR's limitations and effected a corresponding rise in norm-based theories. Her claim that the realist tradition in IR (defined as an emphasis on capabilities over norms) has experienced

steadily declining influence over the twentieth century is highly dubious, as is the notion that it provides a useful and accurate way to understand global politics between the sixteenth and nineteenth centuries (Rosenberg 1994). The idea that the world's elite powers have been moving steadily toward normative agreement — along with the corresponding claim that this normative consolidation has led them to accord more weight to the claims of indigenous peoples — is also a problem because it portrays rights as essentially a gift accorded to Indigenous peoples by European benevolence. Thus Wilmer, despite making a strong argument that indigenous politics should no longer be marginalized, actually reproduces the liberal internationalist / English School schema in which modern civilization, embodied by the European states system, is evolving away from violent conflict and toward peaceful cooperation.

In sum, the English School perspective, articulated by such writers as Bull and Watson, corrects realism's ahistoricism, opening the door to a sophisticated analysis of colonialism. As Keal and Wilmer argue, as a consequence of its statist liberalism, the English School approach never realizes its potential to meaningfully incorporate Aboriginal experience into IR. But these authors reproduce statist assumptions. This is the problem this dissertation addresses: how is it possible to bring Aboriginal peoples into IR without granting the modern European state as the only legitimate form of sovereignty? The next section reviews how this question has been addressed in IR. The prevailing answer to this question in IR has involved approaching it, so to speak, from the other side: if arguing that indigenous nations are "as good as" states merely reinforces the state's status as the benchmark for legitimate sovereignty, then why not challenge the very notion of sovereignty itself? This took the form of an "indigenous turn" in IR, which was based on constructivism.

The "Iroquois Diplomacy" Debate[23]

For constructivists, the most valuable insight developed by writers from the English School was less the historical contextualization than the notion of an international society held together by culture.25 The constructivist emphasis on discourse offers some useful insights into the colonial encounter. Of the many differences that distinguished Aboriginal from European political traditions, two of the most important were the propensity to hold land in common rather than privately, and the simple fact that indigenous political structures were not formalized by being written down: "customs, rituals, and traditions are a natural part of life, and individuals grow into an acceptance of them, eliminating the need for formal articulation of the rules of Indian tribal society" (Deloria and Lytle, 1984:18). While many Aboriginal nations had oral instead of written cultures, and thus recorded and communicated their political structures through stories and legends, this was not always this case. For example, the first written constitution in North America was the Great Binding Law of the Five Nations (Gayaneshagowa), which was created by the Iroquois Confederacy and articulated such democratic values and goals as equal suffrage,

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[23] The names by which Aboriginal nations are generally known are rarely those they used for themselves. In fact, often they derive from insulting names their neighbours used to describe them to early traders and explorers (Wilson 1998). Here and throughout I have somewhat reluctantly chosen to maintain the scholarly convention of using the common terminology, such as Iroquois instead of *Haudenosaunee* or *Hotinonshonni*, and Cherokee instead of *Ani-Yunwiya*.

[25] On the specific issue of cultural homogeneity, see for example, Martin Wight (1977), who argued that historically societies of states have only ever appeared in regions with shared culture. Hedley Bull, while rejecting the suggestion that cultural homogeneity was a strict theoretical necessary for the emergence of a society of states, nonetheless noted that historically societies of states "were all founded upon a common culture or civilization" (1996:15; see also Bull and Watson 1984). Different iterations of this argument can be found across the IR literature. Constructivists also posit an international society held together by common culture. And essentially the same assumptions underpinned the normative case made by Carl Schmitt (currently experiencing a renaissance in IR) for a Europe united politically through its imperial authority and culturally through a deeply held conviction that Europeans were civilized while non-Europeans were not — with these forms of unity allowing Europe to avoid or at least mitigate the perils of inter-imperial rivalries. Indeed, the tendency to homogenize the multiple colonial powers, reducing them to the simple entity "Europe," is widespread in the historical literature, not just in IR (Seed 1995).

referendum and recall. The availability of written text[26] may explain why the Great Law of Peace, a document from the Iroquoian confederation, is the subject of perhaps the only debate about indigenous diplomacy I am aware of in the IR literature — although other confederacies of indigenous nations, such as the Illinois and Delaware confederacies, did exist. Neta Crawford's article in International Organization, "A Security Regime Among Democracies: cooperation among Iroquois nations," attempted to incorporate indigenous experience into IR by portraying the document in question as an articulation of a non-European version of a security regime.

The Iroquois (*Haudenosaunee*[27]) League was a powerful indigenous government made up of an alliance formed in about 1450 of five nations: the Mohawk, Oneida, Onondaga, Cayuga, and Seneca. It was joined in about 1720 by a sixth nation, the Tuscarora. For Crawford, there are two salient features of the Iroquois League. First, it was very successful at reducing conflict. Its member nations did not go to war with each other from the League's founding until its dissolution in the context of American secession — and even this was an essentially nonviolent process. Second, the member nations, as well as

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[26] This is not nearly as straightforward as it may sound. The League did use wampum (beads) as a form of communication roughly equivalent to writing, but to consider wampum simply as a form of "writing with beads" entails committing a strong act of cultural mistranslation. Wampum was used to memorialize events such as the creation of the League, along with other cultural forms such as songs (Foster 1985; Jennings 1984). Yet the history of the Great Law is still primarily an oral one, passed down through generations of Aboriginal elders, whose social role included keeping oral traditions alive; these traditions have their own characteristics and complexities, which traditionally have been poorly understood by non-native scholars. The massive loss of Aboriginal life and culture since colonization means that a good deal of historical "evidence" was almost certainly lost, and this, in combination with the complications associated with translating from one culture's worldview to another's, caution against examining the history of the Great Law in exactly the same way we might examine written documents such as the Magna Carta or the American Declaration of Independence. At the same time, this is not at all to diminish the legitimacy of oral traditions as historical documentation. As many scholars have noted, written histories typically have one author, whose perspective, however biased or incomplete, takes on great stature simply because it was written down. In contrast, oral histories are relatively democratic (Crawford 1994). Recently oral histories have been accorded greater authority in legal proceedings in many countries. For example, courts in Canada and the US have admitted oral history in numerous important cases (such as the *Delgamuukw* case in Canada, and *The Assiniboine Indian Tribe v. The United States*), even though they are *prima facie* examples of hearsay. (Gover and Macaulay 1996)

[27] This is in the Seneca language, meaning People of the Long House.

the League political structure itself, were democratic. A governing council of fifty seats met at least once per year, but debates and discussions were ongoing throughout the year; these followed a complex process that emphasized checks and balances, public debate, and consensus. At the same time, the internal sovereignty of each nation was respected. Among other advantages, this decision-making structure fostered unity and by extension security. Benjamin Franklin suggested to the colonies that the Iroquois constitution be used as a template for federal government (Cohen 1942:128ff; Wilkins 2006:129-134).

For Crawford, the evidence that democratic nations formally cooperated to achieve peace provides an opportunity to test out two IR hypotheses. She claims "the Iroquois nations stopped fighting each other and kept the peace among themselves through the operation of a well-functioning security regime," as per the regime theory of Stephen Krasner and in particular the security-regime model as conceptualized by Robert Jervis (346). Crawford's assertion that IR stands to benefit from the inclusion of indigenous experiences is deserving of praise, and her historical reconstruction of the Iroquois confederacy is meticulous, based as it is upon almost all available secondary sources (349-353). Yet her approach uses this non-Western historical example less as a way to test or problematize regimes theory than as a way to "expand the universe of cases of security regimes" by adding a stronger example than the Concert of Europe, which stands as the canonical case-study in the literature. Crawford also argues that the Iroquois League "exemplifies Immanuel Kant's idea of a system for perpetual peace," and thus would seem to confirm the democratic peace thesis that was generating so much interest in the IR literature at the time Crawford's article was written (346).[28]

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[28] Democratic Peace (also known as Liberal Peace) theories hypothesize that the absence of war between states in the capitalist core can be explained by the fact that (liberal) democracies do not go to war with one

In addition to conceptualizing the Iroquois League as an example of a security regime or a manifestation of Kantian democratic peace, Crawford claims a third reason for her study: it offers the potential to "begin to correct any biases that may result from the condition that most theories of international relations are primarily based on a reading of European history" (347). Yet despite the stated laudable goal of tempering IR's Eurocentrism and "realist claims to cross-cultural and timeless validity," Crawford treats the historical example at hand as confirmation of the logic of conventional IR. This is the basis for Bedford and Workman's critique of Crawford. They claim "the interest that the author finds in The Great Law of Peace does not lie in the uniqueness of the Iroquoian confederacy but rather in its supposedly (Western) democratic character" (Bedford and Workman 1997:91). In contrast, they declare their interest precisely in "the nonmodern character of the text," which they consider to embody "understandings and practices that are incommensurate with Realist orthodoxy" (91). This interest is part of a larger challenge to realism's ahistoricism, which the authors develop by demonstrating historical exceptions in which Realist laws of motion did not apply.

Bedford and Workman thus correctly identify Crawford's untenable application of ahistorical and Eurocentric IR to questions of indigenous history. However, the alternative they propose is a little more than a thin normative celebration of the ostensible differences between European and indigenous ways of life. The loss of traditional indigenous governance structures meant the destruction of "practices permeated with balance and moderation — practices diametrically opposed to the extremely aggressive conduct of

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another. This approach dates back at least as far as pioneering work by Doyle (1983, 1983a), but received a surge of attention in the 1990s, with a large literature appearing to support or challenge the central notion of Democratic Peace, as well as to offer more detailed explanations of the processes by which such a peace is achieved. See, for example, Weart (1998), Mousseau (2000).

capitalist states in the late twentieth century" (Bedford and Workman 1997:108). This is little more than a "noble savage" argument, in which an idealized version of pure pre-modern (almost prelapsarian) societies is contrasted favourably with the violence and corruption of modernity. While it is difficult to disagree with the claim that modern societies could benefit from exposure to human history beyond modern Europe, as a piece of analysis Bedford and Workman's article is unconvincing because it severs the Iroquois experience from real historical political context. The authors emphasize the contrast between the norms of a pre-modern society and those of contemporary international relations, rather than the real social contradictions and conflicts between the Iroquois League and colonizing European states. This is an imaginative vehicle for a broad critique of the limitations of realist-dominated conventional IR, but it would have been more powerful if it had treated indigenous-colonial relations as international relations, and it does very little to answer real historical questions about colonization. The Aboriginal people who appear in the Bedford and Workman account are detached from their historical agency, having apparently done little actively to resist colonial intrusion.

Sovereignty as Discourse: Shaw, Beier, and Stewart-Makarere

Karena Shaw's book *Indigeneity and Political Theory,* which includes a similar critique of Bedford and Workman, represents an additional step beyond the narrow conceptual limits of conventional IR (2008). Shaw's book is structured around a critique of the conceptual dominance of "sovereignty" in IR, and the resulting exclusion of indigenous experiences. She uses a close reading of the second chapter of Hobbes' *Leviathan*, arguing that the notion of sovereignty produced in this work became paradigmatic in IR. Hobbesian

sovereignty, as defined by Shaw, fundamentally entails the construction of a shared identity, a process that is "pre-political" — in other words, natural and inevitable — rather than the result of real historical forces and social relations. This notion of sovereignty then effectively naturalizes "the political," defined as the narrowly limited relationship between the sovereign and the citizens. This means that indigenous forms of political organization are inherently "outside" the political realm, and the Western state structure is "rendered apolitical and uncontestable, necessary and inevitable" (9).

After introducing her argument regarding the Hobbesian construction of sovereignty, Shaw moves on to explore how sovereignty is reified through academic scholarship, and in particular through the disciplinary separation of IR and anthropology, a separation that limits the potential for critical self-awareness within each of those disciplines. According to Shaw, Bedford and Workman's article "reproduces the agency and centrality of international relations and freezes Indigenous peoples as at best marginal contributors to its questions and endeavors" (68). Shaw intends "international relations" to refer to the system of inter-state relations, as well as the discipline of IR. This is an important point for understanding the book, which is, as the author notes, "an attempt to come to terms with how discourses and practices of sovereignty still set the conditions under which indigenous — and other forms of "marginal" — politics occur at all" (8).

Having established that the dominance of the concept of sovereignty limits political thought, and in particular limits the options for thinking about indigenous politics. Shaw then applies this framework to constitutional and legal indigenous issues in Canada, portraying the pursuit of formal legal recognition as a complex dynamic. On the one hand, focusing on the pursuit of rights is perhaps the most direct way for First Nations to realize compensation for broken treaties and past mistreatment on the part of the state. On the other

hand, this strategy has the side effect of legitimizing and perpetuating the same liberal state institutions that render Indigenous peoples, by definition, marginal. Whereas Keal and Wilmer advocate admitting Indigenous peoples to the system of inter-state relations, Shaw's critical stance toward sovereignty is more sophisticated and attenuated to its inherent contradictions.

Yet Shaw's book ascribes far too much power to the "discourse of sovereignty" relative to the real historical structure of the state. Shaw is primarily interested in political thought, specifically in "reconceptualizing the relationship between political theory and the challenges posed by contemporary indigenous politics," and she uses such historical examples as Alexis de Tocqueville's description of emerging forms of democracy in the US, in addition to the legal and policy frameworks for Aboriginal issues in Canada, to reveal "the resonances across discourses and practices of sovereignty" (8). No doubt an emphasis on political theory is perfectly legitimate, but the result in this case is an analysis overly detached from political context, with the rise of sovereignty analytically isolated from the wider context of the production of social relations. However successfully Shaw theorizes the construction of sovereignty as a concept and its role in naturalizing the sovereign state — the reproduction of social relations — she does not have an account of the social forces that drove the expansion of the state form. This weakness is reinforced in the final section of Shaw's book, in which she turns to the critique of sovereignty found in Deleuze and Guattari's *A Thousand Plateaus*, further emphasizing knowledge production and authorization over social relations and politics.

The emphasis on discourse over social relations is nearly total in Marshall Beier's *International Relations in Uncommon Places* (2005). Adopting a post-modern theoretical synthesis, in particular postcolonial theory and Derridean deconstruction, Beier argues that

IR's neglect of indigenous peoples is the product of the discipline having "internalized many of the enabling narratives of colonialism in the Americas." IR articulates the "'hegemonologue' of the dominating society: a knowing hegemonic Western voice that, owing to its universalist pretensions, speaks its knowledges to the exclusion of all others" (2). Western academic disciplinarity more broadly, and IR theory in particular, are guilty of reproducing the dominant Western worldview to the exclusion indigenous perspectives. As such, IR itself is a contemporary colonial practice. Having made this case, Beier unsurprisingly goes on to argue that conventional ethnographic practices such as participant observation through fieldwork are inadequate to capture Aboriginal reality. Beier's concerns about the exclusion of Aboriginal voices from the discourse of IR are passionately articulated, but his argument ultimately boils down to this unremarkable insight: the dominant society dominates discourse and culture. The final analysis fails to move us beyond the initial problem: Indigenous peoples are excluded from IR. Beier's insistence on exposing IR's complicity in colonialism and rejecting totally the authority of the scholar leaves him no ground on which to take a clear theoretical or analytical stand. The ironic result is that, in Beier's account, Aboriginal people are rarely more than the passive and largely forgotten victims of colonial tyranny.

Makere Stewart-Harawiwa's *The New Imperial Order: Indigenous Responses to Globalization* situates Indigenous people within the contemporary global political economy (2005). Its first chapter sets out the author's understanding of an indigenous ontology; this is part of a larger narrative strategy designed to avoid replicating IR's state-centrism. After that chapter, the author describes the establishment of "world order" in two stages: the first builds on Keal's (2003) argument that international law changed from natural law, which was concerned with individuals' moral rights as members of a universal humanity, to a

legal framework concerned with states' rights. The second stage explores the establishment of a multilateral economic order in the twentieth century, manifest in international institutions. Stewart-Harawiwa then locates indigenous resistance within this historical emergence of international order, although she offers little that is genuinely new in this regard, choosing to focus mostly on indigenous struggles for legal recognition. The book then sprawls out to cover the postwar period up to the advent of "globalization," which she characterizes as the "return of empire" and analyzes through an eclectic combination of critical perspectives culled from the "globalization" literature, most prominently the work of Hardt and Negri (2000). This book covers an exceptionally long historical period and draws upon a very wide mix of critical theories, such that its argument fails to cohere (in this way it testifies to many of the problems with the "anti-globalization" literature of the late 1990s). Despite those criticisms, Stewart-Harawiwa's book does make valuable contributions to the general theoretical problem I am addressing in this dissertation. (The sections on the particular historical period I am working on do not contain significantly new analysis.) First, she considers indigenous issues in a global political-economic context, which allows (at least potentially) for a much more political analysis. Second, she insists on the need to recognize, critique, and then move beyond the Eurocentric and state-centric assumptions of mainstream IR if we are to develop genuinely new insights into the role of Indigenous peoples in international relations. To this end, she employs an innovative indigenous theoretical approach known as *Kaupapa* Maori, which was developed by Maori scholars on the basis of the Maori history and experience with colonization and de-colonization. While she unfortunately fails to follow any one of her theoretical paths through to a useful conclusion, ending up instead with a vague critique of "world order" and "empire," these two elements alone make the book an advance.

State-centrism Reconsidered in Spatial Terms

The centrality of the state in IR has been critiqued by many scholars, ranging from pioneering works by critical constructivists (Walker 1993), to Atlantic studies' critique of the artificiality of state-based organization through an exploration of cultural hybridity (Gilroy 1993). Various critical and historical-materialist approaches in the IR tradition, from the early anti-imperialism of Hobson and Lenin through World Systems Theory, have attempted to explain the dominance of the west in terms of transnational capital, with little regard for the role of the imposition of the nation-state form. Recently, some social scientists have become so fed up with the concept of the state they propose dropping it altogether. These schools of thought in international studies challenge state-centrism, but they have done so largely at the cost of missing the real role of the state — in effect throwing out the empirical/historical baby with the conceptual/methodological bathwater. Examining the colonization of North America allows me to avoid such an all-or-nothing approach to the state. This is because in the New World, sovereignty was not established as organically as it did in modernizing Europe. European colonization of North America was an attempt to project certain practices onto a space that was not already ordered for them. A whole set of interrelated European assumptions regarding the relative status of different forms of land tenure, property rights, and private versus state interests crash-landed into Aboriginal North America. Focusing my analysis on this particular historical moment — in which the relationship between sovereignty and property was much more arbitrary than it was in early-modern Europe — offers an opportunity to develop new insights into sovereignty as a concept and an historical reality.

Let us consider the particular value such insights offer IR. Consider how the IR literature has been characterized by pendulum swings between challenges to the state's theoretical centrality and assertions of its empirical durability, producing the "seemingly unsatisfactory conclusion that the state is both a fetish illusion (a mask for class power) and an organized political force in its own right" (Harvey 2009:261). While it is beyond the remit of this study to survey comprehensively the literature on the social theory of the state, two linked summary points deserve emphasis. First, the concept of the *nation-state* has cemented the fundamental associations between the state and the nation. The terms "state," "nation," and "nation-state" are often used interchangeably in the literature. Theories of the state typically imply some degree of nationalism, while theories of nationalism often see that phenomenon as a state-led project (Sharma and Gupta 2006:7). This makes such theories largely useless to explain indigenous nations. Second, the vast majority of social theory — and this is especially true in IR — accepts the state as a straightforward subject for empirical observation. This concept of the state rests on an unexamined territorial basis (Harvey 2009:267). Conceptually, space functions as an assumption rather than a subject meriting examination in its own right (Biggs 1999).

Despite this unexamined status — or perhaps because of it — spatial assumptions are powerful in IR. As Sack (1980) shows, space, especially through the use of metaphor and other forms of representation, is embedded in the social sciences in deep and complex ways. Certain spatial assumptions structure, organize, and limit the research carried out by IR scholars.[29] The theoretical problem of state-centrism has been addressed in some of IR's

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[29] A spatial lens is not on its own sufficient to move beyond an assumption of the formal state. For an example drawn from IR to prove the point, we can turn to Carl Schmitt's *Der Nomos der Erde* — the first appearances of which in English translation produced a Schmittian "revival" in IR (Chandler 2008). Schmitt's account of two linked historical phenomena — the sixteenth-century conquest of the New World and the

adjacent disciplines, notably geography. We can benefit by borrowing from critical geography the concept of the "territorial trap," which describes an ahistorical state-centrism "in which the only possibility for mapping global processes is in terms of the fixed territorial boundaries of states" (Brenner 1997:138). This argument has been developed in detail by John Agnew (1994). In these terms, the territorial state is seen as a pre-existing "container" of society.[30]

The main alternative to the state-as-container theory in IR and international sociology has been the core/semiperiphery/periphery model of World Systems Theory

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development and expansion of the European state — is a highly innovative combination of the juridicial and the geographical (Jameson 2005). However, the value of Schmitt's spatial analysis is profoundly limited because it confirms, rather than challenges, the definition of the modern state as strictly a matter of sovereign territoriality.

To summarize his argument in outline: Schmitt considers expansion overseas to have constituted the beginning of a Eurocentric world order, an order whose passing he mourned in the *Nomos*. Even though this "world order" saw the rise of a series of genocidal European empires, Schmitt portrays it in consistently elegiac tones (Rasch 2008). The core of Schmitt's analysis in *Nomos* rests on a paradigm of insider/outsider, or friend and enemy. Since the beginning of the Holy Roman Empire, Christian Europe saw itself as unified, despite its many internal cultural, ethnic and political fissures. Whatever these differences, Christian Europeans were inherently superior to the rest of the world. As a result, wars between European states were "bracketed," or contained within reasonable limits (not unlike aristocratic duels) while relations between Europeans and the "uncivilized" world were subject to no such constraints. Schmitt emphasizes that "this great accomplishment," which constituted a break from both medieval concepts of just war and Roman legal tradition, "arose solely from the emergence of a new spatial order" (140). In Schmitt's schema it was the imperial conquest of non-European territory — "the appearance of vast free spaces and the land-appropriation of a new world" — that gave European states the central, privileged position within international law, and thus created the European order of limited inter-state war (140-141; also cf. 126-129). In this way, Schmitt's *nomos* is literally grounded in the land as he sees land as the most fundamental object of appropriation. This is what makes it a deeply *territorial* order: Europeans were successful at conquering territory outside Europe, and this success provided its own justification (cf. Schmitt 2003:80-84). The taking of land is "constitutive" of international law, both in the sense that making territorial changes peaceful is international law's core function, and also that "it is essential for Schmitt's argument that there be no deeper criterion of legality than that of the successful act of appropriation" (Hallward 2005:238). Every *nomos* is based upon land appropriation; the age of international inter-state law was inherently territorial, just as the medieval order before it arose fundamentally out of land conquests (Schmitt 2003:57). The logical conclusion of the Schmittian analysis is that conflicts between great powers are more important than "the fundamental relations of exploitation and domination that distinguish the rules of these powers from those they exploit both at home and abroad" (Hallward 2005:242). In short, the potential insights of the *nomos* model's spatial approach are limited because it sees the state as formal and space as static, not relational.

[30] This assumption — which is shared across most mainstream IR theory — is the first of three geographical assumptions that underpin Agnew's concept of the territorial trap. The second of these is that the strict distinction between the national/international, or domestic/foreign obscures how social relations work at different scales. The third assumption that forms the foundation of the territorial trap is the reification of national spaces as historically fixed — the consequence of which is that processes of state formation and change are overlooked or at best seen out of historical context.

(WST). Immanuel Wallerstein's historical-materialist approach was motivated by the need to place national cultures and societies more clearly in the context of international social relations. Wallerstein (1974, 1980) posits a modern world system, a "world economy" that is, essentially, capitalism on a global scale.[31] Wallerstein's largely static world system pre-empts political agency within the theory; political struggles and contradictions are relegated to the secondary structures of the state. In this way, WST "collapses potentially contradictory state-society relations into an ahistorical, abstract unity no less than do the neorealists" (Rupert 1995:10). By establishing its subject matter as a world-scale social phenomenon, WST and related approaches *assume* the space of social relations, rather than viewing it as the product of political dynamics and social contradictions (Drainville 1995). Conceiving of space in relational, as opposed to static, terms is not possible within WST's structuralist framework. However, WST does not exhaust the possibilities for a historical-materialist theory of spatiality. Indeed, as Soja (1989) shows, spatiality historically had a central place within Marxist and other radical approaches.[32]

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[31] This economy is capitalist simply in the sense that within it market exchange is carried out in pursuit of profit.

[32] The work of utopian socialist Fourier is one example of the geographically sensitive strand of socialist thought. The half-century-period, with 1848 as its mid-point, was the classical era of competitive industrial capitalism. During this period, "historicity and spatiality were in approximate balance as sources of emancipatory consciousness" (Soja, 1989:4). The discipline of modern geography emerged in the late nineteenth and early twentieth centuries to serve as a reservoir for spatial considerations. Consequently social theory became dominated by two strands: a relatively narrow, naturalistic historical materialism evincing historicism at the expense of any sensitivity to human geographies; and a series of compartmentalized social sciences, each becoming steadily more positivist, less critical, and less interested in the spatiality of social relations. Geographically aware strands of socialist thought after this point included the works of the anarchists Proudhon and Kropotkin (the latter of whom was a professional geographer). Within Marxist thought, the great figures in the fruitful period of the early twentieth century — Lenin, Luxembourg, Bukharin, and Trotsky — all displayed an acute interest in spatial and geographical issues. Marxist theories of imperialism and Trotsky's theory of combined and uneven development — surely among the Marxist tradition's signal achievements — contained an important spatial element, and they remain a primary source of spatial analysis in Marxist thought. Over time, however, the geographical dimensions of Marxist thought would come to be seen as merely a product of historical development — we might say space became a superstructural phenomenon in relation to the "base" of historicism. Despite the relative decline of spatiality in Marxist theory, Marxist historicism remained radical. The same was not the case for non-Marxist sociology, where historical analysis largely underpinned Eurocentric modernization theories. Thus, in the long

Conclusion

To sum up my argument so far, IR's traditional concerns such as war, trade regimes, and state diplomacy share a particular theoretical foundation, namely the assumption that the international system is naturally and timelessly a system of inter-state relations. English School approaches are historical, and indeed have been applied to the colonization of the New World. But these accounts are state-centric and apolitical. Keal and Wilmer frame the problem I address in this dissertation more or less "by accident" with their inability to move beyond the European state as the benchmark for legitimate sovereignty. Crawford, Shaw, and Stewart-Harawiwa address this problem, but they all fall victim, in various ways and to various degrees, to two of the failings of the English School: a lack of politics and a reproduction of state-centrism. They don't get beyond a formal analysis of the state. Moreover, attempts to challenge the legitimacy of statist sovereignty by portraying it as mere "discourse" do not shed any light on how indigenous communities' interactions with English colonizers shaped modern sovereignty in profound and lasting ways. I the next chapter I turn to my historical reconstruction of the colonization of North America, which I will theorize in light of the ideas outlined in this literature review.

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fin de siècle, spatiality became steadily marginalized within social theory — at precisely the moment when space took on a new social and political instrumentality (Soja, 1989: 31-35).

3. The Modern State Emerges out of England

Different European powers interacted with the peoples they encountered in the New World in different ways. There were different forms of modern state in Europe, and the specific moments of state formation were unevenly timed, with economic ambitions, culture, and domestic social relations accounting for most of the variations between different imperial systems. The different forms of state were also shaped by inter-imperial antagonisms and rivalries. An assumption of formal sovereignty, such as characterizes most IR accounts of colonialism, obscures these dynamics. The work of the English School in IR is the signal example of this point of view, which we might call the "European state" thesis. Roughly stated, it assumes that colonial interactions with Indigenous peoples occurred between them and a generic "Europe." It was this European state form that colonized the world.[33]

In this chapter I reject the European state thesis, contrasting the English and Spanish colonial presences. Viewed through our spatial social-relations lens, inter-imperial rivalries mandated the adoption of a conceptual framework of acquisition based on the theory of absolute space, because the different powers needed to establish mutually exclusive claims to sovereignty in the New World. I emphasize the importance of the modern English state; it was not the "European" state that provided the framework that effected the transfer of indigenous land, but rather the modern state that emerged out of

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[33] According to Watson, for example, international society's spread to the Americas begins at the moment of secession, which "effectively subtracted the new American states from the European balance of power" (Watson in Bull and Watson 1984:127). Watson's claim that US state formation fundamentally signified a net loss in the European balance of power is only convincing within a narrow, state-centric frame of reference. It is also at best historically incomplete: consider Napoleon's attempts to take over Louisiana and sell it again, or of the ongoing complex actions of the British, Spanish and French governments in North America.

sixteenth- and seventeenth-century England. The distinguishing characteristic of the modern state as it emerged out of sixteenth- and seventeenth-century England was the separation between sovereignty and property. The separation between (state) sovereignty and (private) property is one of the fundamental characteristics of the modern state form — for the purposes of this dissertation it is *the* fundamental characteristic. This is what distinguishes it from the feudal state, in which property was not owned privately, but rather held by the Crown — thus the feudal monarch enjoyed both *ownership* and *political control* over the nation's territory. It also distinguishes the modern state from indigenous nations, which, as we see in the following chapters, claimed sovereignty without necessarily governing an exclusive territory, and in which land was not held as private territory. As we will see below, the separation between the political and the economic allowed the modern state to function in effect as a powerful and efficient machine for transferring land from communal ownership into private hands.

I establish English specificity by contrasting the Iberian view of indigenous land rights with that of the English: the English were much more concerned with owning land, while Spanish colonists were relatively more interested in extracting minerals and metals from under the land — and so relatively more interested in indigenous labour than land *per se*. Spain was also culturally committed to legal formalities, and came to equate rights with religious conversion. In contrast, the English culture of legality shared roots with classical liberal (in particular Lockean) notions of property rights being derived from labour. For the English, the emphasis on estates and the productive use of land achieved by "improving" it was more important than cultural or religious conversion. But it also required the English (after an initial period of controversy) to acknowledge indigenous land rights on land occupied by Indigenous peoples. The rights to Indian land were then appropriated through

two parallel processes: "unused" or "unimproved" land was deemed unoccupied, and there for the taking; and English governments asserted, by virtue of their "superior sovereignty," the exclusive right to buy native land. The imposition of the state also entailed the imposition of legal doctrines that constituted a framework for the acquisition of land.

For Europeans, contact with the Indigenous peoples of North America was truly a "discovery," in the sense of finding something that was both newly exposed to the viewer and also pre-existing. However little they knew about or understood Aboriginal people, Europeans in general understood Aboriginal society to have been revealed to, not invented by, them (Pagden 1993:5-6). This discovery had to be incorporated into European political and legal understanding, and Europeans often found their conceptual frameworks entirely inadequate to explain the colonial encounter. European theories of property and land rights evolved through a series of modes, with changes at the level of theory reflecting the needs of expanding colonial empires (Green and Dickason 1989; Pagden 1993, 1995; Keal 2003). While it is the central contention of this chapter that we must understand the differences between English and other colonial projects, that is not to say were no commonalities. In what way might it be accurate to say that there was a *European* perspective on the New World?

The pursuit of natural resources was a central motivation for all colonial empires, and all used their experience with war and superior military technologies to apply brutal violence in the service of appropriating resources. But arms were not the only technology of dispossession: the law and culture were also potent. Legally and culturally, most important was the imperial powers' presumed inherent right to assert lordship over the entire world (cf. Pagden1995:8). For the imperial states of Europe, the issue of sovereignty was uncontroversial — they all took for granted their right to claim sovereignty. All

assumed a "superior sovereignty" to that of the Indigenous peoples they encountered. This idea was a legacy of Christian universalism. The rise of sovereign territorial states marked the end of the great medieval church, which had lasted a millennium and promised to unite every person together under the kingdom of God. Christian universalism had a stabilizing effect by papering over intense social contradictions — its promise of eternal happiness in heaven for those who lived a hard life on earth absorbed political dissent and helped protect the feudal system from rebellion (Ishay 1995:xxv). The idea of the Church as a universal commonwealth had been the determining influence on medieval political, legal and ethical thought regarding colonization (Pagden 1993).

Philosophically, the early-modern colonial projects in the Americas were explained and justified by drawing upon ancient (specifically, Roman) notions of universalism.[34] When Renaissance Europe first made contact with Indigenous peoples in the New World, the Europeans already "enjoyed the singular advantage of possessing a systematically elaborated legal discourse on colonization. This discourse, first successfully deployed during the medieval Crusades to the Holy Land, unquestioningly asserted that normatively divergent non-Christian peoples could rightfully be conquered and their lands could lawfully be confiscated by Christian Europeans enforcing their peculiar vision of a universally binding natural law" (Williams 1990:13). Yet the Church had had very little interest in attempting to regulate trade or commerce, either directly or through moral suasion. There were never any universal European conventions of finance or trade, but rather a patchwork of regional cultures and practices. As a result of these legacies, Europe's

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[34] The Holy Roman Empire, as its name suggests, was one of several early-modern European empires that found in ancient cosmopolitanism an ideological model that could be combined with Christian universalism to support its own imperial projects. In particular, the ancient Roman Empire provided a trove of imperial pretensions that were adopted by European colonizing powers, especially those that had themselves once been Roman colonies — thus it was no accident, for example, that Charles V referred to himself as Augustus (Pagden 2000:6).

colonial discourse was universal in *form* — in the sense that it was fundamentally about extending a particular set of social relations out to the rest of the world — but not in *content*. Aside from the commonly shared assumption that they were entitled to impose their own traditions on other peoples as a matter of imperial prerogative, there was wide variation among different European cultures. So, while the European discourse of colonial conquest typically was expressed in "universal" or "international" economic dictums, *pace* the English School literature this did not demonstrate a "European" culture. Frequently European colonial justifications that were "characterized as 'international' or 'universal' were simply their own distinct European cultural traditions applied overseas." This is true even in the case of international law (Seed 2001:4).

Imperial Absolutist Spain

The colonial policy and culture of absolutist Spain manifested understandings of land rights and Indigenous people that were very different from those of the English culture that would become dominant. Spanish colonists were much less interested in owning land than were the English. Instead, the Spanish were most interested in gold and other precious metals and stones found under the land, as well as the labour force required to extract them. My rationale for choosing absolutist Spain as the foil for England in this example is that the country was not merely one among many to experience the transformation to absolutism in late-Renaissance Europe, it was quantitatively and hence qualitatively distinct: "The reach and impact of Spanish Absolutism….acted as a special over-determination of the national patterns elsewhere in the continent, because of the disproportionate wealth and power at its command: the historical concentration of these assets in the Spanish State could not but

affect the overall shape and direction of the emergent State-system of the West" (Anderson 1979:60).

The context of an absolutist Spanish state shaped notions of property and sovereignty in particular ways that were different from those of modernizing England (recall that by our definition modernizing signifies an emerging separation between sovereignty and property). In the most basic terms, the Spanish did not really care about owning land, they wanted to control Aboriginal people's labour. They valued land in terms of its use value — often the metals found under the soil, and they saw Aboriginal people as a source of labour to extract those natural resources. They justified colonialism using a series of arguments based in the logic of pre-modern states. In contrast, a new form of land tenure was emerging in England along with the modern state. This was a shift from a functionally organized system to a spatially organized one.

Spain emerged as a unified monarchy in 1492, the same year Columbus led the first Spanish voyage across the Atlantic. As Spain first extended its imperial presence across the Atlantic at the end of the fifteenth century, it was an absolutist state. There are extensive debates in the literature about the nature and extent of absolutism among European royalty in the seventeenth and eighteenth centuries (see, *inter alia*, Anderson 1979; Giddens 1985; Teschke 2003). For my purposes, the fundamental qualities of absolutism are relatively uncontested and easily summarized: absolutism replaced the partitioned sovereignty of feudalism — manifest in a system of estates held by politically powerful nobility — with a structure in which political and economic power was centralized with the Crown. This also entailed the establishment of many of the elements of state power, including unified state laws, standing armies, and professional bureaucracies. The characteristics of absolutism that are particularly germane to this discussion are its combination of exclusive territorial

(state) sovereignty, and non-exclusive (landed) property. A territory was controlled exclusively by the sovereign; within that territory, however, the monarch maintained ultimate authority for the land. Thus property and sovereignty were essentially overlapping and conjoined. This combination distinguished absolutism from the modern state, in which the state exerts sovereignty over an exclusive territory, but the land within is held exclusively by one (usually private) owner. (There are exceptions such as Crown reserve land in the form of public parks, for example, but these are still consistent with the logic of exclusive property — they just happen to be owned by the state.) None of this should be taken to suggest Spain's absolutist structure impeded the efficiency of its colonial adventure. As Perry Anderson describes it, "conducted and organized within still notably seigneurial structures, the plunder of the Americas was nevertheless at the same time the most spectacular single act in the primitive accumulation of European capital during the Renaissance" (Anderson 1979:61).

Owning land was not the main concern for the Spanish settlers who arrived in the New World; instead they were looking for the resources found underground. The Crusades had left another important legacy, in the addition to the powerful notion of a universally binding Christian natural law described above: the rise in the use of gold bullion as payment for imported foreign luxuries. By the fifteenth century, the use of metallic money (gold and silver) had become established as fundamental to European social and economic life (Braudel and Reynolds 1972). Western Europe had few gold mines, and relied on mines in the Middle East and western Africa for most of its gold. But Portugal had already established control over the African supply, giving it a great competitive advantage and making the discovery of new, cheaper sources a high priority for Spain (Walton 1994). The earliest Spanish colonists to arrive in the New World found gold almost immediately upon

landing. In his first reports back to Spain, which had a huge and immediate effect on the European imagination, Columbus emphasized the numerous mines and "the rivers, many and great, and good streams, the most of which bear gold" (Quoted in Stannard 1992:63). Spanish colonists believed that, by establishing control of territory in the New World, they were collectively entitled to its mineral reserves, including gold, silver, and emeralds. This assumption reflected a long-established tradition, which held that mineral reserves were collectively owned by the members of the dominant religious faith, in this case members of the Catholic church. The tradition originated in the Iberian Peninsula's Islamic past. Unlike in most of Europe, where precious metals were considered the property of whoever found them, in the Islamic legal tradition buried precious metals and stones were considered to have been left underground as a gift from God, to be shared amongst the faithful. No one person, not even the monarch, could claim them as personal property. By the fifteenth century, Christian Iberians had adopted the idea that mineral resources had been buried by God for his Christian followers, and in the colonial period some colonists argued that God had placed such underground wealth in the New World in order to attract Europeans, who would then convert the locals (Seed 2001:57-61).

In order to extract the gold they found in the New World, the Spanish colonists needed labour. This perspective is reflected in Columbus's written reports back to Spain, in which he typically referred to indigenous people as part of the natural landscape, usually including them in his discussions of nature, as in "in the interior of the lands, there are many mines of metal and countless inhabitants" (Quoted in Todorov 1996:34). By the time of his second voyage, in 1494, Columbus had developed a tribute system to systematize the enslavement of the natives: "Gold was all that they were seeking, so every Indian on the island [of Hispaniola] who was not a child was ordered to deliver to the Spanish a certain

amount of the precious ore every three months. When the gold was delivered the individual was presented with a token to wear around his or her neck as proof that the tribute had been paid. Anyone found without the appropriate number of tokens had his hands cut off" (Stannard 1992:71). This tribute approach — essentially a per capita tax on indigenous people — was "the central unique economic feature of Spanish dominion over New World peoples," and was in keeping with a medieval Iberian convention under Christian rule, in which wealthy conquered communities paid tributes in cash, while poorer ones paid in labour (Seed 1995:83).

In effect, then, the most valuable resource for the first Spanish colonists was not land, and not even gold — which was so plentiful — but the slave labour to extract it. This is why individual colonists were apportioned a share, not of land, but of the native population, which they put to work looking for gold. What was originally an ad hoc system of allocating this "human resource" personally run by Columbus was, by 1501, officially sanctioned by Queen Isabel, who also asserted the Crown's right to assign labour. The power dynamics under an absolutist state were such that, after finding herself unable to prevent private Spanish settlers on the other side of the ocean from assigning native labour themselves, the Queen changed tack, ordering that indigenous people be forced to gather precious metals and putting the control of native labour under direct royal control. This practice came to be known as a trusteeship, or *encomienda*. It is worth emphasizing that it was native *people* who were held in trust, not their land (Seed 2001:62-65). In fact, all indigenous people who surrendered to the Spanish crown were formally guaranteed the right to own their property, including land, a right that no other European power extended to Indigenous peoples it encountered. They were also formally guaranteed the right to continue using indigenous laws and systems of trade. Weaver (2003) summarizes three

main ways in which Spanish colonial land practices differed from those in English

colonies:

> First, colonial bureaucrats, notaries, advocates, and judges arranged the benefactions of land grants; there was an elaborate bureaucratic structure engaged in distributing land to elites. Second, when these elites established landed estates in the Americas during the colonial period, they also sought official sanction for their master over labour and local markets….Third, the church emerged as a major proprietor of estates. As a consequence of these three factors, landholding and political power overlapped, and both were greatly concentrated. (32)

The concentration and overlap of land ownership and political power is the core distinction

between absolutist colonialism and the colonial approach of the modern state.

The Spanish process for formally establishing Aboriginal people's surrender to the

Crown involved the reading of a statement that informed them of the truth of Christianity

and the necessity of immediately pledging allegiance to the Pope and the Spanish Crown.

If they did not do so (and as David Stannard points out, since it is likely that almost none of

the audience had any idea what was being read to them in this foreign language, and since

they were often shackled first, the issue of "pledging allegiance" was largely moot), the

statement declared:

> I certify to you that, with the help of God, we shall powerfully enter into your country and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and Obedience of the Church and of Their Highnesses. We shall take you and your wives and children, and makes slaves of them, and as such sell and dispose of them as their Highnesses may command. And we shall take your goods, and shall do you all the mischief and damage that we can, as to vassals who do not obey and refuse to receive their lord and resist and contradict him. (Quoted in Stannard 1992:65-66)

This peculiar mix of brutality and legality highlights the Spanish requirement of going

through the formal exercise of reading a declaration. In contrast, English law (alone among

European cultures) would not require a written contract or the reading of a declaration to claim land until the late seventeenth century (Seed 2001:13).

Charles V declared that the Indians of North America should be allowed to preserve their traditional surface-land rights, on the condition that they abandon resistance. Spanish government and colonial officials actually worked to prevent their colonists from seizing indigenous land, and met with relatively little organized opposition. Such a royal decree had the effect of giving First Nations enough reason to moderate, at least somewhat, the intensity of their opposition to the Spanish presence, while also preventing Spanish Christians from assembling large holdings and thus becoming a threat to the King's authority (Seed 2001:83-84).

The Vitorian Tradition of International Law

The violent Spanish conquests of Mexico and Peru in the sixteenth century generated an intense Spanish debate about the legality, under the emergent law of nations, of colonial settlement in the Americas (Keal 2003:84ff; also see Tuck 1999). International law emerged in the colonial period as the Law of Nations (*jus gentium*), a development that reflected the uneven but inexorable change in the centre of gravity of political power, from the supra-national church to state governments (cf. Green and Dickason, 1989:241-250). The Law of Nations, which was based upon the tenets of natural law, provided a framework to legitimize European political and economic intrusions overseas, and its history is usually written by IR scholars as a universal, or a least "European" one (Bull and Watson 1984). English School writers typically locate the origins of international law in the work of the Dutch jurist Hugo Grotius, who set out a framework for international law, including a

theory of just war, abstracted from natural law. Grotius's notion of international society provided a foundation for modern theories of international society in IR. Hedley Bull described Grotius's work as "cardinal because it states one of the classic paradigms that have since determined both our understanding of the facts of life of inter-state relations" (Bull, Kingsbury, and Roberts, eds, 1990:71). For that reason the English School is occasionally referred to as the contemporary iteration of "the Grotian tradition" in IR (Cutler, 1991). By starting their historical narrative of international law in the seventeenth century with the work of Grotius, the English School ignores the sixteenth century Iberian tradition of Francisco Vitoria (cf Seed, 2001:199).

The Spanish Crown, which assumed it had sovereignty over any Indigenous peoples encountered by Spanish settlers, asserted the settlers' (encomemderos') right to extract labour or tribute in exchange for "protecting" indigenous people and converting them to Christianity. This issue generated real and consequential debate (Anaya 2004; Keal 2003). The papal bull "Inter Cetera Divini" of 1493, the year after Christopher Columbus landed in the Americas (a journey undertaken on the condition that he be entitled to ten percent of the value of whatever goods and treasures he found there), referred to "certain remote islands and also mainlands" discovered by Columbus, and acknowledged that "these nations living in the said islands and lands believe that there is one God and one Creator in the heavens" (Quoted in Stewart-Harawiwa 2005:58). In the eyes of the church, then, indigenous nations were sovereign nations, and so the genocidal colonialism underway in the Americas was in direct contravention of the papal bulls (Morris 1992). When Christian theology proved unsatisfactory to establish the humanity and by extension the legal rights of the Indigenous peoples in the New World, supporters of the encomemderos turned to Aristotle's category of the natural slave (cf. Heath 2008). According to Vitoria, an

influential idea comes from Aristotle: "there are those who are by nature slaves, that is those for whom it is better to serve than to rule. They are those who do not possess sufficient reason to even rule themselves, but only to interpret the orders of their masters and whose strength lies in their bodies rather than in their minds" (in Pagden and Lawrence 1991:67). They argued that the natives were, in essence, less than human, and thus, following Aristotle, "natural slaves" who certainly had no rights to their territory: "by defining away the essential humanity of the inhabitants, and by denigrating their capacity for self-government, it becomes possible to convert inhabited land….available for the first taker" (Hanke 1965:28).

The Spanish emperor, a devout Catholic, appealed to the prominent theologian Francisco de Vitoria for advice, likely in the expectation that he would provide legal-theological support for Spain's right to claim the New World (Cohen 1942:46). Vitoria, however, largely sided with opponents such as the former encomemdero Bartolome de Las Casas, who were asserting strong public opposition to colonization. Vitoria drew on theories of natural law to contest the justice of the encomienda system, and arguing specifically that natural law applies equally to all humans, regardless of nationality: "so long as the Indians respected the natural rights of the Spaniards, recognized by the law of nations, to travel in their lands and to sojourn, trade, and defend their rights therein, the Spaniards could not wage a just war against the Indians and therefore could not claim any rights by conquest" (Cohen 1942:46-47). Vitoria did not dispute Spain's legal right to establish sovereignty over the New World, but he did not accept the argument that the Castilian crown could claim indigenous land because it was occupied by "barbarians" (Keal 2003:89-92). This was Vitoria's greatest specific contribution: he demolished natural slavery as a justification for colonialism, pointing to the cities constructed by the Inca and

Mexica as proof that these people were not natural slaves. Vitoria's understanding of natural law was separate from Christianity; the Indians were still entitled to rights as humans, even if there were not Christians.

Writings by critics of the Spanish colonial project in North America show how international law, if we acknowledge its Iberian tradition, was in its earliest iterations a debate over the treatment of Indigenous peoples in the Americas. This reality is lost when we follow the standard IR line that sees international law beginning with Grotius, which in turn is part of a larger English-language scholarly tradition that sees human rights as originating in the emergence of individual citizens' rights in northern Europe. For Grotius, natural law was a "dictate of high reason." His law of nations depended heavily on all nations recognizing their mutual self-interest by deferring to custom, rules, reason, and practising moderation (Roelofsen 1990). Property rights were of central concern. As Murphy (1996) argues, Grotius's use of "high reason" as the foundation for natural law was based upon ancient conceptions of private property, along with the theory of sovereignty developed contemporaneously by Jean Bodin. The individual political subject living in a national state (with all associated legal restrictions and entitlements) was understood to be the equivalent of a state operating in a global context, where there was no regulatory or legal framework. Writings by Vitoria (and other critics of colonialism such as de Las Casas) help us see the origins of international law in the New World. Instead of the individual citizen being the central figure, Spanish debates over colonialism and international law emphasized communities, or (non-state) nations, a reality that is lost when viewed retrospectively through the lens of the nation-state. In the early-modern period, the rights of Indigenous peoples were widely recognized (if not widely respected); many thinkers specifically named indigenous societies as distinct and sovereign political entities

enjoying territorial rights (Berman 1993; Tuck 1999). Support for such rights, along with any possibility of a debate on the issue, disappeared in the seventeenth and eighteen centuries. How and why did this occur? As the modern state form gradually emerged and became entrenched, beginning in England in the late seventeenth century, the understanding of natural law itself changed, from a universal human moral code to a reflection of a dichotomy of individuals and states. In other words, there came to be in effect two sets of natural rights: one for individuals and one for states. (Anaya 2004:19-26)

English Property Rights in the New World

"The modern liberal idea of individual property rights," Buck, McLaren, and Wright write, "is just that — modern. Preceding ideas associated with feudal property relations placed significant impediments on the treatment of property as a commodity. During the turmoil of the English civil war, however, an opportunity was created for discussion and debate about alternative concepts of property, political order and sovereignty" (2001:3). Aoki adds specificity to this claim and places it in the international context: "the rise of public and private spheres occupied by, on one hand, materialistically motivated individual rights-bearers and on the other by strictly constrained, but powerful state entities, was paralleled by the rise of the idea of the sovereign nation-state and growing articulation of political sovereignty along strict territorially justified lines" (Aoki 1995:1312). The English colonial tradition, which would become dominant in North America, evolved through several modes. At the moment of contact, England was still essentially a feudal state, without the clear modern distinction between sovereignty and property in land — land was still held of the Crown rather than privately owned. Consequently the English Crown

assumed that when it claimed sovereignty (the power to govern) in North America it also claimed property (ownership of the land), which it could then grant to British individuals and companies who petitioned for this privilege. But the English understanding of landed property rights hinged on the application of labour, and at the time of contact, First Nations had developed a complex agriculture based on corn, beans, and squash, supplemented with other crops including cotton. Techniques such as soil rotation and cultivation through selective breeding in order to meet specific geographic requirements were common (Hurt 1987; Nabhan 1989). When confronted with the reality of Aboriginal agriculture, it could no longer be assumed that property followed sovereignty directly. Moreover, the reality on the ground was not so simple. In real material terms, colonists had limited power relative to the Aboriginal people they encountered, and so many chose to purchase indigenous land rather than forcefully assert the purported property rights that had been granted to them by their King. (The important role of private colonists, who made up the leading edge of English colonialism, is explored in detail in the next chapter.)

In terms of foreign policy, England was mercantilist.[35] Mercantilism was centred in England and France at time when those countries were beginning to intensify the establishment of colonies across the Atlantic in the sixteenth and seventeenth centuries. Mercantilist states were feudal-military states whose foreign policy, including colonial policy, was dictated by the logic of territorial accumulation and controls on trade. Britain, for example, imposed regulations that allowed its colonies to trade only with Britain

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[35] Mercantilism is, at root, a form of economic nationalism: the belief that national power and economic growth should be mutually reinforcing. The mercantilist state could act as a shield to protect the interests of its own industries as necessary. Strict government regulation of a national economy, typically guided by protectionist strategies, would ensure a positive balance of trade and a national accumulation of gold and silver, and these measures would lead to a stronger nation with even more power to manage trade (cf. Heilbroner 1995:39-40). Notwithstanding regional variations and uneven timing in the implementation of mercantilism, in general it reflected a growing acceptance on all sides that the state should do much more to regulate economic life.

(Wilson 1958). The effects of European colonial "discoveries" in the Americas were echoing back across the Atlantic. A wide variety of global luxury commodities entered the European markets, and American mines were able to out-produce European ones within a matter of decades. These factors combined with advances in shipping to propel levels of foreign trade to unprecedented heights (Landreth and Colander 2002:43). The increase in wealth coincided with a major inflationary cycle, and that increase in prices in turn fuelled the growth of trade, and by extension of the mercantilist class in Europe (Galbraith 1987:33ff). The sovereign state, which had assumed the authority relinquished by the Catholic commonwealth, was the mechanism that allowed the ascending mercantilist class — by now "merchants were the dynamic element in society" — to pursue its global ambitions (Wilson 1958:487). In foreign-policy terms, mercantilism entailed a range of measures to protect domestic markets and increase exports. Such theories did not emerge fully formed: its roots were in a loose mix of feudal leftovers. But, throughout the sixteenth century, the costs of maintaining imperial dynasties grew, and this new reality provided the pressure that forged a previously incoherent set of ideas and approaches into a recognizable shape. England's colonial policy immediately after contact was shaded but not determined by its feudal-mercantilist character.[36]

When English colonists first arrived in North America, they had two main rivalries: with the Aboriginal people they encountered for the first time, and with the other imperial powers. These rivalries were not symmetrical. In the case of the Aboriginal people, the

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[36] The same cannot be said of France, whose colonial land policies displayed a distinctly feudal character long after contact. In the seventeenth and early eighteenth centuries, France established seigneurial estates in New France. This essentially feudal model reflected a French belief in the importance of land tenure in sustaining its colonial presence in the "new world," along with a simultaneous commitment to the *ancien régime*. S*eigneuries* were long strips of land along the banks of the Saint Lawrence River. Each remained the property of the French Crown, and the *seigneur* acted essentially as a landlord, without the power to impose penalties or fines on his tenants (unlike feudal lords in France). After the British victory in the Seven Years' War, the seigneurial system remained as a vestigial structure for nearly a century (Lanctot 1963).

competition was over land (property), whereas English conflict with European countries was over sovereignty. For the English, as it was for all European imperial powers, the conflict over sovereignty was relatively straightforward, entailing few intellectual, cultural or moral complications. They all took for granted their right to assert sovereignty over North America, with no legitimate legal objection from its current occupants. The only complication took the form of geopolitical competition from England's European rivals. So England's claims to sovereignty were made vis-à-vis its imperial rivals, with sovereignty typically flowing from discovery (Slattery 2005). But, alone among European imperial powers, England also claimed private property of land at the same time as it claimed sovereignty of territory; it acted on the view that North American land was un-owned and there for the taking (Banner 2007:14-15).[37] The very first official act of English legal sovereignty in the New World, the letters patent granted to Sir Humphrey Gilbert and Walter Raleigh, entitled them to "have, hold, and occupy and enjoy…all the *soyle* of such lands, countries, and territories" (quoted in Seed 2001:13). The Crown also granted charters of conquest to the Cabots (with the important geopolitical qualification that territories, such as those in Africa, that had already been granted by other imperial nations by the Pope, were off-limits) (Williams 1990:121). Why did England assume the right to claim both sovereignty and property simultaneously? In contrast with that of Spain, English colonial expansion was much more focused on owning land, and this was due in no small part to the English obsession with landed property, which was carried over to settler colonies. Land ownership was at the heart of English (and later American) culture. This preoccupation

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[37] Inter-imperial rivalries had actually provided much of the discursive justification for England's colonial campaigns in the 1500s. Advocates of colonization portrayed it as a crusade to carry Protestantism to the Indians and counter Spain's spreading papist empire in the New World. These early campaigns foundered largely as a result of a lack of capital. When the Scottish king James I replaced Queen Elizabeth on the English throne, the appetite for pursuing Elizabeth's expensive two-headed Protestant crusade in the New World against Spanish Catholicism and indigenous infidels disappeared (Williams 1990:193).

with land ownership was manifest in long-standing cultural and legal traditions, dating back to the Middle Ages, when for centuries the common law was dominated by land law. The English legal system itself was based on the ownership of land (Milsom 1969).

Enclosures

One of the most important and politically contested social changes occurring in England in that seventeenth- and eighteenth-century England was the enclosure of the commons, in which commonly held land was privatized. By the beginning of the sixteenth century, English merchants began investing surplus profits in land. The order of a landed aristocracy who allowed farmers to cultivate a small portion of land, with the produce larger consumed by the producers, fell into decline, to be replaced by a system organized around profitable investments. The new system entailed the use of money instead of labour in exchange for the use of land. The widespread use of money facilitated the commodification of land, with land increasingly being viewed as a potentially profitable investment (Lyons 1992:24).

One of the main ways to get poor tenant farmers off their (purportedly unproductive) land was through enclosure. Enclosure ended traditional rights such as the use of open meadows and fields for farming or to graze livestock — such land was fenced and deeded to a single owner. If we adopt a politically neutral definition of enclosure ("inclosure" was the contemporaneous term) as a method of increasing the efficiency (and thus profitability) of land through specialization, then this was a long, drawn-out process that had been occurring since the early thirteenth century, and would continue even into the eighteenth and nineteenth centuries (Thirsk 1984:66). But in the seventeenth and eighteenth

centuries, as the English government established land tenure in North America, enclosure was a high-profile and controversial issue, and one that dovetailed with colonial concerns — this connection is marked by the fact that the definition of the term changed in this period. Where it once referred to keeping semi-wild animals *in*, it now referred primarily to keeping people *out:* "to erect a fence that would prevent farmers and herders from entering formerly cooperatively or communally held ground" (Seed 2001:33). The evictions of poor tenant farmers was, in Karl Polanyi's description:

> A revolution of the rich against the poor. The lords and nobles were upsetting the social order, breaking down ancient law and custom, sometimes by means of violence, often by pressure and intimidation. They were literally robbing the poor of their share in the common, tearing down the houses which, by the hitherto unbreakable force of custom, the poor had long regarded as theirs and their heirs'. The fabric of society was being disrupted; desolate villages and the ruins of human dwellings testified to the fierceness with which the revolution raged, endangering the defenses of the country, wasting its towns, decimating its population, turning its overburdened soil into dust, harassing its people and turning them from decent husbandmen into a mob of beggars and thieves. Though this happened only in patches, the black spots threatened to melt into a uniform catastrophe. (1957:35)

Land that was enclosed was owned *exclusively*, not communally or cooperatively. Enclosure marked a profound reorganization of land tenure, the transition from a functionally organized system of land tenure to a one organized along the lines of absolute space. After enclosure, land ownership rested on the exclusive control of a territory, not on the use of the land. The loss of the ancient system, in which individuals or communities exercised the right to use particular resources, rather than exert exclusive control over a piece of land, hurt the poor by removing their traditional means of subsistence. In these ways, the enclosures movement in England anticipated the struggle for the land in colonial North America.

E.P Thompson's work on enclosures in *Albion's Fatal Tree* (2011), a collection he co-edited with Hay *et al*, and a monograph, *Whigs and Hunters* (1975), explores the criminalization of common historical practices such as hunting for food, establishing gardens on private land, and wood-gathering. The Black Act of 1723 (so-called in reference to the common practice of blacking faces as a nighttime disguise) made activities such as hunting, fishing, or cutting down trees on private land punishable by death. The Act was enacted in direct response to the killing of a gamekeeper by the Waltham Blacks, a group that would blacken their faces before entering parks to poach. But Thompson connects these specific, localized events — the "economic and social tensions aroused in the forests" — with changes in the broader social context, such as the collapse of the South Sea Bubble, which exacerbated class divisions in England, and the rise of the Hanoverian kings (1975:195). He argues that the imposition of Act was driven in particular by Whigs who, in 1715, had taken near-total control of the government, and had now expanded that to include the elite strata of society, including the army, the legal profession, and local officials. In this context, many Whigs were accumulating new landholdings in the form of estates, on which they were cutting down the old forests to be replaced by formal gardens and landscaping. This consolidation of landed property generated resistance not only from the poorest of the poor, but even larger farmers. Thus, in addition to poaching, the Black Act also outlawed entering private lands with weapons and committing acts of vandalism such as arson, and it was later expanded to cover anyone wearing a disguise while committing a crime (Thompson 1975).

Thompson's work casts light on the cultural importance of land. By using crude laws to restrict the community use of land, the Black Act had the effect of undermining lower-class community and solidarity — in effect, it criminalized a way of life. Thompson

contrasts this traditional worldview with the "Whig state of mind," a view of the world that had private ownership of land at its core (1975:207). Respect for land rights as a core value was among the growing distinctions between British liberalism and other European ideologies of Empire. For the British, the ideological distinctions between their societies in the Americas, and those established by the Catholic monarchs of Spain and France, were central to their cultural and political self-understanding. (As we will see below, this was also true of its successor states — the claim that British expansion was uniquely able to create *free* societies proved to be an enormously powerful idea, one that would form the basis for the concept of Manifest Destiny and other expressions of American exceptionalism (Pagden 1995:128).) An obsession with owning land was common among elites in early-modern England. Colonial estates conferred prestige and social power. Of course, they also meant wealth, and the timing of English colonial expansion was itself an important factor: in the sixteenth century, land rents increased sharply in England. Land, which had long been associated with order, was now also and more than ever before associated with profit (Brenner 2003).

English Colonial Charters

Under James I, the English Crown began granting rights to form colonies in North America by issuing charters to private companies. As Brenner writes, the "material foundations of the merchant community's alliance with the Crown were therefore crystal clear: the Crown could, and did, create economic privileges for the merchants; the merchants offered loans and taxes, as well as political support, to the Crown" (2003: 200). The first company charter was issued to the Virginia Company in 1606, entitling

"Adventurers" to establish settlements on the eastern coast of present-day United States. The Virginia Company, established by a group of wealthy landowners and merchants to finance a colony and make profits, was one of England's first joint-stock companies.

The emergence of joint-stock companies in the early 1600s (including the Dutch East India Company, which received its charter in 1600) marks the evolution beyond guilds and state-regulated companies. The great innovations of joint-stock companies were limited liability — shareholders were responsible for covering a company's debts only up to the face value of their shares — and transferability, which meant that shares could be sold to any willing buyer, thus making them highly liquid. Shares in the colonial joint-stock companies tended to earn positive returns on equity, and so this model quickly became an efficient way to capitalize colonial settlement projects (Hunt 1936).[38] The joint-stock structure represented the evolving complexities of the relationship between the English state and private ownership. The company charters demonstrated colonization's highly commercial character. The Virginia charter, which was a typical example of the royal charters, granted the right to own a certain property exclusive of other private interests, and by extension declared the English Crown's prerogative to grant such rights, exclusive of other imperial interests. In the language of the charter the territories in question are included in those categorized as "not nowe actuallie possessed by anie Christian prince or people" (Quoted in Bemiss 1957).

While few of the English elites who stood a chance of receiving colonial charters or land grants from the Crown expressed any doubt about the legality of colonial policies, these people engaged in intense debates about the most appropriate form of land tenure.

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[38] The success of the joint-stock company in financing colonial endeavours was a general trend. The Virginia companies faced numerous problems, including staggering debts, which necessitated successive additional royal charters, among other measures.

Weaver (2003) shows how early-modern English colonial charters were shaped by this context — in other words, the form that colonial charters took reflected domestic social relations. The two possible forms of colonial tenure were *in capite* or *ut de manore.* The former signified an estate held directly from the Crown. This model required landholders to pay feudal fees to the Crown, but also gave them the right to create landed estates with tenant farmers, as well as some judicial entitlements. *Ut de manore* limited dues owed to the Crown but also limited landholders' judicial prerogatives and freedom to extract rents. The company charters granted by the Crown in the early seventeenth century were commercial — intended primarily to produce wealth through trade — and so they took the *ut de manore* form. The companies had little interest in collecting rents from tenant farmers — they granted land to colonists who produced supplies to be traded, rather than paying rent — and so for them there was no point in paying the feudal dues to the Crown that this privilege entailed.

At this moment in the early 1600s, metropolitan capital's main strategy for extracting wealth from the New World was overwhelmingly commercial: companies were expected to profit from their trade in goods such as furs. Yet this approach proved to be imperfect at best. The new-world companies' trading strategy generated disappointing returns; it was becoming apparent that land rents were more efficient approach to extracting profits from the frontier. This new reality mandated a shift to *in capite* tenure, in which the king granted successful petitioners the right to operate feudal estates, with rent-paying tenants, and enjoying some powers of government, in exchange for dues paid directly to the Crown (Weaver 2006: 180-182). This shift marks an important transitional moment, in which land-based enterprise became the focus.

Whatever the particular form of land tenure granted to the charter companies, there was no acknowledgement that the territory in question may have had previous indigenous owners. The shift in emphasis from trading enterprises (and *ut de manore* land tenure) to those based on land-ownership (and *in capite* tenure) occurred before the English revolution and attendant legal reforms of the mid-seventeenth century. The brief period in which metropolitan capital relied on trading companies ended and the renewed emphasis on land ownership and extracting profits through rents all occurred while England was still feudal. The colonists simply used the legal and philosophical tools they had available to them to structure the framework for acquisition.

This is why, when a number of thinkers and writers found it necessary to develop justifications for claiming indigenous lands (the English Crown acted as if there were absolutely no question of its right to "grant" indigenous territory through colonial charters, and no need to provide anything in the way of justification for doing so), they employed arguments that were essentially intellectual legacies of the medieval Church (Williams 1990:308-317). The most common such arguments were: an argument from Christianity (Christians had an inherent right to take land from non-Christians); an argument from conquest (the English had conquered the natives and therefore were entitled to their land); and an argument that there was no preexisting system of property rights, meaning that Aboriginal people themselves did not actually recognize such rights (Banner 2007:16-20). In general, English legal thought and practice in the period after contact remained dominated by the medieval Catholic Church's view of non-Christian peoples as being inherently legitimate targets for conquest.

But there were additional and more acute problems "on the ground." In particular: English colonists had already been purchasing indigenous land. In other words, while the

English Crown, alone among European powers, assumed its right simultaneously to assert sovereignty and property rights on indigenous land, at least some of the English colonists seemed not to accept the view of their country on the latter issue (Buck, McLaren and Wright 2001; Nammack 1969). As we will see in the next chapter, the explanation for this is largely a matter of direct material conditions: the colonists were outnumbered, out-resourced, and would have had great difficulty enforcing their claim to ownership of indigenous land, even if the English Crown saw the matter as a simple one. The common law reflected the deep-rooted English notion that land is claimed and possessed through labour. And this powerful idea not only gave individual colonists pause when it came to taking indigenous land, it also generated domestic hesitation and criticism.

It was not only individual colonists who purchased the very Aboriginal land they had been granted — the colonial companies themselves did so, too. Stuart Banner describes the experience of the Virginia Company:

> When the Virginia Company finally decided to go public with a statement of why 'it is not unlawfull, that wee possesse part of their land,' the Company combined variants of the argument from Christianity and the right of conquest….But these were all subsidiary arguments, the Company admitted. The main reason the English could settle on Indian land had nothing to do with Christianity or conquest. In fact, these arguments did not make the slightest bit of difference. 'But chieflie because Paspehay, one of their Kings, sold unto us for copper, land to inherit and inhabite.' For all the Company's theorizing about its rights to take the land, in the end the Company purchased it from the Indians. (2007:20-21)

Improvement and Waste Land

English property rights, both formal and informal, on the frontier and in the metropolis, were underpinned by the doctrine of improvement. Improvement entailed a form of ownership and management that saw land as having the potential for profitable

investment through increased productivity and an assertion of humans' dominion over nature (Brace 2001:5). Improving the land meant applying labour (and, later, capital) to it so as to improve its profitability and value. This notion is consistent with the classic Lockean formulation: property is derived from the addition of labour to natural resources (Arneil 1996). "Working the land" converted it into landed property.

Improvement displayed its own internal contradictions. For example, improvement drew heavily upon romanticized ideas of land husbandry, while also abstracting the land onto documents that allowed it easily to be owned by a company, or by an individual who need never set foot on that land: "the improvement discourse insisted on the intimacy of the connection [between land and labour] at the same time as constructing a system of ownership which required its dissolution" (Brace 2001:62). In the eighteenth century, when enclosure intensified, the middle class "discovered" the countryside in nostalgic aesthetic and cultural terms: "the social reality of a changing, improved countryside and an idealized representation of a rustic past, though seemingly in contradiction, complemented a drive among British immigrants to acquire land in new worlds. English history set the stage for a momentous tension between, on the one hand, law and entitlements, and, on the other, appeals to improvement and access" (Weaver 2006:23).

Even more severe were the social contradictions associated with improvement. It generated intense debates, which centred on conflicting notions of property. Defenders of the commons portrayed enclosure and improvement as causing suffering among the poor, and they drew on ideas of stewardship and accountability, suggesting the privatization of land constituted an abuse of the common treasury provided by God. Humans were merely entrusted with natural riches by God, and they should not delude themselves into believing their property belonged to them unconditionally. Opponents of the improvement doctrine

also refuted proponents' claims that commoners could benefit from enclosure by becoming freeholders, arguing instead that it "turned farmers into cottagers, and cottagers into beggars" (Brace 2001:13). These challenges did not hold when applied directly to the colonial context, but the social conflict over improvement complicated its use as a rationale for land appropriation in the new world.

Improvement has a rarely observed spatial aspect. The term, which had once simply referred to investing to make a profit, in the late Middle Ages came to refer more specifically to profits made from agriculture, and then, as English landowners had began to claim unoccupied or "waste" land through the enclosures movement, the term became associated specifically with fencing — that is, *improvement* came to connote profiting from land by asserting *exclusive territorial control*. This is an expression of what Harvey refers to as absolute space. But improvement is also fundamentally predicated on an idea of progress, which likewise depends upon an absolute conception of time.

Land Occupation and the Idea of Waste Land

As William Holdsworth outlines in a classic history of the land law, in the common law before the modern system of property rights was developed in the late 1600s, there was no need for a written procedure for claiming ownership: land could legitimately be acquired and owned through labour (1927:112). This helps us understand why English rituals of claiming land did not involve a contract or a declaration. The English obsession with land explains the ceremonial practices English colonists used to mark their claim. Unlike colonists from other European countries, the English did not claim the land by planting banners, reciting declarations, solemnly kneeling, or staging parades; they only

occasionally read sermons or planted crosses. Upon landing the first priority for the English was building houses. In the colonial records, "no English expedition ever omitted mention of setting up a house" (Seed 1995:17).

House-building was one of the two most important ways English colonists marked their land claims. The second was construction of a hedge or fence. For our purposes this is especially significant because it signified enclosure — not just ownership, but exclusive *private* ownership. The privatization of land in England, in the form of the enclosure movement, was gaining momentum in the sixteenth century, and this provided a particular cultural basis for English colonialism: "Englishmen shared a unique understanding that fencing legitimately created exclusive private property ownership in the New World" (Seed 1995:20).

Of the various forms of labour that could mark land ownership, agriculture held a special prestige for the English. Farming denoted a society that had advanced beyond hunting and gathering and developed the social mechanisms that allowed for private ownership of land. So when they saw first peoples farming, as was quite common, colonists had little choice but to take this as proof of some sort of ownership. This in turn opened up a potentially serious problem, which hinged on the conceptual link between the *use* of land and the *cultivation* of land. If cultivating land denoted a society sufficiently advanced to own property, then: "on the one hand to recognize Indian property rights in uncultivated land was nearly tantamount to recognizing the Indians as owners of the whole continent….On the other hand, cultivation was not a prerequisite for property ownership in England. Everyone knew that land could still be owned even if it was not being farmed, and indeed even if it was not being used or occupied at all. Why should land in North America be any different?" (Banner 2007:33).

The common law's apparent recognition of indigenous property rights, derived from natural law, did appear to constrain private settlers' ability to claim indigenous land legally through occupation. This is another reason why they would have chosen to buy land. But we must remember our distinction between sovereignty and property. Property was a complicated matter, as we have seen. But the question of sovereignty was more straightforward: it was monopolized by the state. One way for colonial state attempted to assert some control on freebooters was to concede property interests on the frontiers to Aboriginal peoples, but then assert its sovereignty by claiming the exclusive right to purchase indigenous land. This strategy would culminate in the Royal Proclamation of 1763.

When English colonizing activities began in the early 1600s to take on the form of broadly capitalized trading concerns, the discourse followed suit, away from religiously grounded and anti-Spanish images — which never really fit very well with the basically non-missionary English colonial presence — and towards efficiency (Williams 1990:193). Arguments from efficiency were a much better fit for the English.[39] This was especially true because of the enclosures movement that was such an important part of the context. Conceptually, land that was not improved was considered "waste." The idea of common land, a by-product of enclosures (non-enclosed land is held in common) became *waste*: the commons were waste land (Seed 2001, especially chapter 2). When the first English colonists arrived in the New World, they saw land that met most of the conditions for waste land: it was, by English standards, sparsely inhabited; not fenced in; and not routinely

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[39] England's colonial expansion was never driven by the goal of religious conversion. But as Brace (1998, especially chapter 3) shows, many English advocates of improvement drew upon religious imagery to portray it as the path to regain paradise on earth by restoring "man's" pure dominion over nature, which had been lost in the Fall. This form of discourse was especially common in the late 1600s, when millenarianism pervaded the culture.

cultivated by animals. And it was held according to a form of land tenure that closely resembled that of the English common fields. They could, and did, therefore, come to see North America as consisting entirely of waste land, waiting to be claimed and improved. The contrast between privately enclosed improved land and commonly held waste appears throughout the colonial literature (Tully 1993).

Whether land was "occupied" or not rested on a question of whether it had been developed, or "improved," which typically meant being put to agricultural use. The first person to use or improve a section of land became its owner (Pagden 1995:76). The notion of improvement (or betterment) is a core concept in Locke's theory of property rights, one that he considered especially germane to what he called in his *Second Treatise* the "vacant places of America" (1988:23). Locke falls into the seventeenth-century English natural law tradition: he intervened into debates around British settlements in Carolina, and distinguished his theories about landed property from Dutch and Spanish colonial thought. This may be why most of the scholarship has treated Locke's theories of land and property from the narrow point of view of *English* property, and ignored the many references, especially in the Second Treatise, to American Aboriginal people. Only recently have a few writers demonstrated the significance of indigenous nations in Locke's theory of property. The most notable of these are James Tully (1993, 1994) and Barbara Arneil (1996).

Locke and Land in the New World

"In the beginning," Locke wrote in his *Second Treatise*, "all the World was America" (1988:29). This claim establishes the idea that all societies are the same before they have started to develop; different societies can then be ranked hierarchically based on how "civilized" they are, or in other words, how much they have developed. The European

societies are at the top of this order, as evidenced by their state formations and property rights regimes. The Indigenous peoples of North America are nomadic and undeveloped, legally entitled only to what they hunt or gather. Uncultivated land is essentially up for grabs, with anyone able to claim it. Because indigenous people do not "improve" the land, they have no legal entitlement to it. As Tully (1993) argues, Locke's argument, which is woven into a chapter on conquest, is Locke's justification of British settler colonialism, and his refutation of the British government's implicit acknowledgement that Indigenous nations are independent, self-governing nations possessing the right to own land. As Arneil (1996) clarifies, Locke's defence of the British colonial project does not necessarily prohibit Indigenous peoples from legally owning landed property. Land becomes property through the addition of labour; this is a specific form of labour, namely cultivation and enclosure. Therefore, land becomes the property of whoever cultivates it, as opposed to those who set foot on it, live on it, or hunt on it.

Locke's theory of property allows him to defend colonialism without having to resort to an essentially tautological argument along the lines of, English colonists have the right to take indigenous land because the English king or English law grants them this right. Rather, natural law as Locke uses the concept means that individuals carry within themselves the latent entitlement to claim land — an entitlement that becomes real when they practise agrarian cultivation, engage in commerce, establish freedom under the law, and recognize the Christian God (Arneil, 1996:132-167). In this way, the core of his justification of the European colonization of North America was essentially a cultural one: the native peoples whose land was being appropriated were not sufficiently developed or civilized, and therefore were not entitled to legal rights of ownership. The land itself was similarly reclassified, largely through the notion of improvement. Native land was

considered "waste land' in need of improvement. The word "culture" comes from the Italian *cultura*, which means "to cultivate" and from which sense we derive the term "agriculture" (Williams 1988, 1989). It is no mere etymological coincidence that culture and civilization were so closely associated with improvement of the land. As a result of this equation (culture = cultivate the land), to develop the land, i.e. turn it into property, is to become *civilized*.

The arguments for European possession made by Locke (and further developed by Emeric de Vattel in *The Law of Nations*) cast a long shadow: they were used "through the eighteenth and nineteenth centuries to legitimate settlement without consent, the removal of centuries-old aboriginal nations, and war if the native peoples defended their property" (Tully 1994:169). As we will see in more detail in the next chapter, stateless native peoples — "particularly those who wore few or no clothes" — were made colonial subjects or wards "on the grounds that they were in their cultural infancy, and thus unqualified to govern themselves." However, in a catch-22, those indigenous nations whose political structures approached European standards were then said to be legitimate targets in wars of conquest, in this case on the grounds that their customs and habits violated natural law (Dickason 1989:246).

Vattel's contribution, which also drew upon *res nullius,* made the agricultural development of land the deciding factor in the possession of land. He was clear that he a purely "civilizing" or missionary rationale was inadequate for claiming sovereignty or property rights:

> The cultivation of the soil not only deserves attention of a government because of its great utility, but in addition is an obligation imposed upon man by nature. Every nation is therefore bound by natural law to cultivate the land which has fallen to its share….Thus while the conquest of the civilized empires of Peru and Mexico was a notorious usurpation, the establishment of various colonies

upon the continent of North America might, if it be done within just limits, be entirely lawful. The people of these vast tracts of land rather roamed over them than inhabited them." (34)

After a century of colonization, taking land by contract rather than conquest was the norm for the English. By this point, the facts tended to overrule the theory: purchasing indigenous land was so widespread and common, and advantageous to the English, that philosophical arguments in defence of colonialism were somewhat moot. Moreover, so many English colonists had come to own their land by virtue of deeds and purchase contracts that any meaningful realization of the theory that the English were entitled to indigenous land as a matter of conquest would have de-legitimized the primary method by which land was acquired, and actually *dispossessed* most English landholders of their colonial property.

The imposition of the state was a lengthy, politically contested, culturally complex and geographically uneven process without precise start or end dates. However, for our purposes The Royal Proclamation of 1763 provides a crucial turning point. At that moment, coming at the end of the so-called French and Indian Wars, the English Crown gave colonial governments the exclusive right to purchase indigenous land, and gave First Nations governments the exclusive right to sell their land, thus bringing to an end a several centuries in which land was bought and sold by private contracts between private parties. The 1763 moment marked a profound change in landed property tenure — one that came about after the military victory that established Britain as the dominant colonial power in North America — after which indigenous land could only be transferred through agreements between sovereigns (typically treaties). The modern Anglo-Saxon state had effectively claimed control over land transfers.

As Teschke writes, the decades after the Glorious Revolution of 1688 marked England's shift from dynastic to parliamentary sovereignty, and facilitated subsequent legal enhancements of Parliament's power. These developments allowed British foreign policy to shift such that it came to reflect "national interests" (determined by the propertied classes through Parliament) rather than dynastic interests. Specifically, this took the form of mercantilist "blue water" policies, which combined superior naval capabilities with economic pressure. Both of these elements had been made possible by the creation of the first modern financial system, including a reliable credit system in which public debts were guaranteed by Parliament (Teschke, 2003:249-258). Britain was thus the first modern state, and the attendant "first mover" advantages facilitated its rise throughout the 1700s to become the world's leading power (cf. Van der Pijl 2006:8-12). While the modern British state had left behind both dynastic rule and a foreign policy driven by territorial accumulation, its European rivals, France and Spain, had not. This is why inter-imperial competition in the Americas continued to take the form of direct military conflict over territory. Even though its "blue water" foreign policy gave Britain overall geopolitical competitive advantage, unless it was willing to relinquish its American territories it had to fight for them on the ground. Intensified direct British colonial settlement reflected the dynastic logic of territorial accumulation, and thus was a *prima facie* contradiction of the country's status as a modern, parliamentary state. This approach was partly dictated by the need to counter the strategic challenges posed by France and Spain. This geopolitical context contributed a situation in which the English state was modernizing and simultaneously relying on settler colonialism. But the declining influence of feudalism in Britain meant something different for land rights.

England acted on the assumption that it could declare sovereignty over the Indigenous peoples in encountered in the New World, the only issue was one of imperial rivalries. But property did not necessarily follow from sovereignty, and as the English state modernized, the difference between sovereignty and property came into sharper distinction. In fact, the property-sovereignty distinction actually was even sharper in English-colonial North America than it was in England, where residual feudalism lingered much longer, so change in the colonial context "ran ahead" of that in England. Practice in North America had come to lead theory — colonists had for a long time been buying land directly from Indigenous peoples. And theory itself posed a problem, as irrefutable evidence of farming and other applications of labour to the land seemed to entitle Indigenous peoples to property rights under the common law. And so, after almost two centuries of debate about the question of whether or not indigenous people owned their land, in the late 1600s an important change took place: the English government finally acknowledged that first peoples did own their land, and if English settlers wanted this land, they would have to buy it. There was one significant loophole in this position: land that was unused (or under-used) could be classified as wasteland, and then claimed through a process that resembled enclosure. These two strategies for land acquisition are explored in the next chapter.

4. "The Dissolving Effects of Space": Private Initiative and Aboriginal Land Tenure on the Frontier

Indigenous-settler relations on the ground were not determined by formal sovereignty or nationality, but were also shaped fundamentally by the real material conditions of defining and claiming property in the New World. Colonists' attitudes and practices toward land claiming and ownership were in tension both with those of Indigenous peoples, as well as with the official positions of their home state.

The British practised settler colonialism in North America. Settler colonialism — in which settlers claim and directly occupy land on the frontier — commonly is understood in distinction with indirect "exploitation colonialism," with the former practised in North America in the early British Empire, and the latter practised in Africa and India in the late empire (Evans, Grimshaw et al, 2003; Rist 2002; Armitage 2000). But while the Spanish, French, and Portuguese empires also practised their own versions of settler colonialism, the British settler-colonial presence was unique among these on several grounds, including an established culture of land ownership and of legality. British elites valued estates for reasons that went beyond the (significant) economic benefits: estates also conveyed social status. British elites also revered the rule of law. These ideas combined with the importance of "entrepreneurial" settlers. Unlike other empires, England put relatively little emphasis on conquering Indigenous peoples so as to impose language or religion. Instead, an English culture of landed property and a commitment to Lockean self-regulation informed independent colonists. Unlike the Spanish or the French, most British colonial settlers were "free agents," representing neither the state nor the church.

This freedom meant that, while the ideas that English settlers carried with them — notably those reflecting an early-modern English obsession with land — remained influential, they often underwent stark mutations upon contact with Indigenous peoples in the colonial context. European settlers were not blank slates when they arrived in the new world, far from it; but neither were their attitudes toward land and their land-claiming practices simple, direct reflections of an "English" or "Spanish" point of view. As Elliott writes,

> Spaniards and Englishmen…regarded the reconstitution of European civil society in an alien environment as the essential preliminary to their permanent occupation of the land. As participants in the same western tradition, both these colonizing peoples took it for granted that the patriarchal family, ownership of property, and a social ordering that as nearly as possible patterned the divine were the essential elements of any property constituted civil society. But both were to find that American conditions were not always conducive to their recreation on the farther shores of the Atlantic in the forms to which they were accustomed. The dissolving effects of space, at work from the outset, gave rise to responses which would eventually produce societies that, although still recognizably European, appeared sufficiently different to justify their being described as "American." (2006:36)

As settlers were forced to reconcile their ideas with the challenges of the frontier, they increasingly came into tension with views expressed by their own state. They contradicted official policy, sometimes taking by force land that their government had acknowledged as belonging to first peoples; sometimes buying indigenous land that the Crown believed they already owned as a spoil of discovery.

Along the frontier, land was often claimed by private occupation, with formal state approval provided only after the fact. The land policies of the colonial state often lagged behind the actions of private interests, and often the state's presence was reactive, providing retrospective support by establishing laws, land surveys, and official records.

These tensions were shaped especially by the colonists' spatial position relative to England: the closer they were to the colonial frontier the more "independent" they tended to be. And they were over-determined by relative power balance. Shortly after contact, when colonists were most vulnerable — isolated, small in numbers, and with few resources — they tended to combine dramatic declarations of imperial dominance with *de facto* recognitions of Aboriginal land ownership. As time went on, and Europeans became more powerful, they transformed power into right: their methods for taking Aboriginal land actually become both subtler and more brazen, but in all cases the methods of appropriation were protected by a shield of legality (Weaver 2006:13).

In effect, private settlers were the leading edge of British colonial expansion. Tension between "a conservative-inspired desire for stability and a liberal hankering after progress and development" was "a constant in the colonial experience everywhere" (Buck, McLaren, and Wright 2005:13). In the British case, it was specifically the tension between the informal land-rush carried out through private initiative and government planning and authority — between the state and the market — that ultimately proved very fruitful for the empire, giving it a dynamism that other imperial presences lacked. A range of innovations followed private initiative on the frontier; these helped secure new investments of metropolitan capital. Such innovations typically were explained and justified with reference to the doctrine of improvement — which provided a common language shared by settlers and the administrators charged with enforcing the rules — and also functioned to mobilize capital. The state provided land surveys, maps, written records, and a commitment (even if incompletely and unevenly carried out) to enforce the rule of law; this framework prompted further rounds of investment in land on the frontier. In other words, the colonizers' appeal to the *idea* of improvement generated *real* improvement.

English Settler Colonialism on the Frontier

Before the modern state was established and began regulating land transactions in the New World, land was transferred in what I characterize as a frontier context. The most famous conception of the frontier between colonists and Aboriginal peoples remains Fredrick Jackson Turner's influential argument contained in "The Significance of the Frontier in American History" (1893, republished in 1920: http://www.fordham.edu/halsall/mod/1893turner.asp). Turner's nationalist triumphalism marked the historical moment when the US Bureau of the Census officially declared the US internal frontier closed. In the bloodless terminology of the census, this was a matter of determining, based on population density, that there was no longer a meaningful distinction between "frontier" and "settlement." Turner argues that the relentless westward progress of pioneers in the face of a hostile natural and social environment steadily produced a new and uniquely American way of life. This fundamentally shaped American social and political life, with the constant drive to expand and renew forming the taproot of American exceptionalism. In contrast with Turner's sanguine view, I see the colonial frontier as a space of violent political conflict and uncertainty, a zone defined by its lack of a dominant authority.

Specifically I draw upon Weaver's (2003:18) definition of the frontier as "a place where a state had not yet installed its apparatus for allocating property rights." This is a spatial, not a statist understanding of frontier, and it replaces the conventional IR notion of the frontier as the boundary line between two states. This approach allows us to see how the specific form of colonial expansion that became dominant in this instance was a form of

settler colonialism closely associated with the British. British settler colonialism depended in part upon what we might call "entrepreneurial" settlers acting as the agents in a land rush. This was distinct from Spanish- or French-style colonialism, because the British colonial settlers were "free agents," i.e. not representing the state or the church. In general the British state would follow behind these settlers, retroactively providing formal legitimization of their land claims. Such a dynamic is absent from the IR literature on colonialism, where the dominant narrative is the expansion of the "European state," and private property is relegated to the domestic realm.

There is an interesting puzzle about how Aboriginal land was acquired. As an illustration we can consider how scholars outside IR have theorized the relationship between the imposition of the modern state and the appropriation of indigenous land. (Given IR's assumption of immaculate sovereignty — i.e., not complicated by property — it would be surprising to find this question addressed in the conventional IR literature.) The puzzle finds expression in the relationship between two major themes in the scholarly literature. The first theme is the taking of land by conquest, which is often addressed through an exploration of various mechanisms of conquest, whether military, legal, ideological, cultural, or biological (see, *inter alia*, Armitage 2000; Churchill 1997; Crosby 1986; Diamond 1997; Seed 2001; Williams 1990). Numerous scholars have argued that Europeans' right to claim indigenous land followed from long-standing legal and cultural traditions regarding discovery and occupation. Leslie Green (in Green and Dickason 1989:1-123) summarizes a tradition of legal and state practices supporting European colonial claims. (Essentially the same argument can be found in Seed 2001 and Williams 1990.) This international law tradition begins with Vitoria, who set out the conditions of just conquest and in so doing legitimized colonial plunder. It then runs through the work of

Grotius, who asserted the right to claim "unused" land's centrality within international law, to Locke, who emphasized land rights accrued by working the land, developing a formula in which land plus labour equals property. Locke was an influential proponent of the claim that European settlement on Aboriginal lands was good for Aboriginal people, because it would have a civilizing effect on them through the introduction of private property and profit. Privatization of landed property would also increase the productivity of the land, thus benefiting natives and settlers alike. These precepts were reflected in decisions of the European judiciary, as well as those of US Chief Justice John Marshall, who understood land rights to be based on conquest rather than natural law, and thus recognized a limited Aboriginal sovereignty. Despite the conceptual modifications that occurred through the various iterations of this tradition, the overall effect was to provide forceful justification for the legal dispossession of indigenous land.

The second theme in the literature concerns the transfer of land through *contract* rather than conquest, emphasizing the historical negotiation and (often implied) recognition of land rights embodied in the use of treaties and contracts to purchase land. The literature from this latter perspective has been expanding rapidly, reflecting the many recent efforts by First Nations, especially in former British colonies such as Canada and Australia, to achieve legal resolution of long-standing land claims (cf. Clarke 2002).[40] Recently scholars have focused on Britain's settler-colonialist history, an approach that emphasizes the differences between the British colonial presence in settler colonies in North America and Oceania with the indirect, exploitation form of colonialism practised in India and Africa (Evans, Grimshaw et al., 2003; Banner 2007). Writers from this perspective tend to see the

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[40] On the specific example of the Delgamuukw case in Canada, see Monet and Wilson (1992). On the 1992 Mabo case, which finally overturned the doctrine of *terra nullius* in Australia, see Russell (2006).

history of the law of nations as being more complex, noting that from the sixteenth century and at least into the eighteenth, many European jurists recognized independent Aboriginal sovereignty (Clarke 2002; Keal 2003; Tuck 1999; Wilkins, 2006:45-66).

Considering the relationship between these two perspectives — land appropriation by conquest and by contract — highlights the puzzle: why would European colonizers have bought land to which they believed they were entitled as the spoils of conquest? Conversely, why would they have treated with indigenous governments, which they considered to have an inferior sovereignty? How do we explain the persistence of treaties, deeds, and contracts — all of which would seem to acknowledge that Aboriginal peoples legitimately owned and governed their land — in a context of genocidal colonialism? This dissertation can be seen as one long answer to that question. But that answer can be condensed as follows: colonists bought land to which they believed they were entitled because they were guided as much by the real material conditions on the frontier as they were by their formal nationality. Settlers were "entitled" to claim indigenous land only by virtue of their assumptions of a superior sovereignty. In reality, buying land was often cheaper and easier than taking it.

At contact, England was still largely feudal: property and sovereignty were both held by the Crown. Consequently, after contact the Crown assumed and asserted its right to take ownership over any land over which it claimed sovereignty. This was consistent with the feudal tendency to collapse sovereignty and property together: England had asserted *sovereignty*, and thus it also assumed the right to claim the land in question as *property*. Such claims took the form of colonial charters.

But what did individual colonists themselves think? When they arrived in the new world they found people living on the land. Did these people own the land, or was it, in

effect, there for the taking? How did the colonists themselves answer this question? The earliest English colonists followed the English state in assuming that claiming sovereignty meant claiming property. But England was modernizing, and as feudalism receded, the separation between sovereignty and property emerged. In a colonial context this distinction was even clearer, because the rivalry was different: the dispute over property was vis-à-vis the Indians, while the dispute over sovereignty was vis-à-vis European colonial rivals. In this sense, the dynamic on the frontier ran ahead of that in Europe. So then the question became: who owned the land? After a short period of controversy the English assumed the land was the legal property of indigenous people who lived on it (Banner 2007). (These legal interests were seen as something to be overcome rather than respected.)

In many cases land was "grabbed" or occupied by settlers first, with justification provided only retroactively: "the frontiers of British and American settlement regularly witnessed a conquest of space by private enterprise defying government rules, followed by the phenomenon of private parties plunging into trouble and pleading for government succour in the name of civilization or improvement" (Weaver 2006:24). The government typically respected its racial and cultural bonds with the settlers, and in the case of dispute was always inclined to support people who shared the same race and worldview. Yet while they rarely formally acknowledged indigenous land rights, the behaviour of English colonists — and even colonial authorities — was not nearly so straightforward, as they almost immediately began to *purchase* land (Weaver 2006, esp. chapter 4). Purchasing indigenous land was common from the earliest moments in the English colonial period. The early governor of Virginia, Thomas Dale, bought land, and throughout the early English colonies, purchasing soon became standard practice, so much so that more land was purchased than was taken by conquest. There is compelling evidence in support of this

claim: many deeds of land sales consummated between First Nations and English colonists survive; there were numerous laws requiring private purchasers to secure permission from the colonial government before buying indigenous land; and colonial court records contain many examples of property disputes in which colonial officials recognized and enforced indigenous property rights in land against the claims of English colonists (Banner 2007: 26-28).

We can better understand colonists' purchase of indigenous land by considering how their decisions were shaped by their locations relative to such things as flows of money and supplies, military power, and Aboriginal communities. Their decision to buy land that their state claimed already to have given them makes more sense when we view it in light of their spatial position relative to England, to indigenous people, and to their imperial rivals. In short, together these factors made buying land easier and cheaper than fighting for it. There was a range of material incentives for colonists to buy Aboriginal land. First was the issue of relative power: the first colonists were extraordinarily vulnerable. They were a small community living in an unfamiliar climate. Many depended upon support from Aboriginal people simply to survive (Miller 1991). As Axtell writes, identifying land as "waste" and claiming ownership of it under the rubric of improvement was one thing, but actually cultivating it profitably was another — the first Europeans relied heavily on Aboriginal support and aid in farming (2001:39). This outnumbered and under-resourced group, far from home, was in no position to take land by force. Even as the settler population and military capacity grew and the relative balance in power tipped in their favour, for a long time taking land by direct conquest still would have been much more expensive — in terms of lives lost and other resources — than buying it. This was especially true because land was cheap. The English came from a context in which land

was scarce and expensive; suddenly, they found themselves in a world in which the reverse was true. The population density in the New World was much, much lower than in England, and so buying land rather than seizing and defending it was an eminently reasonable calculation to make. In addition, colonists had a strategic incentive to maintain good relationships with First Nations, as throughout the colonial period the English and French were in a constant rivalry to establish sovereignty over the New World. Aboriginal alliances were central to this struggle, and purchasing land rather than seizing it made such alliances easier.

As JR Miller (1991) shows, from first contact and throughout the better parts of the sixteenth and into the seventeenth centuries, European-Aboriginal relations in what would become Canada and the USA were relatively cooperative and peaceful. Extensive trading relationships were established in this period, with furs (especially beaver pelts, in high demand by the European fashion industry) being exchanged for an ever-growing array of goods, and on the whole these were mutually beneficial, a reality that greatly discouraged large-scale conflict between European and indigenous nations (cf. Miller 1991, 2001). There were exceptions to this early European tendency to stay off indigenous land, such as British colonization of the east coast of what would become Canada; this began in the early 1600s and would ultimately lead to the extermination of the local Beothuk peoples. In general, however — European imperial rhetoric notwithstanding — indigenous nations were treated by Europeans more or less as *foreign nations*. France and England told themselves and each other that it was their imperial prerogative to claim land overseas, but they actually dealt with indigenous nations as trading partners and military allies. Different Aboriginal nations found places for themselves in the context of this inter-imperialist

rivalry by forming military alliances with competing French and British forces (Fowler 2005).

It is important to emphasize that the decision to purchase indigenous land did not demonstrate benevolence on the part of the Europeans — they were buying land because doing so was advantageous to them, not the sellers. Indeed, in the matter of indigenous land sales to private interests, there was "no shortage of deceit." Some English purchasers reached verbal agreements with Aboriginal sellers but in the written deeds that included descriptions that inflated the size the land in question much bigger than had originally been agreed. Some bribed or tricked colonial officials into granting land patents for more land than they had actually bought. Some forged documents or got the sellers drunk before a deed of sale was signed; others threatened sellers or witnesses (Banner 2007:63; 62-68). Some settlers combined tenacity and audacity to use even the flimsiest documentation to hold onto dubious claims for years, often then selling them in the knowledge that the purchaser would support the original claim. Other fraudulent practices were as simple as using the phrase "more or less" in describing the piece of land in question, so the deed holder could then claim a much bigger area than was intended by the seller (Nammack 1969:99-101). And even if legal standards of enforcement had been much stricter, such agreements would still have been quite foreign to indigenous people who had a much different understanding of property rights and land ownership (Pagden 1995:83). But even though much Aboriginal land was simply taken through fraud or force — what we might consider the crudest forms of primitive accumulation — the fact is that most land appropriation involved some sort of legal process, and, rather than ignoring inconvenient laws, the English more typically attempted modifications to make them more convenient. Once again, this was not really an expression of English fairness or any commitment to

justice: capital investment on the frontier demanded the predictability and stability assured by the rule of law. Hence, the law quickly followed the practice: colonial authorities soon caught up with private colonial interests and began acquiring land through purchase as a standard procedure. Aside from purchasing Aboriginal land, the only other way to acquire it while maintaining more than a thin pretense of legality was to declare it waste land in need of improvement.

Why Would Indigenous People Sell Their Land? Indigenous Concepts of Land and Property

Property as a concept and institution reflects different historical, political, and cultural contexts. To the English, indigenous forms of land tenure might have seemed familiar, as they typically resembled those seen in the common fields of pre-enclosure England. An indigenous nation or village would control a large area of land, within which some land would be allocated to families for farming, while the rest of the land would be held in common, and could be used for gathering and hunting. There is strong evidence that the English recognized the similarities: John Locke, for example, wrote of "the wild Indian, who knows no Inclosure, and is still a Tenant in common" (1970:305). For most English colonists it was a matter of lived experience, or at least within living memory, that land rights could take the form of the use of land, rather than private ownership defined along the lines of absolute space. In the early colonial period land tenure in England was undergoing major changes; these changes in the metropole shaped those on the colonial periphery. But aside from certain similarities with pre-enclosure land tenure in England, what was Aboriginal concept of land as property? Keeping in mind the important caveat that there was no universal "Aboriginal" form of land tenure any more than there was a

universal "European" one, we can still identify the major differences between Aboriginal forms of land tenure before and after the imposition of the modern state. To refer to "Aboriginal property," as Bradley Bryan notes, is already a "conundrum for the Western legal system because as soon as we frame our study in a truthful way, the terms revolt" (2000:27).

One widely noted aspect of Aboriginal land tenure is that it entailed a spiritual relationship to land. But what exactly does a spiritual relationship to the land mean? We need to be precise. It does not mean that the relationship was entirely spiritual or religious, even though there has been a tendency in the recent scholarship to emphasize the spiritual or religious aspect exclusively (Buck 2001:45). The anthropologist Frederick Rose argues that, to say the Aboriginal peoples of Australia had a spiritual connection to the land does not mean that land was not owned — in fact an area of land was normally owned by a nation or family group — nor does it mean that they did not use it. (1987:47-48) In North America, Aboriginal people had sophisticated agricultural practices and similar ownership patterns. Therefore it is necessary but not on its own sufficient to note the spiritual aspect of Aboriginal land tenure. Even to say "spiritual" should not be conflated with "religious," in the sense that the land was not an Aboriginal equivalent of a religious icon or an object of prayer. Instead, it was "derived from family relationships that extend not only over a wide net of people but also over relations with other living things and ultimately over relations with the land itself" (Overstall 23). The consequence of this is, in the words of Deloria and Lytle, "as land is alienated, all other forms of social cohesion begin to erode" (1984:12).

The term "alienated" is significant, as can be illustrated with reference to Radin (1993:191-199), who draws upon the personality theory of property to distinguish between two different forms of property. The first is an attribute of a person. The second is a thing

that a person controls. The first form, which she calls "constitutive" property, is what we associate with personhood or human relationships. In contrast, the second form, which she refers to as "fungible" property, is the type of property we treat as a commodity and is exchanged through the market. In the legal terminology, alienation refers to the legal transferability of an object. It is an expression of two factors: private, exclusive property, and transferability. In other words, a piece of property is alienable when it can be owned and sold under law. This is the definition of a commodity. But Radin also notes that alienation has another meaning, borrowed from psychology and philosophy, which expresses a sense of estrangement. Alienation in the sense of commodification is associated with fungible property. Alienation in the sense of estrangement is associated with parts of our personhood being separated: we say, for example, that we have become alienated from ourselves. These "two meanings of alienation can be linked in an ironic pun about capitalist private property" (Radin 1993:193). According to modern liberal property theory, all property, both constitutive and fungible, could (or should) be alienable in the sense of being a commodity. But:

> When property is a property of persons, my liberty is my property. Does this mean I abdicate personhood if my liberty is voluntarily relinquished? Apparently yes, if property means attribute-property. But if at the same time property also means object-property, the voluntarily relinquishing my liberty is also an instance of contract-alienation, and in the traditional liberal ideology this is an instance of self-expression and fulfillment of personhood rather than its negation. Abdication of liberty is both destructive of personhood and destructive of it. (Radin 1993:194)

Radin's "ironic pun" helps illustrate the inherent contradictions between traditional Aboriginal understandings of the land and capitalist property relations. But it also shows the inadequacy of referring to the Aboriginal connection to the land as "spiritual," if by this we mean purely idealist or religious.

Some scholars argue that portraying the Aboriginal connection to the land in this relatively narrow idealist sense originated in the academic anthropology literature in the years just before and after the Second World War. A rising interest in indigenous anthropology occurred long after traditional Aboriginal society had largely disappeared. It was no longer possible to observe Aboriginal land ownership except in profoundly distorted contexts such as reserves. However, traditional rituals and spirituality had survived to a much greater extent, and this is what scholars were able to observe. The resulting conclusion that Aboriginal land tenure was essentially spiritual was at best a partial truth; it ignored how Aboriginal people had actually *used* the land before they lost it (Rose 1987). The English School and constructivist approaches in IR have perpetuated the same view by characterizing the expansion of the European state form as the triumph of the modern, secular state over a spiritual one. In other words, writers from these perspectives may locate indigenous people within the global expansion of the state form, but not within the context of the growth of global capitalism. Yet this is a logical problem, owing once again to the commitment in the literature to sovereignty at the expense of property.

The Marxian concept of alienation offers one way to bridge this conceptual gap. Marx showed how workers in a capitalist political economy produce goods and profits, and at the same time they reproduce the very system that confronts and exploits them. This is the basic dynamic that results in alienated labour. Lefebvre drew heavily on the early Marx, arguing that alienation was a fundamental aspect of human practice. Like both Hegel and Marx, Lefebvre sees the split between state and civil society to be a crucial feature of modernity; however, he is clear that he shares Marx's view that this differentiation expresses an historically specific form of political alienation within capitalism. Every human activity went through a process of abstraction, in which initially spontaneous forms

of order were shaped into organizing structures, which in turn became a fetishized system

of oppression. Marx wrote in the *Grundrisse*:

> Labour seems a quite simple category. The conception of labour in this general form — as labour as such — is also immeasurably old. Nevertheless, when it is economically conceived in this simplicity, 'labour' is as modern a category as are the relations which create this simple abstraction….It was an immense step forward for Adam Smith to throw out every limiting specification of wealth-creating activity — not only manufacturing, or commercial or agricultural labour, but one as well as the others, labour in general….Now, it might seem that all that had been achieved thereby was to discover the abstract expression for the simplest and most ancient relation in which human beings — in whatever form of society — play the role of producers. This is correct in one respect. Not in another. *Indifference towards any specific kind of labour* presupposes a very developed totality of real kinds of labour, of which no single one is any longer predominant….Indifference towards specific labours corresponds to a form of society in which individuals can with ease transfer from one labour to another, and where the specific kind is a matter of chance for them, hence of indifference. (1993:103)

This is one of Marx's great insights: that the apparently simple category of "work" — just

work, not weaving, tailoring, welding, teaching, cooking, driving, typing — is the product

of a society that itself is able to see these indifferently, as versions of the same kind of

activity, reducible to a multiplier — so many dollars and cents per hour. Under capitalism

labour becomes an abstraction, and this conceptual abstraction allows for the division of

labor, which eventually turns into the exploitation of workers.

Dipesh Chakrabarty draws upon Marx's great insight in two important books: his

study of jute mill workers of Bengal, *Rethinking Working Class History: Bengal 1890 –*

1940, and in *Provincializing Europe: Postcolonial Thought and Historical Difference*.

Chakrabarty shows how abstract categories such as "labour" are "deeply implicated in the

production of universal sociologies. Labor is one of the key categories in the imagination of

capitalism itself. In the same way that we think of capitalism as coming into being in all

sorts of contexts, we also imagine the modern category of 'work' or 'labour' as emerging in all kinds of histories…. Yet the fact is that the modern word 'labor,' as every historian of labor in India would know, translates into a general category a whole host of words and practices with divergent and different associations" (2000:76). He shows how employing the universal sociology of labour actually impeded his understanding of, for example, the *hathiyar puja*, or the worship of tools, a festival held in many northern Indian factories. "I interpreted worshipping machinery — an everyday fact of life in India, from taxis to scooter-rickshaws, minibuses, and lathe machines — as 'insurance policy' against accidents and contingencies. That in the so-called religious imagination (as in language), redundancy — the huge and, from a strictly functionalist point of view, unnecessarily elaborate panoply of iconography and rituals — proved the poverty of a purely functionalist approach never deterred my secular narrative" (Chakrabarty 2000:78). In this dissertation I make a parallel argument about the cultural disjuncture regarding assumptions made by English colonizers about land, property ownership, and contracts — assumptions that were often replicated in their own way by IR theorists.

The parallels between indigenous forms of land tenure and those of the English common fields were not absolute. It is important not to see them as equivalent, at risk of committing exactly the kind of analytical error this project critiques. IR's granting of the state carries within it a number of more specific universal assumptions regarding the control and ownership of land, political authority, and national identity. Yet these universalizing notions are not universally true in fact. The purported parallels between pre-enclosure English and Aboriginal forms of land tenure came to be used as a discursive tool by the English to justify colonial dispossession of Aboriginal peoples' land. When he wrote "…in the beginning, all the world was America," Locke was referring to an Aboriginal

system of communal land ownership which, by clear implication, belonged to the past, and which was being surpassed by historical progress, in the form of the privatization of land. In fact, as Patricia Seed notes, the enclosure of common fields was not a sign of universal progress — a development shared by "all the world" — but merely what was happening in England at that moment. In other words, Locke projected the English present onto the entire world, allowing colonists to believe they were not "the wicked dispossessors of Native American farmers; rather, they were the slightly apologetic bearers of unavoidable historical and economic progress" (2001:41). Such misrepresentations of Aboriginal notions of land ownership concealed real differences. Of particular importance is that, as we have seen, England had a long-standing culture of land ownership, and part of this was the simple fact that English people had been buying and selling land for centuries before contact. In contrast, the Indigenous peoples of North America did not sell land — that is, did not exchange land for money — before the arrival of Europeans (Wallace 1972; and cf. Deloria and Lytle 1984:17ff).[41]

Similarly, we even need to be qualify what we mean by "money." For numerous indigenous peoples in North America, the exchange of wampum (beads) was a traditional way of notarizing a contract. Yet this was as much spiritual as material in value. The English saw wampum as money, and instituted a system of exchange, in which wampum were traded for goods, and contracts were purely legal. This fundamental cultural misunderstanding (the term "misunderstanding" should not be taken to imply that it was innocent) would be replicated regarding treaties and other agreements. Accordingly,

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[41] But note Seed's qualification on the use of money: "The Englishmen in the New World seemed to think that money was a source of their superiority over Native Americans....Locke...explicitly characterized the mere possession of (as opposed to the use of) money as a fundamental source of English supremacy over Indians. Locke's allegation that the natives lacked money, in the sense of a generally accepted medium of exchange, was mistaken. Regional currency systems abounded in the New World....Furthermore the colonists themselves often adopted these Native American media of exchange" (2001:18).

purchases of indigenous land colonists and colonial companies through the mid-eighteenth century should not be interpreted as a neutral market transaction, since these transactions actually introduced a market-based system of land ownership.

Typically an area of land was controlled by one Aboriginal nation or community, whose leadership allocated the right to cultivate particular sections of land to families or individuals.[42] However, the holder of this right did not "own" the land, in the sense that they could not sell it, and typically the right to cultivate expired when the owner stopped cultivating the land in question — in other words, indigenous land tenure was characterized by limited exclusive ownership, but this was based upon the use of the land, not its abstract status as exchangeable property. Among the peoples of the eastern woodlands, for example, land was better described as "a symbolic manifestation of kinship" (Seed 2001:19). Consequently, "the very first transactions were most likely understood by the Indians not as real estate sales in the English sense but rather as devices for incorporating English settlers within traditional Indian social and political networks" (Banner 2007:58). Richter clarifies that it was not the ownership of land, "but rather the meaning of ownership was what set…Indians and Western Europeans apart. Native communities treated land as a 'resource,' which could not in itself be owned any more than could the air or the sea….what people owned was the right to use the resource for a particular purpose — to farm, hunt, fish, gather wild plants, procure firewood, build a village — and these rights were not necessarily exclusive or permanent; once a resource was no longer being used, ownership rights faded" (2001:54).

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[42] For a careful description of the variety of forms of land tenure that existed among First Nations in North America, with special emphasis on Hawaii, see Linda Parker's *Native American Estate*. (1989)

In contrast, the English assumed that an exchange of land for money meant the land was permanently relinquished by the "seller"; from the indigenous perspective the exchange entitled the "purchaser" to *use* the land, not to possess it exclusively and indefinitely. This is why many indigenous nations sometimes "sold" the same piece of land to multiple "purchasers" (Snyderman 1951). Yet these issues must have been cleared up relatively quickly: it is absurd to assume there were cultural misunderstandings about land sales that lasted for decades or even centuries. (Still, once it became clear what the colonists understood land sales to mean, within First Nations themselves there must have been uncertainty about who, if anyone, had the right to sell land to Europeans.) The salient point is the introduction of a market for land, with an attendant shift toward an understanding of land as abstract and exchangeable and the introduction of a legal system through which transactions were enforced and disputes resolved. Colonial agents did settle some disputes in favour of Aboriginal complainants, but this did nothing to alter the reality that the English had replaced indigenous legal and conceptual frameworks with their own. In the view of the English, conducting purchases on the open market was the fairest way for land transfers to occur. This provided an answer to domestic critics of colonialism, and allowed the English colonizers to think of themselves as something other than conquerors. These were elements of the modern state that appeared in the New World while the English state itself was modernizing.

If we are able to get beyond the notion that indigenous land tenure was purely a spiritual phenomenon, then their decision to sell land to settlers makes perfect sense. They had a lot of land, and selling some of it allowed them to acquire useful goods, avoid having to fight wars to defend their land from conquest, and establish and firm up political connections with the English and French (Banner 2007, esp. chapter 2). The most important

difference between Aboriginal and modern European forms of land tenure was not that one featured land ownership and use and the other did not. This was not the case: within the area controlled exclusively by an indigenous nation, individuals and families had exclusive rights to use land for cultivation. The difference was that Aboriginal people did not sell their land, meaning they did not "own" it in the same way.

What is the link between commodification and abstraction? As we have seen, a given property right is modern if it can be alienated, or sold: that is, if it functions as a commodity. The modern state allows every property right to be commodified. To clarify this further, let us consider abstract space's parallels with abstract labour. Recall Lefebvre's concept of abstract space: capitalism's distinctive spatiality entails the production of geographically uneven development by producing abstract space, which is driven by three simultaneous characteristics: it is homogenizing; it is fragmented; and it is hierarchical. Lefebvre writes:

> capitalistic space is simultaneously homogenous and fractured. Isn't this absurd, impossible? No. On the one hand, this space is homogenous because within it, all is equivalent, exchangeable, interchangeable; because it is a space that is bought and sold, and exchange can only occur between units that are equivalent, interchangeable. On the other hand, this space is fractured because it is processed in the form of lots and parcels, and sold on this basis; it is thus fragmented. These aspects of capitalistic space are shaped both within the realm of the commodity, in which everything is equivalent, and within the realm of the State, in which everything is controlled. (2009:233)

The state produces homogeneity, equivalence, while the market tends to fracture. Space is fractured through exchange. In other words, the state and the market perform contradictory functions, but ultimately work together to produce capitalistic space.

Now recall that, under capitalism, labour shows, to quote Marx "indifference towards specific" forms. At the spatial level, this can be extended to an indifference

towards specific forms of community. Just as abstract labour "corresponds to a form of society in which individuals can with ease transfer from one labour to another," the states system divides humanity into exchangeable "like units." People are citizens of one state or another. (This is why Indigenous peoples are at best granted a status equivalent to states.)

Such a theory of abstract space allows us to incorporate resistance to the imposition of the state into our analysis. Lefebvre takes Marx's notion of the commodity and applies it to space through the idea of abstraction. According to Marx, commodity exchange was a matter of exchanging things that have different material properties and use value. The commodity form overcomes difference so as to allow for exchange. As Chakrabarty writes:

> Marx's critique of capital begins at the same point where capital begins its own life process: the abstraction of labor. Yet this labor, although abstract, is always living labor to begin with. The 'living' quality of the labor ensures that the capitalist has not bought a fixed quantum of labor but rather a variable 'capacity for labor,' and being 'living' is what makes this labor a source of resistance to capitalist abstraction. (2000:61)

Chakrabarty shows how the category of abstract labour has a dual function for Marx: it is both a description and a critique of capital. It is a description in that is describes how capitalism understands human activity — in abstract terms. (Chakrabarty writes, "the idea of abstract labor reproduces the central feature of the hermeneutic of capital — how capital reads labor activity" (2000:58).) But it is also a critique in that Marx makes it clear that the process of abstraction — the reduction of the wide variety of human activities to exchangeable units — is so unnatural that it profoundly contradicts human freedom:

> Discipline — regulation, legislation, supervisory jobs, and so on — are what make the labour of abstracting visible as a moment of capitalist production, but they are also what makes this moment *possible*. Marx refers to such discipline as "despotism," a choice of terminology that clarifies that what is at stake is much more than technocratic decisions to organize labour in the production process so as to realize maximum efficiency; instead the abstraction of human labour, as Marx writes in the "*Grundrisse*," "confiscates every atom of freedom" (1993:548). Thus labour resistance to capitalist discipline is inherent, natural, and visceral — it is not the

product of historically specific conditions, such as workers achieving a certain level of class-consciousness. To read Marx through Chakrabarty, workers resist capitalist discipline not because they have come to the intellectual realization that they are exploited, but rather because humans have an "innate capacity for willing," which "refuses to bend to the 'technical subordination' under which capital constantly seeks to place the worker" (2000: 61).

This argument can be extended to theorize the imposition of the state form upon — and the attendant powerful resistance from — indigenous peoples.

Surveying, Maps, Archives, and Other State Technologies

I have argued, following Lefebvre, that land tenure on the colonial frontier can be understood as the imposition of the space of the market, in which everything is exchangeable. This entailed a shift from functionally organized forms of land tenure consistent with the "absolute" space of precapitalist social formations, to forms of tenure that involved the abstraction of territory onto documents, which in turn meant they could easily be traded from individual to firm, firm to firm, and so on. The state provided essential technological supports that allow land to be recast as exchangeable property in this way. Property law was necessary but on its own insufficient; its function was more to establish a consistent and predictable framework for the acquisition of land. Producing an exchangeable abstract version of landed property was achieved through a combination of land surveying and map-making.

Cartography, like law, may appear to be an objective, technical enterprise, but it is profoundly political: in a classic essay, Harley writes that maps "are never value-free images….Both in the selectivity of their content and in their signs and styles of representation maps are ways of conceiving, articulating and structuring the human world"

(1988:278). Cartography played a central role in the reification of the modern territorial state: from the sixteenth to the eighteenth centuries the creation and institutionalization of agencies and archives were centrally important to state formation. This "cartographic sea change" was partly a technical matter, but it was also closely related to developments in colonial exploration and changes in property rights, in addition to the evolution of the state (Blomley 1994:83). While the canonical sociological theory of the state sees it as, in the words of Michael Mann, "both a central place and a unified territorial reach," Biggs argues this demonstrates a persistent tendency to project our image of the territorial state back into the past….Our language leads us to conceive of change as additional rather than integral….It is easy to say 'the state mapped its territory,' implying that a preexisting entity increased the quantity of its knowledge" (Biggs 1999:399). In fact the sociological definition does not apply to feudal states, in which the king was typically peripatetic.

Rulers "did not see the 'medieval states' delineated so clearly in our historical atlases. How, then, did they know the ground over which they claimed dominion? In the virtual absence of appropriate maps…the realm …. accord[ed] with lived experience" (Biggs 1999:377). Medieval methods of measuring land were ad hoc and approximate, with measurement units often being specific to one particular area (Blomley 1994). Beginning in the sixteenth century, it became common for rulers to use maps to rationalize and plan the activities of rule, as well as to "represent the fact of their dominion." But it also "came to define the shape of power and to constitute the object of state formation. As lands were surveyed and mapped, they were reshaped into a territory….the old dynastic realm was transformed into a distinctively new shape, the territorial state. This spatial rationalization was modeled on the map." In this way, the modern state form was partially constituted through cartographic knowledge (Biggs 1999 377;385;398).

Thus it was the state that provided the technologies that allowed the conversion of land into property (which was a tradable asset) on the colonial frontier, including territorial surveying, map-making and archives. Recall our earlier reading of Lefebvre, who argues that the distinctly modern form of space that he calls "abstract space" is characterized by a reliance upon representation: "lived experience is crushed, vanquished by what is conceived of." The representation of land through measurement and recording as maps can be understood as a process of abstraction, of abstracting real geographical features onto paper. Biggs describes map-making as "a store of knowledge reflecting surveys that rulers sponsored to penetrate the ground over which they ruled" (Biggs 374).

Mapping was "spurred by colonial expansion" (Biggs 398). The British empire was more dependent on map-making than any empire before or since; a steady expansion of map literacy in Europe, driven by a combination of factors including the rise of new print technologies, coincided with the "discovery" and colonization of North America from the late sixteenth century on (Edney 1997). The sixteenth and seventeenth centuries also saw a shift in the social function of cadastral maps, from primarily inventories of private land to a much more public role in the service of the state: "in the early modern period the cadastral map was a highly contentious instrument for the extension and consolidation of power, not just of the propertied individual, but of the nation-state and the capitalist system which underlies it" (Kain and Baigent 1991:8).

Maps were used to establish title to land, and were central to the process of organizing, controlling, and recording the settlement of "empty" or "waste" lands, especially those that were occupied by people with very different concepts of land ownership. They helped governments promote orderly settlement on colonial lands, and the map proved a highly effective and flexible instrument for governments to promote

particular settlement ideals, from the establishment of large plantations in the southern United States to a strategy of strictly limiting land availability in South Australia so as to force the emergence of an economy with farmers and wage labourers (Kain and Baigent 1991:336).

A strong new demand for land surveying was a by-product of enclosures in England. Cadastral maps were a formal requirement of enclosure legislation, but the actual production of maps was left up to the private sector. In this way surveyors "were simultaneously 'the great panegyrists of enclosing,' the promoters of capitalist farming, and advocates of the cadastral map" (Kain and Baigent 1991:334). At the beginning of the colonial period, surveying consisted of written descriptions based on visual inspection of an area. Landmarks and natural division points such as rivers were the basic markers, and these methods were often accompanied by some sort of measurement, to produce descriptions like the following: "From the large standing rock on the south bank of Rocky Creek near the junction of Muddy and Rocky Creeks, south for 600 yards, then southeast one mile to the large elm tree, then north to Muddy Creek, then down the west bank of the creek back to the starting point." In the sixteenth century, surveying evolved from a combination of visual and chain-based measuring, to more standardized techniques of measurement. Standardization addressed some of the more obvious problems with the old method (over time landmarks such as trees and streams die or alter course; large properties required absurdly complex descriptions; it was very hard to tell if dishonest surveyors had been bribed to craft descriptions that were larger than the intended allotment) but it was market forces that really drove the changes: large tracts of land in the west were being sold sight unseen to investors, and so a visual description was all but impossible. The new methods were highly mathematical and geometrical and drew on innovations such as

triangulation to mark "plots." By the late 1600s, surveying included the mapping of larger political units such as towns. By the eighteenth century, surveying as a category of employment had changed: military leaders and colonial governors, as well as landed individuals, employed surveyors and cartographer. The market-driven revolution in surveying and map-making in the early modern period was driven by landowners and the state alike. The former group came to value carefully precise maps, as these could be used as evidence in court cases. State governors valued them for use in inventories and tax collecting. These were practical applications of the theory of absolute space, which, as Harvey reminds us, "permits the clear identification of landholdings and provides unambiguous locational addresses to which inhabitants can be assigned" (2009:252).

Investment Follows Improvement

Early-modern England was undergoing a transition from a feudal to a market economy, but this transition was neither total nor immediate (Brace 1998; Halperin 2004). The result was a commercial society still governed by landed aristocracy. Merchants and the aristocracy formed "matrimonial and business alliances"; mobility between these classes was high, represented by the sons of the gentry moving into the city and becoming businessmen. Ultimately, the perspective of the landed elite became sufficiently dominant to subsume its potential rivals into a "united propertied interest" (Grassby 1995:386-387; also see Dobb 1946). This amalgamation of merchants, financiers, and landed aristocrats developed an ideology in which an obsession with *owning* land was combined with new ideas for legal tools that allowed land owners to *borrow against* it, and reinvest this capital into cultivating that land to make it more profitable. This process can be expressed as

follows: legal interests in the land → credit → leverage for improvements (Weaver 2006). This was a powerful circular process: private settlers occupied indigenous land and then used some variant on the doctrine of improvement in appealing to the empire to retroactively authorize and support their claim. Government supports such as laws, land surveys, and official records abstracted the land onto documents, making it measurable and tradable.[43] This, in turn, produced the conditions (stability and predictability) that encouraged new capital investments in the land, investments that made it more profitable and hence valuable — and the stability and predictability ensured by the state framework then allowed landowners to borrow against their property's increased value, fuelling further acquisition and investment. As we have seen, legal dealings with first peoples over land sales were riddled with fraud and perfidy. But that does not mean the legal agreements reached with First Nations over land were not important. On the contrary, they were essential for confidence: "when security was presumed, investments could render tangible the doctrine of improvement" (Weaver 2006:140,141). In other words, the colonizers' appeal to the *idea* of improvement generated *real* improvement.

This phenomenon was underpinned by the theory of absolute space, which, as Harvey explains, "permits the clear identification of landholdings and provides unambiguous locational addresses to which inhabitants can be assigned" (2009:252). Relevant measures — land-mapping, the making of exclusive land claims, and the other mechanisms that allow the state to identify its own exclusive territorial boundaries, develop a full inventory of its citizens and their landholdings (for purposes such as taxation) —

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[43] For a fascinating account of abstraction as the "discursive equivalent of extraction…a process whereby traces of a distant place, people or resource are gathered up and consolidated at the metropolitan centre" see Tobin. Tobin emphasizes an interpretation of colonialism as "a process of extraction" (1999:202).

establish continuity between state power and an understanding of the individual based upon absolute theory of space.

The Royal Proclamation of 1763

The Royal Proclamation of 1763, the "Magna Carta of English-Indigenous relations," set out the boundaries for the British colonies, leaving the remaining territories in the control and possession of their Aboriginal inhabitants. In it, the Crown dictated that indigenous nations not be forced off their land that they had not given up by selling it to the Crown:

> Whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds.—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments. as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid….
>
> And. We do further strictly enjoin and require all Persons whatever who

have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements. (www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.ht ml, accessed Aug 10, 2010)

Further, only the Crown or its colonial government representatives could purchase indigenous land:

> We have also thought fit….to give unto the Governors and Councils of our said Three new Colonies, upon the Continent full Power and Authority to settle and agree with the Inhabitants of our said new Colonies or with any other Persons who shall resort thereto, for such Lands. Tenements and Hereditaments, as are now or hereafter shall be in our Power to dispose of; and them to grant to any such Person or Persons upon such Terms, and under such moderate Quit-Rents, Services and Acknowledgments, as have been appointed and settled in our other Colonies, and under such other Conditions as shall appear to us to be necessary and expedient for the Advantage of the Grantees, and the Improvement and settlement of our said Colonies….
>
> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved. without our especial leave and Licence for that Purpose first obtained. (www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.ht ml, accessed Aug 10, 2010)

The Proclamation's grant to indigenous nations control over land not sold or otherwise ceded for use as "hunting grounds" was poorly defined (See Pagden 1995:85-86 for discussion). Its spatial dimension, however, was quite stark: essentially, the proclamation drew a vertical line down the centre of North American and prohibited new land grants or settlements west of the line. Why would the British Crown do this well after the relative power balance between English colonists and First Nations had shifted in England's favour? For an accurate interpretation of this momentous change in policy, we must emphasize that the proclamation eliminated private land sales between individuals.

After 1763 land could only be purchased by colonial governments (acting in the name of the Crown) and could only be sold by Aboriginal tribal governments. Thus the rapidly modernizing British state assumed direct control over the sale of native land; "Indian land sales were transformed from contracts into treaties — from transactions between private parties into transactions between sovereigns" (Banner 2007:85).

The first consideration behind this shift was strategic. In 1754 war had resumed between France and England in the so-called French and Indian War, which was the prelude to the Seven Years' War of 1756-63.[44] The Treaty of Paris of 1763 gave the remaining French territory to England, and what had been known as New France now became the British colony known as Quebec. The original French settlers, the Acadians, were deported and replaced by waves of English-speaking colonists from Britain and New England (Evans, Grimshaw et al., 2003:20-21). But even in the wake of this military victory, the British were forced to take a careful look at their relationship with indigenous nations. The First Nations of the upper Great Lakes, in an attempt to preserve their territories, had staged a forceful rebellion in May 1763, when Pontiac, a chief who was an ally of the French, attacked Detroit. This was bad enough, but when the uprising spread quickly to the Iroquois, who had traditionally supported the British against the French, the British became very worried (Clarke 2002:95). A formal alliance between the Iroquois Confederacy (Haudenosaunee) and British colonies, known as the Covenant Chain, had been of great importance to both sides between 1677 and 1753 (Taylor 2001). The Proclamation of 1763 was intended to reestablish the spirit of this alliance and meet the strategically significant goal of consolidating and strengthening bonds with indigenous

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[44] As Jennings (1990) notes, the French and Indian War is an Anglocentric misnomer that implies that indigenous alliances were only with the French. If this had been true, the French would almost certainly have won the war.

nations.[45] As the Crown explained through the text of the proclamation itself, it is "essential to our interest and the Security of our colonies that the several Nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominions and territories as, not having been ceded to, or purchased by us, are reserved to them or any of them as their hunting grounds."

The most direct way to improve relations with First Nations was to address the issue of fraudulent and corrupt land purchasing, which were major antagonisms for First Nations. "As the Board of Trade explained toward the end of the French and Indian War, 'the primary cause' of many tribes' decision to switch their alliance from England to France 'was the Cruelty and Injustice with which they had been treated with respect to their Hunting Grounds, in open Violation of those solemn Compacts by which they had yielded to us the Dominion but not the Property of their Lands'" (Banner 2007 39-41; quoted in ibid, 40). The text of Proclamation itself acknowledges, "great frauds and abuses have been committed in purchasing lands of the Indians." But experience had already demonstrated that cleaning up indigenous land sales to remove fraud required structural changes — colonial governments already had laws at their disposal, but were unable and unwilling to enforce them. The proclamation adopted an idea already in circulation in the 1750s: set aside an area in which land purchasing was simply banned. All land sales, including fraudulent ones, would be prohibited. This is especially significant because the proclamation in effect created the first reservation (Banner 2007:89). The line described in the proclamation ran north and south along the mountains running through western New

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[45] Clark agrees that the proclamation was implemented because the British were "faced with numerous and warlike tribes," but adds that they "were not completely impervious to sentiments of natural justice" (1990:3).

York, western Pennsylvania, south through Georgia. No more land grants or settlement was allowed to the west of the line. East of the line, land sales could only occur between indigenous governments and colonial governments.

The effects were different on either side of the line, but in each case they were long-lasting. To the west the effect was an intensification of land speculation. Any settlers already on that side of the line were ordered to leave and new settlements were outlawed. But buying land on the west of the dividing line was not criminalized — the consequence was simply that contracts, if challenged in court, would have no legal validity. This did not dissuade speculators, who gambled that the ever-increasing demand for land would soon force the end of the proclamation provisions, and so temporarily restricting the supply of land merely drove up its future value. Government officials quickly became caught up in land speculation, and, as we will see in the next chapter, land speculation would play a central role in American secession and the post-revolutionary period. For example, George Washington (assuming that, while new patents could not be issued west of the line, legitimate claims for land would be honoured when the line was rolled back) marked thousands of acres "to secure some of the most valuable Lands in the King's part which I think may be accomplished after a while notwithstanding the proclamation that restrains it at present and prohibits the settling of Them at all for I can never look upon that Proclamation in any other light (but this I say between ourselves) than as a temporary expedient to quiet the Minds of the Indians and must fall of course in a few years" (quoted in Weaver 2006:155).

East of the line, speculators "redirected their efforts from buying land to lobbying the government to buy it. Once the land was purchased, the government could then grant it to the speculator." Formal land titles obtained in this way were more secure — and thus

more valuable — to speculators than titles lacking a government imprimatur (Banner 2007:105).

The elimination of private land sales east of the dividing line was the most significant and enduring effect of the proclamation: this fundamentally restructured the land market. Jones (1982) argues that it is best understood as a transition from land sales by *contract* to land sales by *treaty*. A relatively informal system of negotiation and agreement between private interests was replaced by a formal system of negotiations between governments. According to Jones, this was simply a continuation of colonialism by other means: "one of the marks of colonialism is that it bends…diplomatic structures to exploitative ends" (xii). Unlike other agreements reached between governments — such as conventions governing trade or military relations — property rights flowed uni-directionally. They were not negotiated in a spirit of mutual need or benefit. Rather they were a "technology of law" which colonizers, having established sovereignty, were able to use to their great advantage; the English benefited from the fact that property rights "arose solely from their history" (Weaver 2006:133). Tully (2000:54) argues that the reliance on treaties — a leading-edge strategy of "internal colonization" — rose and fell in dialectical relationship with indigenous resistance to the encroachment of settler societies and a capitalist economy. At moments when resistance was most effective, treaties were the more likely strategy. This argument would seem to support that interpretation that, although it came in the wake of military victory, the proclamation was essentially a response to England's perceived strategic weaknesses, intended to shore up key alliances with First Nations by addressing their longstanding grievances about corrupt land purchasing practices. In these terms, the proclamation failed. The colonial governments proved unable

to meaningfully enforce the interdiction against settlement west of the boundary line, which, as Banner writes,

> proved extremely porous. It was already an old story by the middle of the eighteenth century: colonial governments simply could not prevent settlers from heading west. Motivated by a belief (at variance with the formal law) that land and other natural resources were free for the taking and belonged to the first taker, settlers swarmed into the west. So many Virginians crossed the boundary and occupied unpurchased Indian land, contrary to the repeated admonitions of Governor Francis Fauquier, that in 1766 Fauquier announced that transboundary settlers "must expect no protection or mercy from the Government, and be exposed to the revenge of the exasperated *Indians*." There could hardly have been any greater evidence of Virginia's inability to restrain its own citizens than this admission that the Proclamation of 1763 would have to be enforced by the aggrieved tribes rather than by Virginia. (2007:98)

Moreover, the proclamation would have legal validity for only about a decade before American secession ended British colonial authority and rendered royal proclamations such as this irrelevant in the newly independent states.[46] The proclamation had also been intended to strengthen the legal connection between the colonies and the British Crown — a goal that reflected the mounting political challenge on the part of the British colonies in the US. After signing the 1783 Treaty of Versailles, in which the British surrendered all territory south of the new American border, the need to increase British population in the existing territories took on a new strategic urgency, and so the British Crown began negotiating with indigenous nations to acquire new lands (Evans, Grimshaw et al, 2003:20). The proclamation may have been a seed for these eventual negotiations, and in this way we might say it did serve some narrow strategic benefit.

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[46] In Canada the proclamation was incorporated into the Constitution Act of 1867, and continues to form the foundation for relationship between First Nations and the Canadian government, with particular relevance to the highly contested issue of land claims (cf. Clark 1990).

A spatial-social relations analysis reveals 1763 to be a watershed in the progressive expansion of the modernizing English state. The boundary line set by the proclamation was a moment (although an ephemeral one) of clarity demonstrating how the expansion of the modern state form occurred geographically across the globe. As a theoretical contrast, let us return briefly to the canonical English School account of the expansion of the state form to the Americas. According to this view, the universalization of the European state begins where the present chapter ends: in the 1770s, with the process of secession, when the American colonies demanded independence based on the two principles the English School views as fundamentally constitutive of the state: absolute sovereignty and juridical equality.[47] A state, thus defined, is compatible with an international society governed by the balance of power, international law regulating conflict, and international diplomacy (Watson in Bull and Watson 1984:127-141;13-32). From the point of view of the English School the events of 1492-1776 are irrelevant. My argument is that the establishment of the state in the New World would not have happened without the events of this period.

To summarize, the process was governed by accumulation, mediated by the differences in culture, law, and economic ambitions between a modernizing England and its inter-imperial rivals, and, within the English presence itself, by the fruitful tensions between private initiative and government regulation. Like all colonizing powers, England's colonial ambitions were centred around the accumulation of resources. In particular, as the consequence of cultural and economic reasons, the English focus was on land ownership in the new world. This distinguished its colonial presence from those of its

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[47] Watson views this as one of two ways in which "states on the European model" became established in the new world: the US model of "unilateral declarations of independence and successful armed defiance of the forces of the imperial power," and "gradual independence by negotiation and mutual consent, with the maintenance of some symbolic constitutional link after the end of all imperial authority," as would be practised by Canada and Brazil, for example (128). The assumption here is that people want to be part of a modern state.

imperial rivals such as Spain, which was relatively more interested in the metals and minerals under the ground. But the English pursuit of land was not simple or straightforward. It was complicated by resistance from indigenous peoples who already occupied the land, and by competition from other European empires. It was further complicated by the need to address the common law's apparent support for indigenous land rights. Domestic class conflict shaped events on the colonial frontier, with the enclosure of the commons being especially important. This privatization of land, and the related notion of improvement, were essential in the development of the modern state in England and the ownership of land in the colonies. But it, too, was highly contested.

Finally, the proclamation issued by the modernizing British state in 1763 set the pattern for the future in a number of ways. It established a close – if inevitably fraught – relationship between indigenous nations and the British Crown. It "drew a line around" some territory, an approach that anticipated the reservation system. And it marked a watershed in the role of the state in land transfers.

In this chapter we have seen how, in the period after contact, the English Crown felt that its colonists were entitled to claim as property any land within a territory over which England had declared sovereignty. Yet when it came to claiming land, the behaviour of colonists was determined less by formal declarations of sovereignty than by material reality. It was often much easier and cheaper to buy land than to take it and then fight to defend that claim. So before 1763, settlers tended to buy indigenous land that their state told them they already owned. And land ownership typically was transferred through *contract*. By 1763 the situation would be reversed: by this time colonists felt much more secure and powerful, and were more interested in acquiring indigenous land through conquest rather than contract. The Proclamation of 1763 changed the legal method of

acquiring indigenous land, concentrating control of such purchases in the hands of the government. A grant from the government became the only way to acquire new land titles. And the form that land sales took was transformed from contract to treaty.

5. Post-Revolutionary Land Policies in the US

The state that establishes sovereignty over a territory has the power to make and enforce property rights in that territory. The particular system of property rights a colonial state imposes is typically developed in the home country first, and then exported. But as we have seen, the relationship between sovereignty and property is complex and dynamic, and colonial property rights regimes are never a simple reflection of those in the metropolis. This chapter deals with the period after American secession — a process that began in 1775 — brought the British colonial period to a close. Viewed entirely through a sovereignty lens, such a major rupture in formal sovereignty would be expected to trigger an equivalent change in property rights. Yet that did not occur in this case. The emergence of a distinctly American property-rights regime was uneven.

Revolutionary American governments from 1775-1785 attempted to assert control over the allocation of land on the frontier by putting land allocation in government hands. But residual feudalism, in the form of pseudo-aristocratic practices, continued well past the English abolition of feudal tenure by 1660, and even well past the American Revolution. This chapter addresses the changes and continuities that occurred after the American state was established and Aboriginal nations were becoming "internal" rather than "external" nations. Just as before, land transfer was structured through a series of contracts; now, however, control over land transfers was centralized in the state. Land was transferred out of Aboriginal hands through contracts, but these no longer took the form of sales between individuals, and instead took the form of sales between sovereigns; that is, as treaties.

British Dominance After the French and Indian War: Continuities and Changes in Land Policy

The Seven Years' War (which Lawrence Gipson has called the Great War for the Empire) marked the consolidation of British dominance in North America.[48] In Europe, even after France's defeat, French remained the language of diplomacy. France's enduring diplomatic influence was reflected in the European treaty system. Of the 100 treaties between European powers signed in the decade after 1763, 69 were in French, and France signed 39, more than twice as many as the next most active participants. In North America, the scenario was very different. Beginning in 1763, after France and Spain had withdrawn from active competition with Britain for North America, the British and the indigenous nations of eastern North America drew upon their long history of contact with each other to develop a treaty network, which reflected Britain's dominance in the new world. Each of the treaties in this system dealt with its own different territories and subjects, but together they articulated the core idea set out in the Royal Proclamation of 1763: the delineation of a boundary between indigenous and British territories (Jones 1982:3-18).

Along with the various territorial advantages accruing to England as a result of its victory also came a war debt, which it addressed by imposing taxes on the American colonies. This provoked resistance, especially from large landowners and the small but influential community of wealthy business owners who did not depend heavily upon British trade. This tension reached a turning point with the Declaration of Independence of 1776.

Establishing independence militarily was expensive; after the Revolutionary War the states were essentially bankrupt. The only likely source of income, both immediately and as potential income for the longer term, was land. Indeed, during the war, many states

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[48] This conflict actually began in North America two years before it did in Europe and ended in 1765 with the treaty signed in Detroit two years after the 1763 Treaty of Paris (Jones 1982:15).

had paid soldiers with promises of land in the form of "depreciation certificates" theoretically redeemable for land, but after the war they did not have sufficient land holdings to discharge these debts. The Continental Congress, and many state governments, began receiving demands from demobilized soldiers to repay the debts (Richter 2001). As we have seen, for decades the English Crown had recognized First Nations' ownership of their land. But now the states' need for land was acute, and the only land available was owned by Aboriginal people. Mounting political pressures mandated a move away from the long-standing recognition of indigenous land rights.

Yet such a change was not easily realized. Even after independence was declared, many of the main reasons for respecting indigenous land rights did not disappear. Aboriginal people still farmed, for example, and given the special value the English placed on agricultural labour, this offered continued confirmation of their land rights. And while European settlers by this point had acquired much greater relative strength and numbers, it was still often cheaper for them to buy land than to seize and defend it. In addition to these continuities, the revolutionary context actually produced new dynamics in support of land rights. In the 1760s England had attempted to establish a coherent land policy. It created an Indian department, which took negotiations with First Nations out of the hands of colonial governments, and it passed the Royal Proclamation of 1763, which established an Indian Territory. The 1768 Treaty of Fort Stanwix, signed by the British and representatives of the Six Nations (Iroquois), had adjusted the territorial line that delineated the boundary of Indian country in the hopes that a new, ostensibly permanent line would impose some order on an increasingly violent and anarchic frontier (Taylor 2006). Speculators created ad hoc new land companies as they rushed to claim the new land opened up by Stanwix. But the now-independent states were no longer bound by the Proclamation of 1763, and the

speculative demand for land far outstripped the supply; speculators who had been frozen out by the proclamation's ban on private sales, and unable to get in on the post-Stanwix rush, saw the revolution as a possible opportunity to open up new Aboriginal territory for purchase. While the Crown argued that it had the right to tax land because that land had been acquired by grants from the Crown, opponents argued that the Crown had no authority to legislate or tax land because it never granted that land — instead, the land was purchased from its indigenous owners (Banner 2007:115-116).

Thomas Jefferson offers an embodiment of these developments. Jefferson grew up in an eighteenth-century Virginia in which land speculation raged. Many land companies were formed to attempt to acquire indigenous land along Virginia's western frontier. Jefferson inherited a share in one of these, the Loyal Land Company, and also invested on his own in frontier real estate. This history contributed to his lifelong sympathy for settler colonists (Wallace, 1999:21-49). Jefferson, along with such others as Washington, John Adams, and James Madison, together made up an American "speculative-landed" gentry that had huge claims on land located on the far side of the 1763 Proclamation Line — claims which could not be realized as long as the letter or the spirit of that agreement were honoured.[49] As Williams (1990) shows, the justifications provided for the widespread and unregulated land speculation on the eve of the Revolution drew heavily upon a discourse based in Jefferson's argument in defence of secession, expressed in his 1774 pamphlet *A Summary View of the Rights of British America*. Jefferson portrayed the American rebels as the political descendents of the ancient Saxons who had left northern Europe, settled there, and established a political system that would come to define Britain. For the Saxons,

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[49] A number of historians have argued that thwarted speculation was an important factor in triggering the revolution. See Abernathy (1959) and Holton (1999).

emigration to America was simply part of a centuries-long trajectory of relentlessly pursuing freedom, justice and the rule of law. Jefferson employed the

> radicals' Lockean-inspired thematic wedge — a natural-law-based notion of a government formed by autonomous compact and the consent of the governed — to legitimate the American claim for independence….The Americans, inheritors of the Saxon mantle of liberty, had seen their natural-law rights to freedom frustrated by the continual usurpations of the British Crown….[which was] a wrongful continuation of the perversion of Saxon principles of right and justice, traceable to the first imposition of the Norman Yoke in 1066. (267)

Jefferson draws on the myth of the Norman Yoke, a shorthand phrase that emerged in seventeenth-century English nationalist discourse to convey the idea that the English gentry were the descendents of foreign invaders who had destroyed the Saxon golden age (cf. Hill 1997). In the service of their war on the noble Saxon race, the Normans had contaminated natural-law principles by imposing a foreign system of feudal land-laws that was little more than a fiction of conquest. When freedom-loving Englishmen fled British tyranny, they carried with them Saxon-inspired common-law principles of free tenure. Thus the Crown could not claim colonial rights in North America based on the Norman right of conquest of infidels, because the King had never formally conquered America. Nominally a defence of American independence, Jefferson's highly influential argument also had profound implications for indigenous land rights. It suggested that for descendents of the Saxons to purchase land directly from its Aboriginal occupants, without granting sanctioning authority to the Crown or its colonial representatives, was a revolutionary act. Not only did free Americans exercise (and thus assert) their natural-law rights when they bought indigenous land directly, First Nations exercised natural rights of their own by "freely alienating that which they occupied"; this willingness to participate in the colonists' land

market demonstrated their natural capacity for rational, self-interested actions (Williams 1990:266-272; 272).[50]

As we have seen, the Proclamation of 1763 was an attempt to control settlement, although it was never successful in thwarting speculation. When the proclamation took away first nations' ability to sell their land privately, they also lost the ad-hoc political coalition backing them: landowners who had bought land directly (and whose title thus depended on indigenous land rights being recognized), and speculators who wanted to buy land. Without the restraining influence of the Crown, the now-independent American states were even less effective than the colonial governments they replaced had been at enforcing the rules surrounding land purchases. Essentially the same dynamic that had spawned the Royal Proclamation reappeared in the revolutionary context: the central government, wanting to avoid antagonizing First Nations, found itself in need of a legal mechanism to impose restraint on the states. After some debate, the Articles of Confederation of 1777 were drafted to include a weak power, leaving the state governments in charge of land sales within their own boundaries. After another decade of chaos on the frontier, the Constitution adopted in 1787 finally gave the central government exclusive control over Indian relations.

It is also important that this was all happening in a context of war. In this light, Jefferson's 1774 use of the Norman yoke imagery takes on an ironic appearance: he

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[50] The ideas themselves drew deeply from a well of racial discourse and myth. In the Revolutionary period, many Americans, following Jefferson, came to see themselves as the standard bearers for freedoms that had first been enjoyed in England centuries earlier: "Has not every restitution of the ancient Saxon laws had happy effects? Is it not better now that we return at once into that happy system of our ancestors, the wisest and most perfect ever yet devised by the wit of man, as it stood before the 8th century?" (as in Horsman 1981:9). The current of publications flowing across the Atlantic was especially strong on the eve of American secession, and a large number of these portrayed the revolutionaries "as Englishmen — Englishmen contending for principles of popular government, freedom, and liberty introduced into England more than a thousand years before by the high-minded, freedom-loving Anglo-Saxons from the woods of Germany" (Horsman, 1981:18). It is important not to overlook the *racial* dimension to the imagery and mythology that Jefferson invoked; these ideas would be picked up and developed in the decades ahead, and folded into the idea of Manifest Destiny.

accused the Crown of employing a feudal argument of conquest to claim indigenous land, which in fact, as we have seen, the Crown did not do. This claim was a discursive straw target. Yet now, in the revolutionary period, it was the rebels themselves who embraced the doctrine of conquest. To understand this we must remember that secession was not peaceful. "In much of North America," Banner writes, "the Revolution was more a war against the Indians than a war against the British. Tribes found themselves drawn into the conflict, unable to stay neutral, because much of the fighting was taking place on their land" (2007:121). The end of the American War of Independence in 1783 left First Nations in a disadvantageous position. Most indigenous nations had fought on the side of the British. By the time of the war, the British had disclaimed entirely the right to indigenous land as a matter of conquest and acquired land by purchase as a matter of course. Britain also endeavored to regulate land sales to eliminate abuses in land-purchasing practices employed by many private speculators — these attempts to regulate land sales were embodied in the Proclamation of 1763. After secession, the new American state was much more aggressive in its land policy. This represented continuity in the sense that land purchases were concentrated in the hands of the state, but also discontinuity without the restraint imposed by the colonial government. The new American government was made up of landowners. Land speculators and frontier settlers had greater political power.

The colonial wars had not been wars of conquest designed to take indigenous land, but after winning, colonial governments often took the land as compensation, and this continued in the Revolution. Before long, however, the conquest of land became a main reason for fighting. This way of thinking meant that the 1783 Treaty of Paris, which formally ended the revolution, was understood by the American government to remove all indigenous property rights. The treaty recognized the borders of the new American state.

Before the war, it would have been assumed that this entitled the United States to exercise sovereignty over this area, but not claim it as property. But after the war, Americans saw the treaty as entitling them to all the land within the state boundaries. They considered the Indians the defeated (See Banner 2007:122-123). In the 1780s land was confiscated through the imposition of treaties. The treaty of Fort Stanwix established an "example of a mundane frontier practice — namely, a purchase from an indigenous people that lacked approval from all interested parties" (Weaver 159).

In 1792 Jefferson, now secretary of state, outlined in a letter to a British government official his understanding of the American right to native land: "we consider it as established by the usage of different nations into a kind of *jus gentium* for America, that a white nation settling down and declaring that such and such are their limits, makes an invasion of those limits by any other white nation an act of war, but gives no right of soil against the native possessors." Jefferson, who had once used the argument against the feudal right of conquest so influentially vis-à-vis the English Crown, had now reversed his position. And Jefferson was clear: Aboriginal people who resisted this use of the law as a tool of acquisition would have to be "exterminated." (in Lipscomb and Bergh, eds.1903-04:467).

The new American state adopted the British interpretation of empire as fundamentally *territorial*. Britain assumed that military victory over European rivals entitled it to territory previously occupied by those rivals. This logic of empire — the notion that the dominant power was entitled to the right of land transfer — caused a lot of tension with First Nations, who were already upset about shady land dealings. (As we have seen, these tensions were only partly and temporarily mitigated by the imposition of the dividing line set out in the Proclamation of 1763.) Moreover, Britain also assumed that the

Iroquois League was also a territorial empire. Understanding this issue requires us to revisit the Covenant Chain, the important confederation between English colonies and indigenous nations that held from 1677 until the French-English conflicts that broke out in the 1750s. The Chain, which organized trade and military alliances, was fluid in the sense that the specific indigenous nations participating, along with their internal power balance, shifted constantly. Throughout the life of the Chain, the Iroquois represented other nations to the British colonial governors (Jennings 1984; Taylor 2001). Their role as intermediaries gave the Iroquois a powerful position, but "Iroquois hegemony was not based on territorial domination" (Jones 1982:19). However, by the mid-eighteenth century, the influence of the core *territorial* assumptions of the modern state form had come to encompass much of North America, including the Covenant Chain. The Iroquois adopted to some extent British assumptions about territorial control. The British held that any First Nations represented by the Iroquois consequently became their dependents, and thus, in keeping with the territorial logic of empire, that the Iroquois thus had the right to sell land that was occupied where these nations lived. In several cases, the Iroquois did just this, selling to the British land occupied by Shawnee and Delaware peoples (Jones 1982).

This return to a feudal-imperial mode of thought partially and temporarily reversed the separation between property and sovereignty: the new American state claimed sovereignty over a territory and also assumed it could claim the land. This should not be too surprising, since at first the American government resembled a feudal state: it was a government made up of property owners. Many American officials were investors and speculators. In this period there were no business corporations to absorb investment. Frontier (indigenous) land was the logical place for speculative investments. And the landowners were running the show. This evidence complicates the claim that the US never

knew pre-liberal values or class structures and thus did not have to overcome them. Canonically, for example, Louis Hartz (1955) attributes the easy dominance of a classical liberal ideology in the US to the country's lack of a feudal past. So it is not accurate to claim the US was exceptional because it was not immaculately conceived as a non-feudal state. A more convincing account can be found in Wood (1995). She argues that in the US, the link between property and social elites was broken early. While the federalists had wanted to create an American landed aristocracy, they were too late: property had already been "disembedded," and the immediate-post-revolutionary context meant that the population was already politically active, so rejecting the notion of democracy was impossible. Therefore, they designed a system that both "embodied and curtailed popular power"; a representative democracy in which an exclusive and active citizenry was replaced by an inclusive and passive one (Wood 1995: 215).

The State Regains Control of Purchasing Land

To build on Wood's analysis, it was specifically the dispute over control of frontier land that was one of the most divisive issues facing the Founders as they constructed the political basis of the United States. This was in fact an inter-colony dispute, which pitted "landed" against "landless" colonies. (In this way it echoed the debates about the morality of colonialism carried out between rival European powers in the so-called Age of Discovery.) Virginia, for example, was a "landed" colony: as the result of its original colonial charter, it had (vague) rights to frontier land currently occupied by indigenous nations. This gave its speculators an apparent legal advantage in acquiring property on the colonial frontier (Williams, 1990). Having charter claims to western land also helped

loosen a financial bind: unable to issue its troops cash during the War of Independence, Virginia was one of the colonies that paid such debts with warrants for land in Indian country, redeemable if and when victory had been realized (Churchill, 1997:209, f.n.).

In contrast, speculators from "landless" colonies, whose colonial charters did not grant them any claim on western land, fanned out aggressively along the frontier, purchasing land directly from its Aboriginal occupants without legal sanction provided by the British Crown or the "landed" colonies that held charter claims to the land. The dispute produced competing discourses that drew upon two different traditions of European political thought: the accumulative logic of the feudal state, and the Lockean-derived theory associated with the modern state as it emerged out of England. Representatives of the landless states, whose speculators stood to gain the most if the state granted indigenous rights to sell land directly, argued that First Nations did naturally have that right. Founders from the landed states, in contrast, invoked the ancient notion that the "savages" had no claim to their land, and thus could not legally sell it (Williams, 1990:233-239). It is interesting to note that this American debate undid the theoretical "solution" reached by the European powers on the problem of how to justify the dispossession of indigenous land under the law of nations. That solution had denied indigenous nations the prerogatives possessed by the European colonial powers, not on the grounds that they were "savages," but rather that they were "uncivilized" because they did not convert land to property through the addition of labour. This, in other words, represented a combination of feudal and Lockean ideas, a combination that the inter-colony dispute over control of frontier land effectively disaggregated.

The solution agreed to by the founders was a political one: the colonies all agreed that the federal government would have exclusive jurisdiction over indigenous land —

which it would claim by purchase or dispossession.[51] This "solution" — federalism — contributed greatly to indigenous land rights. State governments did not have the right to purchase land — that was once again claimed by the federal government in 1787. And they could do little to influence the federal government to buy more land or buy it more quickly. But the states were feeling the pressure to give land to settlers (in part to pay soldiers). So they just gave away indigenous land to settlers without buying it first. Over time this became standard practice and the states came to believe it was a perfectly legitimate practice.

The Revolutionary period had been a temporary exception (in some ways) from the trend of the state assuming direct control over land. But with the Trade and Intercourse Acts the federal government took for itself the same power the Crown had claimed with the Proclamation of 1763. The Indian Trade and Intercourse Acts, first passed by the US Congress in the 1790s, prohibited American citizens from trading with Aboriginal peoples without a licence from the federal government, and hunting and trapping on indigenous land (Wilmer 1993:74). The act was renewed every two years until 1802, when a permanent one was passed. As the legislation evolved through its biennial iterations, it steadily embodied the core tenets of what would become federal Indian policy (Prucha, 1995:31).

There was a particular spatial element to this. The Trade and Intercourse Acts

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[51] Holton (2007) argues that the US Constitution itself was an attempt by the framers to centralize power within the federal government at the expense of state governments, because the latter were "too democratic" — i.e., responsive to citizens, and in particular to farmers. In the wake of the Revolutionary War, state governments had sided with farmers rather than their creditors, passing laws that allowed debts to be repaid with various forms of property rather than "hard money" (gold); state governments also funded the war partly by printing paper money, creating high inflation. Centralizing power in the federal government was a personal priority for the many framers who were private creditors and/or investors in government securities, and even those who were not personally affected believed that limiting the power of the relatively more democratic state governments was necessary to attract investment.

established, in parallel to trade regulations, a system of government-run trading posts ("factories"), where Indians were to offer their goods, most importantly furs, for sale. The factories were closely associated with military outposts; more than 85% of them were built next to, or else prompted the construction of, a fort. This arrangement provided protection for the factories, as well as enhanced commercial credibility because the forts signalled the government imprimatur. They were also used as leverage: indigenous nations were often expected to cede territory in exchange for access to the factory (Prucha, 1995).

Just as British colonists on the frontier tended to "run ahead" of the British state, claiming land first and then expecting the Crown to provide legal justification after the fact, Americans living along the frontier largely disregarded the Trade and Intercourse Act, along with most other legal regulations on trade. The permanent act of 1802 explicitly prohibited encroachment on indigenous lands, but white intrusions were common. Some of these were largely accidental, in areas where land surveys had not yet been carried out — the clearly mapped-out territorial boundaries required by nation-state form were at this point highly fictional, existing only in theory. But more commonly and more importantly, white intrusion into indigenous lands was a direct (and typically violent) challenge to indigenous land ownership. The federal government attempted to use the army to guarantee indigenous boundaries against intrusion, but such a widespread, persistent problem proved far beyond the army's capacity to address for long. The only alternative possible way of policing the frontier was through the use of local militias, but these were made up of the very settlers who were breaking the law, and so by 1816 the federal government had essentially granted disputed territories to the white settlers that claimed them (Wallace:1999:211-218). As Prucha writes:

> Why did the government not take more effective measures to prevent encroachment? The answer lies partly in the insufficiency of the forces available [for enforcement]….but behind these failures was a larger issue. The federal government was sincerely interested in preventing settlement on Indian lands only up to a point, and it readily acquiesced in illegal settlement that had gone so far as to be irredeemable. The policy of the United States was based on an assumption that white settlement should advance and the Indians withdraw. The federal government….meant to….govern the advance of the whites, not prevent it forever. (47)

By the 1790s the main elements of the system for acquiring indigenous land were in place. Over the next century or so the central government bought the US parcel by parcel (Banner 146). (Speculators were not buying indigenous land, they were buying the right to buy it after the government had bought it.) This is the modern state writ large: the state establishes sovereignty; it establishes a rule of law for private property; the land within the state's sovereign territory can now be purchased; it purchases it.

Treaties

From the sixteenth century, treaties were "the basis for defining both the legal and political relationships between the Indians and the European colonists" (Deloria, Jr. and Lytle, 1983:3). But they were not primarily about transferring land. After the American Revolution, this changed. Now land was transferred between sovereigns. In 1778, two years after secession, the US government entered into its first treaty with an indigenous nation on the same territory, in this case the Delaware. Over the next century, more than six hundred treaties and similar formal agreements were made with North American First Nations, of which approximately four hundred were made between the US government and the peoples indigenous to the area now known as the contiguous states (Charles J. Kappler, Indian

Affairs: Laws and Treaties, online at http://digital.library.okstate.edu/kappler/; Deloria Jr. and Lytle, 1983:4).[52]

Treaties with First Nations pose a theoretical challenge for the IR scholar. They are by legal convention agreements between sovereign nations — and so they should be a matter of sovereignty. But in this case they were really about the transfer of property. (On treaties see Deloria and Lytle 1984 7ff.) In general, the purpose of the treaties was to secure an orderly legal transfer of land ownership from indigenous nations to the United States; in the act of which, the US acknowledged that those nations already owned it. For the Aboriginal nations, these treaties were entered into on the understanding that they would secure permanent borders to their national territories, and in turn guarantee the continuation of their self-governance, trade and military alliances, and other trappings of sovereign nations (Churchill, 1996: 516). In these ways, treaties were perhaps the most important signifiers of indigenous nations' de facto foreign-nation status.

Once again, we must not view the issue at hand purely as a matter of formal sovereignty. While the nascent US government's stance toward treating with indigenous nations met the *formal* requirements for relations between sovereign nations, it should be clarified that that was not the *spirit* with which it approached the treaty process. Treaties simply offered the most efficient way to gain control of indigenous land, especially since the US had just emerged from a war with Britain, and it likely did not have sufficient military or financial resources to win a large-scaled sustained fight against many indigenous nations. George Washington, according to a plan he wrote and submitted to Congress in 1782 that was intended to solve immediate problems and also provide future

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[52] These figures are by necessity imprecise in that the territorial borders of indigenous nations in some cases crossed and overlapped the borders with what would become Canada and Mexico.

direction for Indian policy, saw treaties with indigenous nations as the best way to "induce them to relinquish our territories and remove to the illimitable regions of the West," for "there is nothing to be obtained by an Indian war but the soil they live on and this can be obtained by purchase at less expense" (Quoted in Eckert, 1995:440-441). Washington's plan was impressive in its strategic clarity and audacity (not to say legality):

> Since the expense of a major war could not be shouldered by the young and still newly shaping United States government, he recommended that all efforts be made to implant as many new settlers as possible on Indian lands. In order to do this, his plan went on, grants of land should be made to veterans of the Revolutionary War from such parcels in Indian territory as the Virginia Military Lands and the Western Reserve Lands….He then very meticulously laid out for Congress a blueprint of negotiations for such lands. First, government agents should point out to the Indians that as allies of the British, they had become conquered when the British surrendered and, as a conquered people, they had no land rights or rights of any kind and therefore could not make demands; yet that the United States, in its generosity, would, if the Indians gave up their alleged claims, pay them a certain amount and also provide them with new lands of their very own farther to the west. (Eckert, 1995:440)

The international context provided another reason why the young United States felt substantial pressure to treat with indigenous nations. By staging a decolonization struggle against Britain, the US had by definition violated the central tenet of colonialism. It was thus an outlier, even a pariah, in the expanding system of inter-state relations. Wanting to establish its international legitimacy, the US government "adopted the most acceptable posture toward the Indians possible with the hope that by demonstrating their ability to act in traditional political terms they could allay the fears of other nations" (Deloria in Wunder, 1999:23).

Prucha (1996:21), while acknowledging that the US government's habit of "treat[ing] with Indian tribes with legal procedures similar to those used with foreign nations [was] a practice that acknowledged some kind of autonomous nationhood,"

cautions against seeing these treaties as exactly equivalent to treaties reached with foreign nation-states. Still, the strategy of gaining land cessions from indigenous nations through treaties (and the attendant international diplomatic recognition) caused the significant legal problem that, as we have seen, treaties with indigenous nations seemed to be an acknowledgement that they were the rightful owners of most US territory. As Attorney General (from 1817-1829) William Wirt expressed the problem:

> So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive. We treat with them as separate sovereignties, and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory than we have to enter upon the territory of a foreign prince. (Quoted in Churchill, 2003:7)

The *de facto* solution to this problem came from settlers and governments who chose to ignore inconvenient legal implications; by the 1790s US government was purchasing land again, but unscrupulously. The *de jure* solution would be reached in the 1820s and 1830s at the Supreme Court.

The Marshall Doctrine: *Johnson v. McIntosh*

In the 1790s it was assumed by everyone that any land that had not been bought from first nations belonged to them. By the 1820s that had changed completely: unpurchased indigenous land was thought to belong to the government. The legal and political changes that occurred over this three-decade period constituted a watershed: "Like many transformations in legal thought, this one was so complete that contemporaries often failed to notice that it had occurred. They came to believe instead that they were simply following the rule laid down by their English colonial predecessors, and that the Indians

had never been accorded full ownership of their land" (Banner 2007:150). How do we explain this change?

Lefebvre (2009:275) observes that the modern state uses various methods for controlling territory, "the best known of which is 'expropriation.'" Such methods express the state's "eminent" right to a space. The nation state manages the space to which it is attached, dominating and profiting from this space, "almost in the way [the term eminent] meant under the *ancien régime*, whereby the written rights and powers of the nobles and the kings were superimposed on the common rights of the peasants, 'commoners.'" The American government's "eminent" sovereignty over the land was formally affirmed in the *Johnson* case. In 1823, in the case of *Johnson v. McIntosh*, the US Supreme Court was called upon to rule on the question of whether or not private American citizens could purchase indigenous land directly. *Johnson* in effect upheld in law the political compromise reached four decades earlier, in the revolutionary period (Williams, 1992:231). That compromise was to grant the federal government full authority over the allocation of indigenous territory. This arrangement was based on essentially the same medieval argument made by the Spanish *encomenderos* three centuries earlier — that indigenous people were less than human and thus not entitled to protection under natural law.

Once Britain had recognized US independence, Virginia and the other formerly "landed" colonies — they were now states of the union — appealed to the Continental Congress and, in a legal "shell game," received federal grants of the very same land west of the 1763 Royal Proclamation line that they had claimed before the war. Those postwar grants, however, were based on the incorrect assumption that Britain had owned those western lands, which as a consequence made them now US territory. In fact, as we saw in the last chapter, the Royal Proclamation entitled the British Crown the exclusive right to

purchase those lands from their indigenous inhabitants. It did not grant the Crown ownership, which in turn meant that the US government did not own them and could not grant them to states (Horsman as in Churchill, 1997:209-210fn). This decision formally amended domestic law to resolve the contradiction created by the fact that the country had been founded on territory that the law of nations apparently recognized as the rightful property of the indigenous peoples who had occupied it. It was based on a "medievally grounded discourse" (Williams, 1992:325).

Simply put, the court acknowledged that the land was and had always been *occupied* by indigenous nations, but ruled that European discovery provided title for the land, and that this title was recognized by the other European countries. In other words, the court "solved" the problem of how to justify the dispossession of sovereign nations from their land by denying that they were, in fact, sovereign nations. It returned to what we might call the "original" logic of European colonialism by framing the question in terms of an inter-imperial dispute over land. Since England had claimed territories that now made up the United States, and since that claim was recognized (or at least no longer actively disputed) by England's rivals, it was, therefore, an English possession. (A possession that England lost in 1776.) Writing for the unanimous court, Chief Justice John Marshall — who had himself received 10,000 acres of indigenous land for his contribution to the revolution (Baker, 1976:80) — argued that Christian European nations had assumed "ultimate dominion" over the lands of America and that as a result of "discovery" Indigenous Peoples had lost "their rights to complete sovereignty, as independent nations," and only retained a right of "occupancy" in their lands. In other words, Indian nations were subject to the ultimate authority of the first nation of Christendom to claim possession of a given region of Indian lands (Johansen 1998:574). Indigenous rights, the court ruled, were

not denied but merely "impaired" by European assertions; indigenous nations were entitled to continue to *occupy* their land, but they did not own it as property. The ruling contradicted the recognition of indigenous national sovereignty implied by the many treaties that had been signed with them, first by the British Crown and then the US government. Moreover, it contradicted the United States' own constitution (specifically Article 1, Section 8, Clause 3): "The Congress shall have the power…to regulate commerce with foreign nations, the several states, and with the Indian tribes" (www.usconstitution.net). All of this was accomplished by legally reclassifying indigenous nations as "semi-sovereign" (Deloria, Jr. and Lytle, 1983:4). The Marshall court followed up the *Johnson* decision with other important rulings on indigenous rights the early 1830s, in the two *Cherokee* decisions and *Worcester v. Georgia*. These rulings developed the same logic that underpinned *Johnson*: what Slattery characterizes as the "doctrine of legal symbiosis," which can be contrasted with the "doctrine of a legal vacuum." The latter held that indigenous people were uncivilized and less than fully human, and consequently when Europeans arrived they were able to assert rights over the land as if it were empty. The "doctrine of legal symbiosis" developed by Marshall sets out four historical phases.

In the first phase, the Indigenous peoples of what is now North America were independent nations holding sovereignty over an exclusive territory. In the second phase, the great powers of Europe established a mutually agreed-upon principle to regulate the right of acquisition of new territory. This principle was essentially the right of discovery: discovery of a country gave imperfect title against the other European states. Title could be consolidated, or "perfected" in the legal jargon, by actual possession of the territory that had been discovered. Because this was an agreement between European states, it did not

mandate how relations with indigenous nations should take place. Consequently, the form such relationships took often varied a good deal across European states.

In the third phase, one of these variations in particular rose to prominence as the English Crown began issuing charters conferring title to land of which the English had not yet taken possession. The charters gave exclusive right of ownership to one British subject, a right that could be enforced in British courts against other British subjects. But, as Marshall writes:

> The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the Natives were willing to sell. (1832; for commentary see, *inter alia*, Slattery 2005:53)

The third stage took place in a context of the most intense inter-imperial conflicts for territory and trading routes, and Aboriginal nations were drawn into these conflicts because they were viewed as potential powerful allies. Marshall characterized these relations as equivalent to those among sovereign powers under international law.

In the fourth stage, as set out by Marshall, the Crown began to establish ever-increasing control over First Nations, through treaties and other mechanisms. It was through this process that First Nations took on the status of "dependent domestic nations," that is to say, "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial….[Yet] so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility." The transition to this fourth stage

marked the "conversion of a right of discovery into a right of conquest," or to put it another way, "the transformation of a merely dormant right into a right of fact." In this final stage, Aboriginal land rights were formally recognized; First Nations were understood to have the legal and just right to own their land and use it as they wished. However, the right to sell that land was limited to a "right of alienation to the Crown" (Slattery 2005:53). Slattery's account of Marshall's doctrine emphasizes its evolutionary character, revealing it to be a relatively complex version of the doctrine of a legal vacuum. If we replace the more unadorned account of the Marshall doctrine with Slattery's version, that does not contradict the core claims of my argument.

Culture and Civilization: The "Myth of America"

Justifying the logic embodied in the Marshall decision entailed portraying Indians as nomadic, and this was a cultural phenomenon. In the early nineteenth century Americans came to think of Aboriginal people as nomadic hunters. The American policies that allowed the state to claim and privatize indigenous peoples' land had a parallel in the form of a policy track designed to "civilize" or "Americanize" them, a policy first expressed legislatively in the Civilization Fund Act of 1819. Assimilation reveals how Lefebvre's schema of homogenization, fragmentation, and hierarchization worked at the cultural level.

Recall that the European colonial powers employed a cultural process to reclassify indigenous peoples as uncivilized, according to a Lockean formulation in which land becomes property through the addition of labour. Applying labour to the land — or in other words, "improving" it — was the standard that a people had to meet if they were to be considered civilized, or cultured. The Jeffersonian position, which, by the time of the first

Federalist governments, had become dominant (Wallace, 1999) was that indigenous people, like all other human beings, carried within them the *potential* to become civilized, but realizing that status required them to give up a subsistence economy on communally held land for an agrarian system based on private property (Prucha, 1996). It might be possible to take from this the idea that Aboriginal societies in North America before European contact were made up of nomadic hunter-gatherers who had not yet evolved to the point of learning agriculture. As we have seen, this was not the case: archeological evidence shows they had been farming for over 7,000 years. At the time of contact, they had developed a complex agriculture based on corn, beans, and squash, supplemented with other crops including cotton. Techniques such as soil rotation and cultivation through selective breeding in order to meet specific geographic requirements were common (Hurt, 1987; Nabhan, 1989).

It was not an *agricultural* question per se but rather a commitment to private property that explains how Jefferson was able to ignore already-extensive indigenous agricultural practices, as when he told a delegation: "Let me entreat you therefore, on the lands now given you to begin to give every man a farm, let him enclose it, cultivate it, build a warm house on it, and when he dies let it belong to his wife and children after him" (Quoted in Horsman, 1981:108). In other words, the real problem was not that Indians did not farm, it was that they held land communally, and so their labour did not qualify as "cultivation" or "improvement" because it did transform land into "equivalent, exchangeable" property. Similarly, there was no contradiction between helping indigenous people and steadily reducing their land holdings: these were two sides of the same policy coin, justified with reference to free enterprise and natural law. And the same policies of

land privatization allowed speculators to acquire great tracts of land, a coincidence that helps explain their strong stated interest in indigenous welfare.

In general terms the European equation of culture and civilization, progress and improvement, were replicated in the American context, providing the cultural basis for the "myth of America." As Slotkin (2000) shows, however, a set of related ideas and stories such as these does not make the transition from Enlightenment Europe to embryonic USA without undergoing some changes. What were those changes?

> The majority of the American population before 1800 were European by ancestry, by language, and by religious and literary heritage. The only non-European native cultures were those of the Indians….Since the Indian is, from our point of view, the only one who can claim to be indigenously American, it seems important to question whether our national experience has "Americanized" or "Indianized" us, or whether we are simply an idiosyncratic offshoot of English civilization. (Slotkin, 2000:6)

Slotkin describes how traditional, romantic European myths — drawn from classical, medieval and Renaissance romances, as well as political and religious ideas from the Reformation — were adapted to the new context, to reflect the anxieties of the colonists, whose social and psychological experiences were shaped by factors including the confrontation with a vast, rich, and yet untamed nature, and with profoundly foreign natives; emigrants wrote not for themselves, but also for a European audience, whom they had to try to sell "either actual land or the idea of a colony" (18; also see Drinnon, 1990 for additional examples and commentary). What Slotkin calls the American myth (articulated through a number of literary forms that came together to express a coherent story) fundamentally concerned an isolated settler attempting to claim the land by civilizing both the harsh wilderness and the hostile natives.

The most symbolically significant narrative in the colonial experience was the story of the Indian wars; the archetypal figures in these narratives included the Indian hunter and captive needing to be rescued. Toward the end of the eighteenth century, however, the main mythical figure had evolved. Instead of the heroic Indian destroyer (or converter), a figure that reflected the colonists' early experiences, these subsequent stories featured mythical heroes who tamed the land: the yeoman farmer, the surveyor, the naturalist. These figures mediated between the natural, or savage, world, and European civilization. In some ways they had "gone Indian," or become a part of the now-beloved American wilderness, yet they were resolutely civilized. Thus the archetypal figure in the period leading up to secession was "the lover of the spirit of the wilderness, and his acts of love and sacred affirmation are acts of violence against that spirit and her avatars" (Slotkin, 2000:22). These jobs were held in high regard at the time. For example, "to survey land was to do more than measure it, mark it, and describe it; it was also to read its potential" (Weaver 2006:100). George Washington, before becoming commander-in-chief of the Revolutionary Army and the first president of the US, was a surveyor, trained at the age of 16 on surveying missions on behalf of Lord Fairfax (Ferling 1989). Indeed, when Washington became president he "had been feathering his own personal nest with Indian lands ever since his family first became involved with the Ohio Land Company in 1748," in the process reputedly becoming the wealthiest man in America (Eckert 1995:440).

In the eighteenth century white attitudes toward indigenous people underwent changes. These changes reflected general Enlightenment optimism about human nature, as well as the reality that the American frontier had moved westward, with the result that many Americans now had very little direct contact with indigenous people, and so began to appreciate them from a distance as an exotic curiosity (Horsman, 1981:104). The romantic

notion of the "noble savage," found in the works of writers such as James Fenimore Cooper and Henry Wadsworth Longfellow, raised further complications. As Drinnon (1990:123) notes, for "writers dedicated to the creation of a national literature, the critical vehicle for a national mythology," the central question was this: "Did real people lurk in the woods just beyond the line of white settlement? If the answer was yes, then how could one maintain the dream of American innocence versus European evil?" This was a cultural articulation of the same problem we have seen addressed through political-theoretical debates: are stateless indigenous people really human, and therefore entitled to protection under the natural-law-derived law of nations? As we have seen, Jefferson and others upheld Locke's notion of natural law, which holds that individuals carry within themselves at least the latent entitlement to claim land, an entitlement that is only actualized when they become "civilized" by farming, embracing commerce, establishing the rule of law, and accepting Christianity. This was a core European argument made to justify the colonization of North America.

In the American context, it was modified somewhat. From their perspective, colonists began to see the Indian as "natural man." Conceptually, then, the distinction between the cultivation, or improvement, of the land, and the improvement of its indigenous inhabitants, was blurred. Indeed, Slotkin recounts an argument developed by Cadwallader Colden, a physician, farmer, and surveyor who was the first colonial representative to the Iroquois Confederacy. Colden portrayed the Iroquois Confederacy as follows: "The Five Nations are a poor Barbarous People, under the darkest *Ignorance*, and yet a bright and noble Genius shines thro' these black Clouds. None of the greatest Roman Hero's have discovered a greater Love to their Country….The Five Nations (as the Name denotes) consist of so many Tribes or Nations joyn'd together by a League or Confederacy,

like the United Provinces, without any Superiority of any one over the other" (Quoted in Slotkin, 2000:199-200, italics in original). Colden's missive is based upon the Lockean notion that the individual in the state of nature was free from any political restrictions, and chose to enter into a social contract with others for their mutual protection. In other words, the decision to sacrifice some freedom is justified only by being a response to the hostile natural world (Pangle, 1990:244-260). If this argument is followed to its conclusion, indigenous government may actually be the *best* form of government, since it is the purest, arising as it does most directly from contact with nature. It is an example of nature genuinely improved, before such improvements go too far. Since Locke's theory underpinned that era's most significant changes in English politics, Colden's favourable assessment of the Iroquois Confederacy measured against a Lockean index is very significant, not least because it anticipates the national consciousness that would soon emerge in the colonies (Slotkin, 1990:200).

Arneil (1996) show how the American government's Aboriginal policies in the late eighteenth and early nineteenth centuries were heavily influenced by Locke's theory of property as regards indigenous people. Locke's belief in the natural right to property and the theory that agrarian labour is what transforms waste land into property were adopted by a number of prominent religious and political thinkers (in addition to Vattel) to justify the views on Aboriginal people. The *Two Treatises* were used to refute the notion that indigenous nations help the right to their land because they were self-governing nations; when the same ideas were incorporated directly into American government policy, indigenous nations were no longer treated as foreign nations, and instead became officially seen as primitive communities populated by "natural man." The move from natural state to civil society in Europe marked the fundamental betterment of humanity, and the

replacement of stateless indigenous nations and their "primitive" traditional way of life with a European-style market society would signify similar progress in America (Arneil, 1996:168-200).

The influence of Lockeanism on early-American political thought has been noted by a number of authors (See, *inter alia*, Pangle, 1990, Arneil, 1996). Thomas Jefferson was perhaps the most important and tenacious American advocate of the Lockean-civilization position, which he ultimately articulated through his *Indian* policy. Essentially, Jefferson wanted to allow indigenous people to remain on their land east of the Mississippi river, on the condition that they become "civilized" (cf. Wallace, 1999). This is the origin of the designation "Five Civilized Tribes," which refers to the five nations indigenous to the southeastern United States who were seen to have adapted successfully to European cultural norms. US policies based on the idea that indigenous people themselves would be improved through an embrace of property rights rehearsed some of the key elements of modern liberal internationalism in the twentieth century (Weaver 2006: 28), as we will see in the next chapter.

The Transition from "Greek" to "Roman" Colonialism

For Europeans, the intellectual legacy of expansion to the Americas — the "first European empires" — was ambivalent. By the turn of the nineteenth century, Britain had lost the east-coast colonies that made up the United States in the War of Independence. This setback did not fundamentally disrupt its imperial expansion. But it generated a contradictory response. On the one hand it was "entirely in the Lockean spirit — resistance to state encroachment, self-regulation under the law, and bourgeois control of parliamentary institutions, private property, and free enterprise (van der Pijl 2006:10). But

it now appeared that any settler community, given enough time and resources, would eventually demand political autonomy. While India remained far and away the most valuable British possession, settler-occupied territories, such as the lands that would become Canada and Australia, were becoming more prosperous, and the example set by the restive settlers in the US in 1776 focused British attention on avoiding similar such losses in the future (Evans, Grimshaw et al, 2003:20).

More generally, European political theorists were attempting to come to terms with the widely held sentiment that the approach to colonization in the Americas — large-scale, direct overseas settlement, heavily reliant upon forced native and slave labour, and which they attempted to control from the European imperial centre — was unsustainable. This does not in any way mean that the European powers had soured on colonial expansion — indeed, it was at this same historical moment that the scramble for Indian and Africa began. The difference now was that they would no longer approach colonialism as a process of settlement, bur rather of a purer but less direct form of exploitation: in "Greek" rather than "Roman" terms (Pagden, 1995:6;127). As Charles Maurice de Talleyrand, Napoleon's foreign minister, observed, informal empires established by an essentially commercial society such as Britain stood a greater chance of success by avoiding conquest and then sustained direct imperial rule. As the British experience in India seemed to suggest, a relationship in which the colonized peoples were wards rather than the subjects of direct rule was much cheaper to establish and maintain, and less likely to experience political unrest. For similar reasons, it was desirable to exploit a large, paid native labour force rather than an enslaved one (cited in Pagden 1995:6-7).

By the eighteenth century, a particular understanding of the British Empire would become established and widely embraced: in sum, the British Empire distinguished itself

from its predecessors and its rivals by being Protestant, commercial, maritime, and free (Armitage 2000:8). Legal and political theorists had to attempt to craft justifications for and reconcile the inherently contradictory goals of liberty and empire. The early British Empire embodied "Roman"-style imperialism, with its reliance upon territorial acquisition and direct control. Accordingly, early-modern British thought drew extensively upon classical (and in particular Roman) traditions, traditions that saw *libertas* and *imperium* as fundamentally incompatible values. Classical and contemporary British thought alike held that freedom produced republican forms of governance (Armitage 2000:11;125-126).

British "freedom" was understood as being expressed through institutions such as Parliament and property rights; these were exported throughout the British world. How could freedom under the law be reconciled with imperial expansion? This would become the fundamental question at stake in debates around the American Revolutionary crisis (Taylor 1991). The crisis's culmination in the American Declaration of Independence in 1776, and the Peace of Paris, in which Britain formally acknowledged US independence, together marked the end of the First British Empire and the start of the Second.[53] The contradiction between empire and liberty took on even greater social influence because British elites, from political theorists to colonial officers, received extensive training in classical history and the Roman moral tradition, in which this problem was central. The tension between liberty and empire remained "one of the great legacies of the First British Empire to the Second" (Armitage, 2000:12).

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[53] Some historians have problematized the clear historical distinction between the "First" and "Second" British Empires. See for example Marshall (1964).

6. Removals, Reservations and Allotments

So far I have argued that if we define sovereignty as purely a matter of formal recognition, we necessarily exclude any real consideration of property. This is IR's version of the separation of the economic and the political. In the previous chapter, I addressed a puzzle: why would colonists have bought land to which they thought they were entitled as a spoil of conquest? In other words, was land taken by contract or by conquest? I showed that it is impossible to resolve this puzzle if the separation between property and sovereignty is maintained. In this chapter I develop a similar argument, applied not to private speculators but to the state. From 1828 to early 1840s, the US state forcibly removed most remaining indigenous people to land west of the Mississippi. At the same time, this was formally done through contracts (treaties). If we view sovereignty in formal terms, the preceding two sentences are contradictory, but as we have seen, US government acquisition of Aboriginal land was *always* structured as a series of voluntary transactions. The state normally did whatever it took to achieve formal Aboriginal consent, in the form of treaties and so on. But such consent soon became *purely* formal, not meaningful. The process for appropriating land continued always included both consent and coercion.

Removals

In the last chapter we saw how in the Revolutionary period and the first decades of the nineteenth century, the US government attempted to reconcile two sharply contrasting dynamics. First was the ever-growing white demand for land. In order to open up more Aboriginal land for purchase by settlers and speculators, the government first claimed the exclusive right to treat with First Nations, and then took whatever measures necessary —

including threats, bribery, force, and trickery — to convince First Nations to sign the treaties through which they gave up their land. Even though the "underlying assumption of American Indian policy was that the eastern tribes would continue to relinquish their land at approximately the same rate that whites demanded it," there was another, countervailing pressure on the government. Many citizens wanted the government to find some sort of moral justification for Aboriginal dispossession; these took the form of various efforts to "civilize" Aboriginal people so as to assimilate them into dominant society (Satz 1975:2). Several southern First Nations, notably the Cherokees, had very high levels of contact with government agents, white missionaries, and private land traders. Ironically, this had the opposite effect from what the government had expected.

By the early nineteenth century, Cherokee agriculture had become highly modern and developed. Their use of various forms of intensive agriculture — clearing land to produce cotton, owning slaves,[54] and raising tens of thousands head of cattle — and their connections with the market for agricultural produce meant that their land was very productive and much more valuable than the undeveloped land in the west they were being offered in exchange (Wishart 1995). The Cherokees began to focus much of their political efforts on preserving their landholdings and resisting further encroachment by settlers. The political tools of which they could avail themselves were by white standards very advanced. By the 1820s the Cherokees had adopted a written language, the syllabary of which was introduced by their brilliant leader Sequoyah in 1821. A bilingual (English-Cherokee) newspaper, the *Cherokee Phoenix*, began publication in 1828, and lending libraries and schools flourished. Plans for a national academy and museum articulated the view that

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[54] A census taken in 1835 recorded that approximately 1,600 black slaves were owned in the Cherokee nation (Mayers 2007:95).

Cherokee culture was distinct and worth preserving as such, but also that the best way to do so was through European-style institutions. Traditional forms of spirituality were supplemented and even supplanted, to the point that, by 1835, ten percent of the Cherokee population professed Protestant versions of Christianity. Traditional, clan-based methods of justice and law-enforcement were gradually being replaced by written laws, to be enforced by a national police force. In short, the Cherokee elite was becoming culturally and economically intertwined with southern white society (Mayers 2007:94-105). Most significantly, in 1827, they adopted a written constitution modelled explicitly on the American Constitution, and featuring corresponding legislative, executive, and judicial branches, declaring the Cherokee nation to be an independent nation with complete sovereignty over its current territories (Malone 1956). The federal government had recognized Aboriginal sovereignty as part of the process of claiming complete control over land appropriation. Now, however, such recognition was having the opposite effect; the Cherokee nation announced it would use its sovereignty to end land transfers.

In the state of Georgia, where much of the Cherokee territory was located, the demand for land was acute: the combined white and black population nearly doubled between 1790 and 1800, and then doubled again between 1800 and 1820 (Banner 2007:195). And so, in response to the Cherokee declaration of independence, in 1828 the Georgia state legislature passed a law declaring that all Indian residents of Georgia — including most of the Cherokee — would come under state jurisdiction within six months (Satz 1975). It created a police force, the Georgia Guard, to enforce the new rules — and allowed the force to operate in effect as a paramilitary vigilante squad that harassed Cherokees and their white (mostly missionary) defenders. Aboriginal people were forbidden from testifying against whites in Georgia courts, employing any white man or

any slaves owned by whites, mining gold, or cultivating more than 160 acres of land. Members of the Cherokee nation who spoke out against removal or advised their neighbours not to sell their land could be arrested. It was, as Senator Theodore Frelinghuysen — one of the few government officials to oppose removals — wrote, "a whole people outlawed — laws, customs, rules, government, all…abrogated, and declared to be void, as if they had never been" (Quoted in Mayers 2007:96).

The Adams administration refused to comply with Georgia's legislated demand for removal, causing other southern states to worry that if the Federal government could recognize the sovereignty of indigenous nations within US states, it could also force states to abandon slavery and free the slaves. This precipitated a serious constitutional crisis; for the first time, Indian land policy took on the status of a national political issue. (Banner 2007). The *Johnson* decision was one of a number of cases that hinged on the issue of federal sovereignty in the context of intensifying conflict between federal and state governments in the US. The forced removals of indigenous nations were expected to mitigate these conflicts (Wilmer 1993:75).

The federal government's response was to revivify an idea that had been considered in one form or another by every American president to date: essentially, the plan was to trade uninhabited western land for eastern land currently occupied by First Nations.[55] It was seen as an elegant solution, because western land could be traded for Aboriginal land, which would give the sellers a place to go after they had sold their home land. The plan was to make such exchanges voluntary. And so, from 1828 to early 1840s, the federal

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[55] This plan took on special urgency after the Louisiana Purchase of 1803. Before that point, "removal was more a by-product of Indian land purchases than an articulated government policy." The enormous swath of land acquired through the Louisiana Purchase very quickly came to be seen as valuable currency for Aboriginal land transactions.(Banner 2007:193).

government forcibly removed most remaining indigenous people to land west of the Mississippi. The federal Indian Removal Act of 1830 mandated that individual Indians had to respect the law of the state in which they resided. Thus, traditional governance structures were no longer granted the same status as they had had earlier, when the federal government negotiated directly with First Nations leadership. More significantly, the Removal Act allowed the US president to force First Nations to relocate from east of the Mississippi to the west. During the Jackson presidency of 1829-1837, the US government used the relocation process to exchange 100 million acres of Indian lands east of the Mississippi for 30 million acres in the area that in 1834 became formally known as "Indian Country" (Mayers 2007:81).Title to the new territory was to be held by its new occupants in perpetuity unless, in the words of the Indian Removal Act, "the Indians became extinct, or abandon the same" (Prucha, ed. 1990:52).

The laws passed in Georgia invalidating Cherokee law and threatening to seize their territory and redistribute it to whites were a prima facie rejection of the entire post-revolutionary legal precedent. No state government had ever assumed or claimed the authority to assert its sovereignty over that of an indigenous nation; after all, the federal government had recognized Aboriginal sovereignty in order to take control over land appropriation. The new Georgia law ostensibly drew on the recent precedent set out in the Marshall decision of 1823 — that the "right of occupancy" was inferior to the "right of discovery" (Deloria and Lytle, 1984:16). Yet Marshall's decisions, while somewhat unclear on whether the federal government could actually seize native land, was perfectly clear that a state government could not do so. In reality, the Georgia government had little interest in directly pursuing such ends. The new legislation was mostly intended to force the Cherokees to the bargaining table and hasten their exodus.

At its core, the removal of the Cherokees to territory west of the Mississippi represented continuity, not change, in Aboriginal policies. First, in employing aggressive methods that pushed the legal boundaries, Georgia was continuing a long-standing pattern in which local governments, particularly sensitive to the influence of settlers on the frontier, acted much more aggressively than did central governments. As we have seen, the metropolitan perspective was different from the colonial one: soon after contact the imperial government in London was attempting to convince British colonial governments to enforce laws respecting Aboriginal land rights (typically with very limited success). In the post-revolutionary United States an equivalent relationship existed between federal and state governments. The other very important parallel is that, as we have seen, US government acquisition of Aboriginal land had always been formally structured as a series of voluntary transactions. This explains why the state of Georgia would pass a law that unilaterally abrogated Cherokee land rights with the real intention of forcing the Cherokee nation to enter into negotiations to give up traditional land — and in the weakest possible position. The state normally did whatever it took to achieve Aboriginal consent, in the form of treaties. But such consent was purely formal. That there were negotiations should not be interpreted as evidence of an equal power relationship.

Cherokee Resistance and the Trust Relationship

The federal government's exclusive right to purchase land from and treat with indigenous nations, enshrined in the US Constitution and confirmed by the Supreme Court, also seemed to imply some sort of responsibility. Since the nineteenth century the US government considered itself to have a fiduciary or trust relationship with the indigenous nations within its territory. This doctrine was first formally addressed by the Marshall

Supreme Court in the 1831 case of *Cherokee Nation v. Georgia*. This case represented the Cherokees' appeal to what was really their last hope. They had resisted removal using a range of means, almost all of which were clearly aimed at a white audience: they expressed their position in the *Cherokee Phoenix* and wrote letters and opinion pieces for northern newspapers; they sent delegations to petition Congress and government officials; and they worked with sympathetic missionaries and abolitionists to make their case.

Finally, they retained William Wirt, former Attorney General of the United States, to represent them before the Supreme Court in the case of *Cherokee Nation v. Georgia*. In it, the Cherokee nation attempted to have the aggressive Georgia laws of the 1820s struck down, on the grounds they contravened the Constitution, the treaties signed with First Nations, and the Intercourse Acts. The decision, once again written by John Marshall, was profoundly significant in that it offered the first extended discussion of the legality of Aboriginal sovereignty. In its decision, the court ruled against the Cherokees. Viewing indigenous nations as neither foreign states nor American states, the court held that their status in US law was as legal "wards" of their "guardian," the federal government (Johansen 1998:345). Marshall found that "the tribes…[constituted] distinct political [communities]….that may, more correctly…be denominated domestic dependent nations" (1831).

While "trustee" status rests upon the concept of "trust," it is important to clarify that the trust relationship established in such treaties was based not on the common-sense meaning of trust as a condition of honour and obligation, but rather on the *legal* usage of the term. Simply put, this usage refers to a situation in which an individual arranges for someone else to hold property on his behalf. The person who holds the property for another's benefit is the trustee. The trust relationship as it applies to the US government and

indigenous nations does not actually meet the normal legal standard of a fiduciary relationship:

> In the white man's business world, a "trust" is likely to be a property of great value; the trustee is required to protect the trust property and to turn over all the profits of the enterprise to the beneficiaries of the trust. The trustee has no control over the beneficiaries' person. In the Indians' world, he same principles should apply; there is no legal basis for the common view that the [US] Indian bureau may deal with Indian trust property as if it were the owner thereof, or use such power over lands to control Indian lives and thoughts. Unfortunately, administrators often find it convenient to forget their duties, which are lumped under the legal term "trusteeship," and to concentrate on their powers, which go by the name of "guardianship." (Cohen 1960:333)

In other words, the narrow legal meaning of "trust" applies to the relationship between the US government and First Nations only in the abstract. In real policy terms, "trusteeship" is with conflated with "guardianship," which is technically a different condition, one in which the state assumes control over the property of an invalid or incompetent person so as to protect that person's interests (Cohen 1942). It is this latter form of trust relationship that arose out of the European colonial project, was formalized in the US, and, as we shall see in the next chapter, extended to the international level, forming the basis for the Berlin, Brussels, and Algeciras treaties, which made Indigenous peoples the guardians, or wards, of the colonial state, an arrangement ostensibly required by their incompetence.

> Aborigines are the members of uncivilized tribes which inhabit a region at the time a civilized State extends its sovereignty over the region….Aborigines are distinguished from "colonists," the latter term including the citizens of civilized States who settle in the region….The relations of the aborigines with each other, with the colonists, and with the colonizing State are necessarily subject to a special regime established by the colonizing State for the purpose of fitting the aborigines for civilization, and opening the resources of the land for the civilized world….Hence the dealings of individual civilized States with aborigines under their respective sovereignties are matters of common interest to all nations, and the law and practice of nations properly concerns itself with the common and international aspects of such national action…Taking it to be established as a fundamental principle of the law of nations that aboriginal tribes are the

wards of the civilized State, the question of the validity of agreements made between civilized States and aboriginal tribes is to be determined by principles which would apply in the case of an agreement between guardian and ward. (Snow [1919] 1972, quoted in Wilmer 1993:119, 12)

Snow summarizes the view contained in a report prepared for US President James Monroe by his special Indian Commissioner:

> The Government, according to the law of nations, having jurisdiction over the Indian territory, and the exclusive right to dispose of its soil, the whole Indian population is reduced, of necessary consequence, to a dependent situation. They are without the privileges of self-government, except in a limited degree, and without any transferable property….in return for what they virtually yield, they are….entitled as "children" of the Government, for we so call them, peculiarly related to it, to kind paternal treatment." (Snow [1919] 1972, quoted in Wilmer 1993:119-120.)

The status of "domestic dependent nation" deserves a bit more attention, in particular the word "domestic." According to Marshall's ruling, once a European nation's occupation of territory it had "discovered" in the "New World" was established, the original inhabitants of that territory became an exclusively domestic concern, and any efforts by other European nations to "form a political connection with them would be considered by all as an invasion of our territory, and as an act of hostility" (1931).

A year after the Cherokee Nation v. Georgia opinion, the Cherokees found a new case that allowed them to in essence appeal the core of the original ruling. They used the case of Samuel Worcester, a white missionary who opposed removals and who had been convicted of violating state law by living on Cherokee territory. The decision in this case represented a victory for the Cherokee nation. With Marshall again writing for the majority, the court rejected the way Georgia had dealt with the Cherokees in their long dispute. In this ruling Marshall left no room for doubt: colonial settlement only entitled the English to buy "such lands as the natives were willing to sell." When it came to Aboriginal territory that had not been purchased, English and American rights were limited only to the right to

keep other imperial powers away. English and US sovereignty over Aboriginal land, Marshall ruled, existed only vis-à-vis other non-Aboriginal sovereigns. Citing the many treaties with First Nations signed by the federal government as evidence, Marshall concluded, "the Cherokee nation….is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter."

How to explain Marshall's change in opinion regarding Aboriginal sovereignty between the 1923 ruling in Johnson v. MacIntosh and Worcester v. Georgia less than a decade later? The latter ruling actually contradicts some of the key assumptions of the earlier ones. The most likely explanation is that in the earlier ruling, Marshall had been primarily concerned with white settlers who had received grants of Aboriginal land from state governments. In the *Worcester* case, the context had changed: the removals issue was a national controversy, and it was clear that the fate of the Cherokee nation depended upon Marshall's decision (Banner 2007). This is an argument *against* a formal reading of sovereignty and the laws that uphold it. Neither indigenous sovereignty nor the Supreme Court rulings that affected it existed in a vacuum: historical and political context were essential to understanding them.

That the formal victory of *Worcester v. Georgia* was politically inconsequential is evidenced by the end result. In late 1835 the treaty of New Echota was signed; by its provision, the Cherokees gave up all of their land — totaling 8 million acres — in exchange for $5 million and land west of the Mississippi. Yet despite this agreement, most members of the Cherokee nation still opposed relocation. The Cherokee nation consisted of enough people that its removal was intended to occur through several stages, of which the treaty signers were in the first, small, stage. Their voyage was relatively swift and healthy, and

they arrived in Oklahoma in 1837. But the discovery of gold within Cherokee territory combined with the general demand for land to produce sufficient pressure for the immediate removal of the rest of the population.[56] In 1838 soldiers led by General Winfield Scott rounded them up and organized them into prison camps. From there they embarked on a long winter march west, the infamous "trail of tears"; during which one of every four Cherokees died *en route* (Brown 1970).

The context was also essential to understanding how a major vindication of the Cherokees' rights as was contained in the Worcester case ultimately failed to have any real effect.[57] The state of Georgia carried out the narrow mandate resulting from the decision: it pardoned Worcester. If other cases had made it before the Supreme Court it likely would have ruled on similar grounds, overturning a particular conviction or restoring one particular plaintiff's property. But the court could not require the state government to stop trying to intimidate and harass the Cherokees into signing away their land, nor could it mandate the federal government intervene to that effect. This helps explain American governments' consistent reliance upon treaties and contracts as the main tools of dispossession. True, the use of such tools provided a thin veneer of legality on a process that amounted to organized theft on a grand scale. But that does not mean the legality was purely superficial. By respecting the laws, a government could support and justify its own actions regarding Aboriginal land. At the same time, respecting the letter — if not the spirit — of the law validated the entire legal system. And that system was set up so that it could

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[56] In 1830 state legislators held a land lottery to distribute Cherokee land to white prospectors.

[57] In 1834, Congress passed the final Indian Intercourse Act. It identified an area known as "Indian territory," specifically "all that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana, or the territory of Arkansas" (Trade and Intercourse Act, June 30, 1834, quoted in Prucha 1990:63). The Indian Territory echoed the British Royal Proclamation of 1763, which set aside Crown lands east of the Appalachian Mountains for white settlement. The final Intercourse act combined with the Indian Removal Act to forcefully abrogate whatever meaningful recognition of national sovereignty for First Nations still remained at this point.

not challenge the most fundamental power relations. And those power relations were how First Nations lost their land.

The presence of a legal system and a modern state did not make the process fair, except in the most superficial ways; to the contrary, the state supported and facilitated the massive transfer of indigenous land into non-native hands. In the next section I use a case study to show exactly how a legal system and modern state could be imposed upon one particular First Nation, with the effect that that First Nation lost its property and sovereignty. As much as any Aboriginal nation, the Cherokees embraced the trappings of formal sovereignty. It did not help them. Moreover, it demonstrated that the primary goals of removal policies were the acquisition of desirable land and the generalized extermination of indigenous people: "Indian Removal…was a rejection of all Indians as Indians, not simply a rejection of unassimilated Indians who would not accept the American life-style" (Horsman, 1981:192). Other First Nations attempted more direct, violent forms of resistance to removals. The Black Hawk War in Illinois and Wisconsin lasted fifteen weeks in 1832. The Second Seminole War of 1835–1842 involved eleven thousand federal troops (Mayers 2007:80-105). The Muskogee also resisted in their own ways. As we shall see in the next section, their fate was no better than that of the Cherokee.

Governance: The Case of the Muskogee

The effects of European contact on indigenous governance structures and practices are illustrated with dramatic clarity by the changes experienced by the so-called Five Civilized Tribes of the South (made up of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole). As one illustrative example let us consider the experience of the Muskogee, or

Creek. (This section is based on Braund 2008:3-24, 139-162; Deloria and Lytle 1984:20-27; and Green 1982:69-141.) The Muskogee confederacy was made up of a number of towns, which were communities that controlled a certain territory. By the time of European contact, the confederacy was made up of fifty to eighty towns whose members spoke at least six different languages. The population of the towns typically ranged from 200 to 600. When the population of a town reached 600, it would often split into two separate towns on nearby sites. Although these towns shared common culture, history, and some family roots, their union was primarily a political one. The Muskogee kinship structure was based on matrilineal clans, who shared a common ancestor. Members of every clan lived in each town in the confederacy, with large extended families — all members of the same clan — living together in a cluster of houses.

At the moment of European contact, the Muskogee were a nation. The confederacy was divided into two groups, called the Upper and Lower towns by Europeans. Although this division existed before trading relationships had been firmly established with Britain's Atlantic colonies, it designated the relative proximity to the two main trade paths linking the confederacy with South Carolina. The Upper and Lower nations held separate councils and often pursued different foreign policies. The towns in the confederacy were further divided into one of two classifications: "red," or war towns, or "white," or peace towns. Red towns were responsible for military and foreign relations — with other confederacies and also with European colonial officials. White towns held all councils, developed laws and treaties, and oversaw all internal affairs, including adoption. The distinction between red and white towns bears rough similarity to what a government in the European tradition might have classified as the division between foreign and domestic affairs, but in fact the

designations carried historic and ceremonial significance as well administrative and governmental.

Each town was led by a *micco* (typically referred to as the headman by Europeans, although the term was sometimes translated as "king"), a political figure who was appointed for life unless "recalled" for bad behaviour, and who was advised by two councils, including one made up of respected elders known as the Beloved Men. Each town also had a structure of war officials and leaders organized along roughly parallel lines. This basic structure, allowing for some variations reflecting different cultural histories, was common across all Muskogee towns. Although they were influential figures, the headmen and councils did not enjoy any material advantage as a result of their position, and all were expected to contribute their share of work and hunting. Moreover, they did not possess coercive power, they did not have the political authority to impose decisions, an authority that the British considered essential to good government. This traditional governance structure reflected a culture that valued democracy more than efficiency.

The towns had always valued autonomy and independence, but increased contact with Europeans in the form of trading and diplomatic relations forced them more frequently into collective actions. Yet, in a political culture that placed such high value on debate and democracy, the new pressures to work together had an unexpected result: the basic equivalent of a party system, in which popular headmen built support among like-minded people in their regions. In the seventeenth and eighteenth centuries, these influential leaders were courted by Europeans, which had the circular effect of reinforcing their authority. During the American Revolutionary War, the status of the war chiefs was elevated above those of the peace chiefs. The Muskogee were allied with the British, and sustained conflict with the Americans, lingering territorial disputes with the Spanish, and diplomatic

complexities with the British dramatically intensified the demands placed upon the war chiefs. The number of war chiefs was steadily increased in an attempt to address the numerous threats and complications that these three state governments posed to the Muskogee. These pressures produced a new form of government, led by two principal chiefs, one from each of the upper and lower towns. A new confederate council structure also evolved out of the old confederate structure; unlike the former structure, which performed ceremonial and judicial functions, the new one was essentially legislative. After American secession, the requirements of dealing with the US government continued to reshape the Muskogee governing structure. It moved away from the more democratic pre-contact form, and toward what was now recognizable as a federal structure.

In the 1820s the Muskogee entered into a series of superficially voluntary transactions with the federal government. In 1821, they sold almost half of their land in what was then Georgia, and soon after this deal had closed they found themselves under intense pressure from federal commissioners to sell the rest. This took the form of an "offer" to purchase that barely hid a threat:

> If you wish to quit the chase, to free yourself from barbarism, and settle down in the calm pursuits of civilization, and good morals, and to raise up a generation of Christians, you had better go. The aid and protection of the government will go with you….You must be sensible that it will be impossible for you to remain for any length of time in your present situation as a distinct Society or Nations, within the limits of Georgia. Such a community is incompatible with our System and must yield to it. (Quoted in Banner 2007:197)

The Muskogee leadership resisted such threats, but in 1825, a dissident group signed the Treaty of Indian Springs, which exchanged all remaining Muskogee land for new land in Arkansas and cash. Even though the leader of this group was executed for treason and the treaty abrogated, the pressures to sell continued to mount, and by 1827 they

had sold their land and moved to Alabama. Even this provided only temporary respite, and in the 1830s the Muskogee people were forcibly relocated by the US government to what is now Oklahoma.

At that time, the confederacy's government had taken the form of a two-house legislature with appointed executive officials. In the 1860s, further major reforms were effected. The former distinction between upper and lower towns was eliminated. A principle chief and a second chief together became a permanent executive branch of the government, which now included a council made up of influential men from each town. The nation was divided into four judicial districts, with a judge in each district; above this level five judges were appointed to the supreme court of the Muskogee nation. And a national police force was created, made up of former second-ranking warriors. In 1867, following the US Civil War, the US government demanded that the Muskogee legislature become a two-house body made up of the House of Kings and the House of Warriors — finally eliminating the former distinction between the white towns and red towns, and merging "foreign" and "domestic" functions into one. The evolution of the Muskogee governance structure from a traditional indigenous, democratic form to a European-style government with an executive branch, courts, and police was a lengthy iterative process. However, the prevailing pressures that shaped the changes came from European contact in the form of trade, incursion into traditional Muskogee territories, diplomacy and military alliances, and then the direct demands of the US state.

Also in the immediate aftermath of the Civil War, the federal government initiated a process of making the Five Civilized Tribes (of which the Muskogee were a member) territory an independent Indian state within the United States. While the prospect of achieving statehood did not please many members of the Five Civilized Tribes, the

possibility did seem to offer protection from further forced relocation. The US Congress saw this as test case, and funded a series of annual meetings in which the tribal leadership submitted a series of proposed constitutions, which were intended to preserve as much as possible cultural traditions while moving the territory toward statehood. Congress and presidents and secretaries of the interior rejected these proposals, with the major problem being that none of the proposals included any formula or mechanism for allotting tribal lands — in other words, the indigenous nations were determined to maintain the communal holding of land. For the federal government the notion that a state could exist without a regime of personal land tenure was completely unacceptable (and likely absurd). Commerce would be impossible without the private ownership of land. Thus, the US government's attempt to force these indigenous nations into adopting the nation-state form foundered on the issue of property rights. The idea of statehood was abandoned, and in 1898 the federal government's Curtis Act gave indigenous nations a date by which they had to have negotiated allotment of their communally held lands; if this deadline was not met, the government had the authority to unilaterally dissolve tribal governments and allot land into private hands. In the terms of our Lefebvrian analysis, we might say that homogenization could not happen without fragmentation.

Reservations

The strategy of "removing" indigenous people, pushing them ever westward, only partially and temporary satisfied the insatiable settler demand for land. Shortly after the removals of the 1830s, white settlers were moving across the Mississippi in gigantic numbers, and they were quickly claiming land all the way to the Pacific Ocean. The

construction of the Pacific railroad, as much as any other development, fuelled westward expansion (Wilmer 1993:99). By 1840, with very few small exceptions, the eastern third of what would become the contiguous United States had been cleared of all indigenous people. But white settlements were also already reaching the Pacific coast: Oregon was purchased from Britain in 1846, and in 1848 the vast northern half of Mexico — land that would become California, Arizona, Nevada, Utah, New Mexico, and southern Colorado — was taken by force. For example, in 1848 the non-native population of California was estimated to be approximately 15,000. By 1854 over 300,000 settlers had arrived.[58] Meanwhile, the Aboriginal population, which stood at an estimated 150,000 in 1848, began a steady decline, to below 30,000 in 1870. The presidents, such as Jefferson and Jackson, who only recently had advanced policies intended to push the indigenous population ever-westward, could surely not have foreseen how quickly events would overtake those plans. "Native North Americans were now caught in a vise" — surrounded on all sides by burgeoning white settlement — "from which there was truly no escape"[59] (Churchill 1997:218-219).

There was no more western land on which to relocate Aboriginal people, so westward removals could not continue. The government solution to this problem was the introduction of the reservation system. Reservations were not a new idea in the United States. Some of the earliest treaties between the US government and First Nations signed in the late eighteenth century included zones of Aboriginal territory surrounded by white settlement. These were referred to as reservations or reserve land in keeping with the

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[58] US Census Bureau, accessed online Sept 1, 2010.

[59] Local exterminationist sentiments fuelled an astonishing wave of several hundred brutal attacks on indigenous settlements carried out by gangs of vigilantes or paramilitaries. This form of "free-enterprise" racial lynching was effectively condoned by governments, who offered a bounty on the scalps of victims (Carranco and Beard 1981; Churchill 1997; Eckert 1995).

meaning of the term as it was used in early property law.[60] If the seller of a piece of land maintained some rights to the land — either a portion of it, or the right to use it for certain purposes, such as grazing — this was referred to as a reserve. The difference in this case was that people were being relocated to land the *government* owned and chose to reserve for this purpose. Relocation happened almost entirely on land that the government had recently purchased from western First Nations, and that would have been sold to white settlers if not used for reserves (Banner 2007). It is significant that this terminology has its roots in the private *sale* of land. Even though the idea of reserves had been around for decades, in the decades in which the system itself was established, between the 1850s and the 1880s, the velocity of land appropriation accelerated intensely. It had taken 250 years for whites to acquire the eastern half of the United States; it took only three decades to acquire the western half.

Reservations were fundamentally a matter of land-taking, and the primary goal was to prevent Aboriginal interference in white migration and settlement in the West. Still, many proponents argued that the reservations system would protect Aboriginal welfare. There were several variations on this theme, some of them based more than others on genuine humanitarianism. Perhaps the most honest such argument was that the reserve system would protect Aboriginal people from settler violence on the frontier. Given the brutal violence being levelled against Aboriginal people on the frontier, many proponents portrayed reservations as basically benevolent because they move Aboriginal people out of the line of fire. This notion of reservations-as-sanctuary was frequently accompanied by another set of arguments in favour of the new policy, a series of interrelated ideas centred

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[60] The "praying towns" of seventeenth-century New England and the "demonstration farms" proposed by Thomas Jefferson a century and a half later stand as other examples. See Wilson (1998).

around the assumption that indigenous people were in transition from barbarism to civilization. Reserves offered a permanent settlement, and the promise of an end once and for all to a "nomadic" lifestyle. In this way, reserves represented the logical culmination of English ideas of land rights following from improvement in the form of agriculture.

A closely related argument for reservations was that they offered the cultural benefits of "civilization": in addition to agriculture, these included Christianity, literacy, and the discipline of work. In 1849, the federal government's Committee on Indian Affairs proposed that the "only alternative to extinction" was to settle "our colonized tribes" on reservations, where they would be sheltered until they were "sufficiently advanced in civilization…to be able to maintain themselves in close proximity with, or in the midst of, a white population." This view was summarized was brutal clarity by the Secretary of the Interior: "the policy of removal…must necessarily be abandoned; and the only alternatives left are, to civilize or exterminate them" (quoted in Wilson 1998:289).

The logical accompaniment of such ideas was a federally mandated education system, of which several hundred Indian Industrial Schools were the signal institutional form. This was intended to retrain indigenous people out of their traditional culture. As the motto of one school declared, the goal was the total destruction of indigenous culture: "From Savagery to Civilization." During vacations, students were not allowed to return to their families but instead were placed in white homes. After all traces of indigenous language, spirituality, dress, kinship and political structures had been eradicated, the reservation system could be dissolved, and indigenous people released from their cultural quarantine, now able to blend into American society without difficulty (Otis 1973, as in Mayers 2007:176-177). Nonetheless, the strategy of pursuing cultural homogenization by

"civilizing" Aboriginal societies always dovetailed with the imperative of transferring their land into private (white) hands (Wilmer 1993:174).

Race and Manifest Destiny

Those who supported reservations on the grounds that they would civilize the Indians drew on an emerging racial discourse. In the nineteenth century, the powerful mythology of the freedom-loving Saxons that had animated American revolutionaries underwent a change. English writers began using the term "Anglo-Saxon" as a broader racial designation, which referred to Englishmen as well as a poorly defined but powerful notion of a fraternity of white English-speaking people in Britain and beyond. In the 1840s, in the US, the term "Anglo-Saxon" became more common and less precise, now referring to white Americans, although always vaguely informed by an awareness of backward linkages with the Saxon myth. The racially informed belief in the inherent superiority of Anglo-Saxon political institutions now took on an even stronger cultural aspect. It was informed by a rising European Romanticism (Horsman 1981).

Romantics argued for the restoration of their national cultures. One of Romanticism's themes along these lines was the assertion of nationalism through a focus on national languages, folklore, customs, and traditions. Now, "as German philologists linked language to race," Horsman (1981:5) writes, "Americans were able to see new meaning in their drive to the Pacific and Asia….Americans had long believed they were a chosen people, but by the mid-nineteenth century they also believed that they were a chosen people with an impeccable ancestry."

Yet there was a necessary divergence between American and European forms of Romanticism. In Europe at the turn of the nineteenth century, in the wake of the French Revolution, the Napoleonic Wars, and the coming of the Industrial Revolution combined to produced a prevailing consciousness that the old order had passed and a new one begun. In this philosophical context, writers drew upon conventional mythological figures, whether they were attempting to return to the old order (by, for example, portraying a victory of reason and order over radical passion) or celebrate its destruction (by inverting the mythology's conventional morality). In contrast, Americans were constantly confronted with the conflicts arising from an ever-shifting frontier. Consequently, while European and American writers alike drew upon a vocabulary of frontier character types to embody social and philosophical values and ideas, American sources of frontier material were ever-changing; it was "therefore inevitable that the movement of the American literary mind during the Romantic era should be, figuratively and to a degree literally, a movement toward the Indian" (Slotkin 2000: 371).

Treaties and Allotment

By the 1850s, almost all Aboriginal land cessions included two components: the federal government purchase of the land in question, and the designation of a specific area of land on which the selling First Nation would set up its new home. In some cases the reserve was located on a portion of the land that had been sold; in other words, the sellers retained a small portion of their territory. This was done through the treaty mechanism. In other cases, the federal government allocated some of its own holdings — land that would otherwise have been put up for sale to white settlers. But no matter which option was

chosen, as had always been the case, reservations required the formal consent of the First Nations involved. Throughout the nineteenth century, the courts continued to uphold Aboriginal land title as a consequence of the right of occupancy. The federal government had the exclusive right to purchase the right of occupancy, but it could not legally force a sale.

Recall that the Supreme Court ruling in the 1823 case of Johnson v. MacIntosh, in which the court first discussed Aboriginal property rights to their unsold land, seemed to leave open some possibility that the government could appropriate such land. But subsequent rulings, as well as the general rule in federal government policies, made it clear: Aboriginal land rights, based in their right of occupancy, were as meaningful and consequential as white fee simple. In other words, as a matter of law, the only way to acquire land from First Nations was to purchase it. (And as a matter of policy only the federal government could do the direct purchasing.) In the second half of the nineteenth century, the tension between the formal law requiring land to be acquired by purchase and the real practices of land acquisition became especially acute. Sometimes the necessary signatures were obtained by threat, bribery, or forgery. Reservation s were a form of cultural segregation, played out in the clearest imaginable form of dislocation across space; they were met with resistance from indigenous leaders who "disapproved of a future that tolerated their physical existence but scheduled their cultural disappearance" (Mayers 2007:161). Sometimes efforts to force an intransigent First Nation onto a reserve were brutal.

Among the many documented examples of frontier violence, the massacre that occurred in 1864 at a small, unarmed Cheyenne and Arapaho village in eastern Colorado called Sand Creek stands out. At the time, Colorado was the western frontier of white

settlement. Settlers were pouring into the state, with many squatting on Cheyenne and Arapaho territory. Some of the Cheyenne chiefs had agreed to give up land in exchange for reserve land, but others had not, a situation that frustrated settlers to no end. An angry, violent rhetoric featuring genocidal threats was encouraged by the local newspaper, the *Rocky Mountain News*, which started a campaign in support of Indian extermination: "They are a disolute, vagabondish, brutal, and ungrateful race, and ought to be wiped from the face of the earth," the *News'* editorial wrote in 1863. Moreover, an upcoming vote on the question of whether Colorado should move toward statehood contributed to the problems, as proponents claimed having the status of a state would allow the government to assemble more troops to police the Aboriginal population.

In 1864, a family of settlers was killed by Indian raiders. No one knew who had carried out the killings, nor which nation they were from. The governor issued an emergency proclamation, authorizing civilian soldiers to kill any Indians they could find. In exchange they would be entitled to whatever property they were able to loot, and the governor also promised to petition the federal government for additional payment. The *News* urged "extermination against the red devils." Out of this political context rode a group of about 700 heavily armed soldiers, led by the former Methodist missionary, Colonel John Chivington. Chivington also happened to be a candidate in the upcoming Congressional elections. His stated policy was "kill and scalp all, little and big," on the logic that "nits make lice." In other words, Aboriginal children were nits, and the only way to get rid of the annoyance of lice was to kill all the children.

On the morning that Chivington's troops attacked the village of Sand Creek, the population was an estimated 600 people. Almost all the young men in the village were away on a buffalo hunt. As well, the villagers had voluntarily disarmed themselves a few

days earlier. They had turned in all but their essential hunting weapons at Fort Lyon, in order to demonstrate they were not hostile. Chivington was told the governor of Colorado technically considered the residents of Sand Creek to be harmless and disarmed prisoners of war. Even still, Chivington's troops moved in with military-level aggression. The Cheyenne chief flew a white flag and an American flag in an effort to show this was not a hostile camp. But the massacre would not be stopped. Cannons were fired into groups of Indians and as they scattered they were chased down on horseback. As one of the Colonel's guides later testified:

> After the firing the warriors put the squaws and children together, and surrounded them to protect them. I saw five squaws under a bank for shelter. When the troops came up to them they ran out and showed their persons, to let the soldiers know they were squaws and begged for mercy, but the soldiers shot them all….they sent out a little girl about six years old with a white flag on a stick; she had not proceeded but a few steps when she was shot and killed….I saw quite a number of infants in arms killed with their mothers. (As quoted in Stannard 1992:132)

Another participant later admitted, "it was hard to see little children on their knees have their brains beat out by men professing to be civilized" (as quoted in Mayers 2007:164). Once the massacre was over, Colonel Chivington described it to the press as "one of the most bloody Indian battles ever fought" against "one of the most powerful villages in the Cheyenne nation" (quoted in Stannard 1992:133). Although the *Rocky Mountain News* joked about the victims' body parts taken as trophies by the soldiers — "Cheyenne scalps are getting as thick here now as toads in Egypt. Everybody has got one and is anxious to get another to send east" — the killings at Sand Creek shocked eastern liberal society. Even though the survivors gave in and moved to the reservation, this was far from the process that proponents of reserves had envisaged. Sand Creek became an important symbol of the failures of the reservation system.

When the reservations system was set up, it was rationalized through two basically contradictory arguments: it would help confine and contain Aboriginal people, keeping them out of the way of white settlers; and it would protect them. By the 1870s it was clear that the first of these was the real goal. In some cases the government forced First Nations onto reserve land they did not want, or forced dissenting members onto land they did not wish to inhabit. Perhaps the most striking illustration of the true function of reserves was the increasingly common practice of the government sending the army to track down people who had escaped from reservations and returning them there. In the 1870s, a group from the Nez Percé nation escaped their reservation and attempted to flee to Canada. Several hundred Cheyennes escaped their reservation in Oklahoma; they were violently captured after six months and the survivors forced to return to the reservation. In 1879 Chief Standing Bear led most of his Poncas nation in an escape which attracted national attention and the support of white reformers. By now it was clear: reserves were more prison than sanctuary.

The gap between formal, legal sovereignty and sometimes brutally violent real practices was always a function of the relative power balance between whites and First Nations. As the nineteenth century progressed, the white population's relative power, in terms of wealth, technology, and sheer numbers, was greater than ever. Yet,

> as a matter of Supreme Court doctrine, the Indians continued to enjoy the right to live on their own land as long as they wanted to. They had the power, in theory, to refuse to convey their land to the government, to refuse to move to a reservation, and to leave a reservation so long as they were not trespassing on someone else's land. As accounts of forced relocations and foiled escapes filled the newspapers, and as Congress held hearings into atrocities committed by the United States soldiers in the course of herding the Indians into reservations, Supreme Court justices could hardly have avoided learning the reality of life in the West. Yet the Court continued to adhere to the fiction that Indian land transactions were void unless voluntarily entered into by the Indians. (Banner 2007:244)

The courts treated treaties with First Nations as the equivalent of international treaties, at least in one important respect: they could be repealed. This was a complicated issue. On the one hand, First Nations were treated as wards of the state. They were dependent in many ways upon the state for protection, etc. They were not equals. Yet, formally speaking, treaties with First Nations were just like treaties with foreign countries, in that they were agreements between sovereigns. This is an example of how the separation between the political and the economic — of the gap between formal sovereignty and real power — was used as a tool of dispossession.

This basic truth remained largely unchanged. Thus, in the final decades of the nineteenth century, some of the main ideas that had animated policies and debates in the years after contact reappeared. There was extensive and growing dissatisfaction with the reservation system, not only from liberal white reformers (who typically lived in the north and east of the country), but also from westerners. As the white population continued to swell, and demand for land grew commensurately, reserves that previously had seemed reasonably sized now seemed — in the eyes of settlers — far too big. The discourse of improvement was once again mobilized to portray reserve land as being so unproductively used that it was essentially wasteland.

One idea that gained a good deal of prominence was the notion that First Nations on reservations were fundamentally hampered by the absence of a private-property system. Land within a reservation was granted to the First Nation as a collective entity, not to individual members. Even though most of these communities did have systems of land tenure that incorporated some individual property rights, a lack of government-defined individual property rights was widely identified as an impediment to investment. (In reality,

if anything made land tenure on reserves too insecure to encourage investment it was the government's practice of moving reservations around, moving and combining different Aboriginal nations onto different territories, and shifting the borders of reserves.)

In 1881, there were 156 million acres of Indian land under the protection of the US government, almost all of it west of the Mississippi river. This included the self-governing Indian Territory (which is now Oklahoma) in addition to numerous reservations. Without titles, Indians could not sell land or lease it (to grazers, for example). The idea of breaking up reservation land gained currency, supported by an awkward political coalition of white reformers who saw it as the key to assimilation, and western landowners and speculators. The General Allotment Act (the Dawes Act), which was passed by Congress in 1887, was the legislative foundation of assimilation; in Theodore Roosevelt's words, it was "a mighty pulverizing engine to break up the tribal mass" (Quoted in Wilson 1998:303). It was intended carve up Indian land into fee-simple plots to be held by individuals or families. The legislation gave the President the power to compel allotment of a reservation (with some exceptions). This was to occur when the president was satisfied that the First Nation in question had achieved a sufficient level of civilization, although "it soon became clear that tribes were as likely to be selected for the quality of their 'surplus' land as for the degree of 'civilization' they had attained" (Wilson 1998:304). Land was assigned roughly on the basis of household size. At first, these allotments were held in trust for 25 years, to encourage landholders to work the land rather than sell it immediately, but this restriction was soon relaxed. In a parallel development, unallotted land was deemed surplus, and open for settlement. This was not the case for land on the self-governing Indian Territory. Those nations legally owned all the land, and so there was so surplus to revert to the federal

government. However, the people who received land through allotments often sold it (in many cases keeping a small portion as a homestead) to whites.

The aggregate effect was to open up nearly all Indian land for private acquisition by speculators and settlers: they could lease allotted land, purchase it after the trusteeship had been lifted, or purchase the surplus. By the late 1880s the white settler demand for western land was intense, and with the allotment system now exposing most Indian land to the market, the land in "Indian country" was quickly becoming predominantly the property of non-Indians (Weaver 2006:332-333). In fact, allotment's two ostensible goals — to protect Indian land and encourage Indian farming — both failed. During the 47 years in which the Dawes Act was in effect, Aboriginal landholdings in the US dropped from 138 million to 86 million acres, and during the same period the extent of Aboriginal farming fell, both in absolute terms and relative to whites (Banner 2007:257).

This takes us back to the beginning of our narrative — to the enclosures movement in England. Allotment featured almost exactly the same process of breaking up communally held land into small, privately held parcels. The shift from a functionally organized system of land tenure to a spatially organized one characterized not only the enclosure of common lands, but also the shift from traditional Aboriginal forms of land tenure to European models in which land was help privately and subject to sale. Many Aboriginal leaders based their argument against allotment on these very grounds. For example, the Cherokees already had a system of private property, but it was in the *use* of land. As Cherokee chief Dennis Bushyhead argued:

A Cherokee is entitled to all the land he can cultivate and the exclusive use of land a quarter of a mile outside his fence. These rights descend to children and heirs, or can be sold and are sold continually, but the right is in the use; the property is in the improvements, and the land is not itself a chattel that can be speculated on whether cultivated or not. If it is abandoned for two years it reverts to the public domain, and any Cherokee can take unoccupied portions. This, like the air and waters, is the heritage of the people; if it were otherwise, our domain would soon drift into the hands of a few, and our poor people, in a few years, would become like your poor people, most of whom, if they died tomorrow, do not own a foot of the earth's surface in which they could be buried. If this is the phase of your civilization, to which you are at present so nervously inviting us, can you wonder if we pause to study the present tendencies and probable future of this fearfully anti-republic system? Our people have been taught from remote ages to believe that the surface of the earth, apart from its use, is not a chattel. We are neither socialists nor communists, but we have a land system which we believe to be better than any you can devise for us. Individual rights are fully respected, but the rights of the whole people are not destroyed. (Quoted in Banner 2007: 265)

The response to this was summarized by Senator Henry Dawes, who, after a visit to the

Cherokee nation in 1885, wrote:

The head chief told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the nation did not owe a dollar. It built its own capitol, in which we had this examination, and it built its schools and its hospitals. Yet the defect of the system was apparent. They have got as far as they can go, because they own their land in common….there is no enterprise to make your home any better than that of your neighbours'. There is no selfishness, which is at the bottom of civilization. (Quoted in Wilson 1998:300)

Allotment was formally ended with the passage of the Indian Reorganization Act in

1934. Under this legislation, the Bureau of Indian Affairs was authorized to return to

reservations land that had been removed but not yet sold to white settlers. In other words,

the government was committing itself to a package of policies that were exactly the

opposite of those that had underpinned allotment: the new goal was to preserve and protect

traditional forms of land ownership.

7. Conclusion

Conventionally there have been two main ways of dealing with the presence of non-state forms of sovereignty, such as those embodied by indigenous nations, in the international states-system. The first is, in effect, to define them away — as out of bounds for consideration — on the tautological ground that Indigenous peoples have not adopted the territorial nation-state form of sovereignty required to enter the international sphere. The other main approach, commonly associated with a liberal discourse of recognition, is to argue that First Nations are equivalent to states. The second approach, no less than the first, reproduces the Eurocentric norm of sovereignty by confirming the nation-state form as the benchmark for legitimacy. How to bring Aboriginal peoples into IR without granting the modern European state as the only legitimate form of sovereignty is the problem this dissertation addresses. My account of the historical confrontation between European colonists and First Nations in North America from first contact until the end of the nineteenth century takes issue with the assumption of formal sovereignty in IR's attempts to account for Indigenous peoples. I have argued that an assumption of formal sovereignty is built into the traditional IR account of colonialism, and shared by liberal and constructivist critics alike. By "formal" I mean the conventional understanding of sovereignty based on recognition, and with insufficient regard for cultural, political or historical context. I argue that the establishment of sovereignty is not a story of recognition, but of social relations. More specifically, it is the story of social relations that are played out in geographical space — and at the same time concealed by assumptions of empty space. I refer to this framework as spatial social relations.

My first two historical chapters call into question some core IR assumptions

about state sovereignty. First, there was no such thing as a "European" state: different European powers interacted with the peoples they encountered in the New World in different ways. There were different forms of modern state in Europe, and the specific moments of state formation were unevenly timed, with economic ambitions, culture, and domestic social relations accounting for most of the variations between different imperial systems. An assumption of formal sovereignty, such as characterizes most IR accounts of colonialism, obscures these dynamics. In chapter 3, my first historical chapter, I contrast the English and Spanish colonial presences, emphasizing the importance of the modern English state, which emerged out of sixteenth- and seventeenth-century England, with its separation between sovereignty and property.

Chapter 4 takes this line of thinking further: even though the modern state form that emerged out of England would come to define the state in the new world, "England" was not simply reproduced on the other side of the Atlantic. The dominant trends that first emerged and flourished in England were refined by the tensions between metropolitan government officials, colonial administrators, and land-hunters on settlement frontiers. The modern state form, which emerged out of England, spread out over the surface of the globe, but this process was not frictionless. As the colonial frontier moved geographically further away from the metropolitan centre, the friction increased. This is why geography matters, and illustrates why a spatially informed theory is important to an analysis of colonialism.

The next two historical chapters highlight the real historical influence of the state. Where (neo)realists in IR take the state form for granted, constructivists have attempted to address the absence of indigenous experience from the discipline — on the grounds that stateless indigenous nations are not sovereign international actors —

by challenging the conceptual authority of the sovereign state. The latter approach amounts to an attempt to wish away the state's real political authority. And it overlooks the agency of Indigenous peoples, who had a major influence in shaping modern sovereignty. Rather than an all-or-nothing approach to the state form, I show how the English and then US governments took over control of land acquisition, and then, in the US case, used tools such as reservations and allotment to directly move Aboriginal communities around — all in the interest of freeing up land for white acquisition.

The emergence of separate public and private spheres distinguished the modern state from the feudal state, in which land ownership and sovereignty had been largely conterminous (with both being held by the Crown). Pre-modern European states were characterized by exclusive territorial sovereignty, but non-exclusive property: while the state exercised exclusive territorial jurisdiction, within the state itself land might be subject to multiple, non-exclusive forms of ownership. Nor was the property-sovereignty distinction characteristic of traditional indigenous governance structures, where land was not privately owned, nor subject to purchase. Whereas feudal property relations and indigenous property relations both placed significant restrictions on the treatment of land as a commodity, under the modern state, private property in land is held exclusively. From the seventeenth century onward, as the modern state form spread across the globe, stateless indigenous nations were subsumed under nation-states and traditional indigenous governance structures were reshaped steadily away from democratic pre-contact forms by the requirements of dealing with nation-state governments (Warren 2005). In effect, the modern state was imposed upon Aboriginal people as a central part of a process of accumulation and exploitation. Conventional IR makes this point precisely by missing it.

In my telling, the rise of the sovereign, territorial nation-state in sixteenth- and seventeenth-century Europe triggered a double movement. With the emergence of the modern, geographically bounded nation-state and attendant theories of sovereignty, the notion of a public realm first appeared. This called forth a reaction by private landowners, who pushed for the creation of a distinctly private sphere to restrain the law-making power of the Crown (and later Parliament) (Horwitz 1982:1423). The resulting separation between public and private mitigated the tension between "external" sovereignty (vis-a-vis other states) and "internal" sovereignty (vis-à-vis private property owners): while only one sovereign exercised exclusive authority over the state, internally this sovereignty was not absolute but rather socially and politically contested. The reason this bifurcated conceptual framework resonates at the deepest levels of IR is the discipline's commitment to the sovereign, territorial European state as the basic unit of analysis: sovereignty and property emerged as separate spheres coincidentally and relatively organically in early-modern Europe. In other words, grant the modern state, grant the separation between sovereignty and property.

The Relationship Between Sovereignty and Property

My narrative allows me to develop a richer account of sovereignty, one that is literally grounded in property. Indigenous communities organized themselves into political structures that controlled territories, practised self-government, and conducted foreign relations with each other using various forms of trade and diplomacy. By these formal criteria, they were very similar to European states, and logically might well have been recognized as sovereign international actors, every bit as much as states were. For our

purposes, the substantial differences between European and indigenous forms of political organization had to do with property rights. Most Aboriginal systems of land tenure *did* include private property — in the *use* of land. But in these systems land was inalienable. It was not subject to individual, exclusive ownership nor could it be sold. In these ways, Aboriginal modes of property ownership were similar to feudal regimes, and fundamentally opposed to the capitalist logic of landed property rights. But as markets emerged, land was re-imagined as marketable, alienable property. In the modern state, land was considered a commodity, which, like any other commodity, could be a source of profit. This helps explain why the establishment of a modern system of landed property rights was integrated with advances in the market economy, such as the formulation of capital-raising instruments such as stocks and bonds. Colonial land-taking also shared with the emerging market economy and classical economics "a disregard for moral, customary, or judicious restraints on dreams of unlimited material possibilities" (Weaver 2006:348).

The core characteristics of the process I describe in this dissertation are:

1) The privatization and commodification of land. Aboriginal systems of landed property rights, in which land could be subject to multiple and overlapping ownerships, were replaced with one in which land was subject to exclusive ownership and could be privately transferred at law.
2) A specifically spatial character to the new form of land tenure, which was based on territorial exclusivity. Simply put, a functionally organized system of land rights was replaced by a spatially organized one. This was accompanied by the refinement of abstracted representations of territory on documents.
3) A "culture of legality" (Weaver 2006:323), originating in early-modern England, that ensured most land transactions were formally legal and recognized through treaties, even while many were voluntary agreements by First Nations in name only, or even outright fraudulent.
4) The idea of improvement as a main justification for land appropriation. As the formation of landed property rights evolved in the New World, a parallel idea arose: that Indigenous peoples themselves would benefit from a process in which their land was taken from them.
The cumulative effect of these elements was a near-total transfer of indigenous land into white hands. This occurred despite indigenous resistance, and the many difficulties associated with exporting social forms from the metropolitan centre where

they had developed, and imposing them on a colonial society that was not ordered for them. It was the modern state that made this possible, despite the contradictions. It is impossible to understand this fact — apparent contradictions and reversals in state policies and priorities cannot be explained — if we rely upon the conventional IR view of law and sovereignty in formal terms.

Formal sovereignty — which entails the authority to set the law — was always present in every land transfer. For example, after an initial period of uncertainty, the English Crown acknowledged Aboriginal property rights, and held that Aboriginal land could only be obtained by contract, a position that was maintained by the US government. But real practices often diverged from formal law in significant ways. Thus, the same states that formally recognized Aboriginal land rights and insisted upon using treaties to acquire Aboriginal land also failed (often spectacularly) to enforce these policies on the colonial frontier, and in many cases treaties with First Nations were voluntary agreements in name only. Legal agreements and contracts outlining the sale of land to European settlers were often intentionally misleading or even fraudulent; some settlers combined tenacity and audacity to use even the flimsiest documentation to hold onto dubious claims for years, often then selling them in the knowledge that the purchaser would support the original claim. And in any case, if the colonizers could not achieve the property rights regime they desired through private law, they could always resort to the big stick of public law — that is, by holding sovereignty they held the power to make indigenous people suffer for their intransigence.

This dissertation has highlighted a number of closely related oppositions: sovereignty and property; the state and the market; the political and the economic; contract and conquest; law and power. A formal IR theory would emphasize the first part of each pair: sovereignty to the exclusion of property, law over power, and so on. Yet the transfer of Aboriginal lands into white hands always involved *both* sides of these pairs. Law was always involved in land transfers. But so was power. The law is set by the state that enjoys sovereignty over a territory. English colonists, and then American settlers, acquired Aboriginal land within a legal and political framework set and enforced by their own state, and over which First Nations had no formal influence.

The capacity to set the laws governing landed property — to turn power into right — was a huge advantage for non-Indians. Yet this does not mean Indians simply were victims. In fact, precisely *because* property rights are a form of social relations, the lack of formal influence over the law did not prevent First Nations from having real power. Military and other forms of resistance — both direct and through strategic alliances — trade, and other factors acted as vehicles for indigenous resistance. The laws and policies governing land transfers were always shaped by the relative power balance between whites and First Nations. In the period shortly after contact, when Indians were relatively powerful, laws and treaties were much more meaningful than they would be in later years, when the relative power balance had shifted dramatically away from the Indians.

The persistence of treaties demonstrates that security of property under law was of central concern. Of course, this legal process was in some ways just for the sake of appearance. If legal standards had been much stricter, such agreements would still have been quite foreign to indigenous people who had a much different understanding

of property rights and land ownership. But being for the sake of *appearance* does not mean that the legal agreements reached with First Nations over land were not important. They were important for confidence: when security was established, real investments followed the doctrine of improvement.

In short, the several-centuries-long acquisition of Aboriginal land was a story of power, but, as legal historian Stuart Banner (2007:6) writes, it was "a more subtle and complex kind of power than we conventionally realize. It was the power to establish the legal institutions and the rules by which land transactions would be enforced." Direct, physical violence, both private and military, was ever-present and devastating in its effects. But on the colonial frontier power did not only come from the barrel of a gun: land was also acquired by contract. Still, one fact is fundamental: whether land was taken more by contract or more by conquest, it was *taken*. The presence of a legal system and a modern state did not make the process fair, except in the most superficial ways; to the contrary, the state supported and facilitated the massive transfer of indigenous land into non-native hands. Consistently, the state acted to make Aboriginal land a commodity, after which it could be acquired by whites.

The legacy of this process is still felt today, in ways that may not be obvious. For example, since 1990, property rights have been established and/or expanded in the former Soviet Union, following on similar processes in numerous countries from the so-called Third World. But even though the expansion of property rights is now reaching the most distant corners of the globe, this expansion is not merely geographical. Where the colonial version of property rights centred on landed property, in the contemporary world, the frontiers of property rights are not geographical but abstract and intellectual. These range from traditional Aboriginal knowledge, popular music and movies, genetic materials, licences to broadcast television, to carbon-tax credits, which are essentially licences to pollute. The complications around the establishment of landed property rights along the colonial frontier have found parallels in the contemporary world. Just as squatters and freebooters subverted colonial laws, contemporary intellectual property rights are undermined by including illegal copying and downloading, "creative sampling" of music, and so on. In response, rights-holders and potential rights-holders have moved to define, clarify, and assert their claims to the valuable and ever-emerging new forms of property. And they have gone to the state for support — in the form of court rulings or government policies.

When a vast new quantity of property — especially when it is new in kind, not just in degree — suddenly comes up for grabs, potential investors invariably turn to the state. Only governments can create and enforce the attendant system of rights for the new property. The connections and tensions between the state and the market — between sovereignty and property — to those that characterized the colonization of North America now animate the creation of new property rights. The new developments confirm one of the main insights from this dissertation: property rights are always political. They are contested. Neither the state nor the market is a neutral arbiter.

This project demonstrates the profound and lasting legacies of the colonial confrontation between European states system and indigenous nations in modern international relations. The colonial imposition of the state form through British settler colonialism in North America rehearsed and anticipated some of the key

features of contemporary international politics.

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