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INDIGENIZING AGAMBEN

RETHINKING SOVEREIGNTY IN LIGHT OF THE "PECULIAR" STATUS OF NATIVE PEOPLES

Mark Rifkin

But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.

. . . .

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy . . .; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.

—Cherokee Nation v. Georgia *(1831)*

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

. . . .

They were, and always have been, regarded . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

—U.S. v. Kagama *(1886)*

Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. . . . By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.

—Oliphant v. Suquamish Indian Tribe et al. *(1978)*

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What does "sovereignty" mean in the context of U.S. Indian policy? Looking at the statements above, all from U.S. Supreme Court decisions focused on the status of Native peoples, sovereignty at least touches on questions of jurisdiction, the drawing of national boundaries, and control over the legal status of persons and entities within those boundaries.[1] While one could characterize the concept of sovereignty as a shorthand for the set of legal practices and principles that allow one to determine the rightful scope of U.S. authority, it seems to function in the decisions less as a way of designating a specific set of powers than as a negative presence, as what Native peoples categorically lack, or at the least only have in some radically diminished fashion managed by the United States. Further, the decisions cited seem less to extend existing legal categories and precedents than to indicate the absence of an appropriate legal framework in which to consider the political issues and dynamics at hand. Native peoples appear as a gap within U.S. legal discourse. These passages suggest that the available logics of U.S. jurisdiction are unable to incorporate Native peoples comfortably, and that continued Native presence pushes against the presumed coherence of the U.S. territorial and jurisdictional imaginary.

While the decisions seem to be grasping to find language adequate to the disturbing legal limbo in which Native nations appear to sit, they also insist unequivocally that such peoples fall *within* the bounds of U.S. sovereignty, and the oddity attributed to U.S. Indian policy is offered as confirmation of that fact. Typifying "the relations of the Indians to the United States" as "peculiar" and "anomalous," while also consistently presenting Native peoples as unlike all other political entities in U.S. law and policy, indexes the failure of U.S. discourses to encompass them while speaking as if they were incorporated via their incommensurability. In *Homo Sacer: Sovereign Power and Bare Life*, Giorgio Agamben has described this kind of dialectic as the "state of exception," suggesting that it is at the core of what it means for a state to exert "sovereignty."[2] He argues, "the sovereign decision on the exception is the originary juridico-political structure on the basis of which what is included in the juridical order and what is excluded from it acquire their meaning" (19), and "[i]n this sense, the exception is the originary form of law" (26). What appears as an exception from the regular regime of law actually exposes the rooting of the law itself in

a "sovereign" will that can decide where, how, and to what the formal "juridical order" will apply. The narration of Native peoples as an exception from the regular categories of U.S. law, then, can be seen as, in Agamben's terms, a form of "sovereign violence" that "opens a zone of indistinction between law and nature, outside and inside, violence and law" (64).[3] The language of exception, of inclusive exclusion, discursively brings Native peoples into the fold of sovereignty, implicitly offering an explanation for why Native peoples do not fit existing legal concepts (they are different) while assuming that they should be placed within the context of U.S. law (its conceptual field is the obvious comparative framework).[4]

In using Agamben's work to address U.S. Indian policy, though, it needs to be reworked. In particular, his emphasis on biopolitics tends to come at the expense of a discussion of geopolitics, the production of race supplanting the production of space as a way of envisioning the work of the sovereignty he critiques, and while his concept of the exception has been immensely influential in contemporary scholarship and cultural criticism, such accounts largely have left aside discussion of Indigenous peoples. Attending to Native peoples' position within settler-state sovereignties requires investigating and adjusting three aspects of Agamben's thinking: the persistent inside/outside tropology he uses to address the exception, specifically the ways it serves as a metaphor divorced from territoriality; the notion of "bare life" as the basis of the exception, especially the individualizing ways that he uses that concept; and the implicit depiction of sovereignty as a self-confident exercise of authority free from anxiety over the legitimacy of state actions.[5] Such revision allows for a reconsideration of the "zone of indistinction" produced by and within sovereignty, opening up analysis of the ways settler-states regulate not only proper kinds of embodiment ("bare life") but also legitimate modes of collectivity and occupancy—what I will call *bare habitance*.

If the "overriding sovereignty" of the United States is predicated on the creation of a state of exception, then the struggle for sovereignty by Native peoples can be envisioned as less about control of particular policy domains than of *metapolitical authority*—the ability to define the content and scope of "law" and "politics." Such a shift draws attention away from critiques of the particular rhetorics used to justify the state's plenary power and toward a macrological effort

to contest the "overriding" assertion of a right to exert control over Native polities. My argument, then, explores the limits of forms of analysis organized around the critique of the settler-state's employment of racialized discourses of savagery and the emphasis on cultural distinctions between Euramerican and Indigenous modes of governance. Both of these strategies within Indigenous political theory treat sovereignty as a particular kind of political content that can be juxtaposed with a substantively different—more Native-friendly or Indigenous-centered—content, but by contrast, I suggest that discourses of racial difference and equality as well as of cultural recognition are deployed by the state in ways that reaffirm its geopolitical self-evidence and its authority to determine what issues, processes, and statuses will count as meaningful within the political system. While arguments about Euramerican racism and the disjunctions between Native traditions and imposed structures of governance can be quite powerful in challenging aspects of settler-state policy, they cannot account for the structuring violence performed by the figure of sovereignty. Drawing on Agamben, I will argue that "sovereignty" functions as a placeholder that has no determinate content.[6] The state has been described as an entity that exercises a monopoly on the legitimate exercise of violence, and what I am suggesting is that the state of exception produced through Indian policy creates a monopoly on the legitimate exercise of legitimacy, an exclusive uncontestable right to define what will count as a viable legal or political form(ul)ation. That fundamentally circular and self-validating, as well as anxious and fraught, performance grounds the legitimacy of state rule on nothing more than the axiomatic negation of Native peoples' authority to determine or adjudicate for themselves the normative principles by which they will be governed. Through Agamben's theory of the exception, then, I will explore how the supposedly underlying sovereignty of the U.S. settler-state is a retrospective projection generated by, and dependent on, the "peculiar"-ization of Native peoples.

THE DOMAIN OF INCLUSIVE EXCLUSION: THE CAMP AND THE RESERVATION

In introducing his argument in *Homo Sacer,* Agamben marks, while seeking to trouble the distinction between *zoē* and *bios*, "the simple fact

of living common to all living beings (animals, men, or gods)" versus "the form or way of living proper to an individual or a group" (1). He suggests that in classical antiquity the former was excluded from the sphere of politics, and that part of what most distinguishes modernity, particularly the structure of the state, is the effort to bring the former into the orbit of governmental regulation, in fact to see it as the animating principle of political life ("the politicization of bare life as such" [4]). The first articulation of the book's central thesis, then, is as follows: *"It can even be said that the production of a biopolitical body is the original activity of sovereign power"* (6).[7] In other words, modern sovereignty depends upon generating a vision of the "body"—of apolitical natural life—that is cast as simultaneously exterior to the sphere of government and law and as the reference point for defining the proper aims, objects, and methods of governance ("[p]lacing biological life at the center of its calculations" [6]). That "body" is divorced from politics per se while simultaneously defining the aspirational and normative horizon of political action. "Bare life," therefore, serves as an authorizing figure for decision-making by self-consciously political institutions while itself being presented as exempt from question or challenge within such institutions.

Further, and more urgently for Agamben, the generation of "bare life" makes thinkable the consignment of those who do not fit the idealized "biopolitical body" to a "zone" outside of political participation and the regular working of the law but still within the ambit of state power. Describing this possibility, he observes, "The relation of exception is a relation of ban. He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is, exposed and threatened on the threshold. . . . It is literally not possible to say whether the one who has been banned is outside or inside the juridical order" (28–29). For Agamben, the Nazi concentration camp serves as the paradigmatic example of the biopolitical imperatives structuring modern sovereignty, described as "the hidden matrix and *nomos* of the political space in which we are still living" (166). The existence of the camps disrupted the "functional nexus" on which the modern nation-state was "founded": "the old trinity composed of the state, the nation (birth), and land" in which "a determinate localization (land) and a determinate order (the State) are mediated by automatic rules for the inscription of life (birth or the

nation)" (174–76). The camp opens up a location within the state in which persons who are linked to the space of the nation by birth can be managed as "bare life," as mere biological beings bereft of any/all of the legal protections of citizenship.

Yet if that denial of political subjectivity and simultaneous subjection to the force of the state confuses, or perhaps conflates, "exclusion and inclusion," to what extent is that blurring predicated on the reification of the boundaries of the "sovereign power" of the nation? Put another way, if the person in the state of exception is considered "bare life" and thus neither truly "outside [n]or inside the juridical order," how does one know that the "abandoned" comes under the sway of a given sovereign? How might the "irreducible indistinction" enacted by sovereignty that Agamben describes itself depend on a prior geopolitical mapping that is also produced through the invocation of sovereignty, differentiating those people and places that fall within the jurisdictional sphere of a given state from those that do not?

That process of *distinction*, I contend, draws on the logic of exception Agamben theorizes but in ways that cannot be reduced to the creation of a "biopolitical body." In describing how modern sovereignty appears to found itself on the will of the people, Agamben locates a biopolitical problematic at the core of that claim:

> It is as if what we call "people" were in reality not a unitary subject but a dialectical oscillation between two opposite poles: on the one hand, the set of the People as a whole political body, and on the other, the subset of the people as a fragmentary multiplicity of needy and excluded bodies; or again, on the one hand, an inclusion that claims to be total, and on the other, an exclusion that is clearly hopeless; at one extreme, the total state of integrated and sovereign citizens, and at the other, the preserve—court of miracles or camp—of the wretched, the oppressed, and the defeated. (177)

The "People" stands less for the actual assemblage of persons within the state than for the set of those who fit the ideal "body" and who consequently will be recognized as "citizens," with the rest of the resident population consigned to the realm of "bare life"—the people who are not the People and thus are excluded from meaningful participation while remaining the objects of state control. However, when reflecting on the status of Indigenous populations in relation to the settler-state, a third category emerges that is neither people nor People—namely

peoples. The possibility of conceptualizing the nation as "a whole political body" requires narrating it as "a unitary subject" rather than a collection of separate, unsubordinated, self-governing polities. Conversely, for "inclusion" to be articulated as "total," it needs to have a clear domain over which it is extended. In critiquing the approach of previous theorists to the issue of sovereignty, Agamben notes, "The problem of sovereignty was reduced to the question of who within the political order was invested with certain powers, and the very threshold of the political order itself was never called into question" (12), but Agamben's account itself assumes a clear "within" by not posing the question of how sovereignty produces and is produced by place, how the state is realized as a spatial phenomenon as part of "the very threshold of the political order itself."

I am suggesting, then, that the biopolitical project of defining the proper "body" of the people is subtended by the geopolitical project of defining the territoriality of the nation, displacing competing claims by older/other political formations as what we might call *bare habitance*. Agamben notes, "The camp is a piece of land placed outside the normal juridical order, but it is nevertheless not simply an external space" (169–70), but that definition also seems to capture rather precisely the status of the reservation, a space that while governed under "peculiar" rules categorically is denied status as "external," or "foreign." Examining the reservation, and more broadly the representation of Native collectivity and territoriality in U.S. governmental discourses, through the prism of Agamben's analysis of the state of exception helps highlight the kinds of "sovereign violence" at play in the (re)production and naturalization of national space.[8] The effort to think biopolitics without geopolitics, bare life without bare habitance, results in the erasure of the politics of collectivity and occupancy: what entities will count as polities and thus be seen as deserving of autonomy, what modes of inhabitance and land tenure will be understood as legitimate, and who will get to make such determinations and on what basis?[9] Focusing on the fracture between "the People" and "the people" imagines explicitly or implicitly either a reconciliation of the two (restoring a version of the "trinity" of state, land, and birth) or the proliferation of a boundaryless humanness unconstrained by territorially circumscribed polities. These options leave little room for thinking indigeneity, the existence of *peoples* forcibly made domestic

whose self-understandings and aspirations cannot be understood in terms of the denial of (or disjunctions within) state citizenship.[10]

While in the next section I will address how biopolitical and geopolitical dynamics work together, specifically in the translation of Native peoples into aggregates of individual domestic subjects (as either a race or a culture), I first want to explore in greater detail how the production of national space depends on coding Native peoples and lands as an exception. Administrative mappings of U.S. jurisdiction remain haunted by the presence of polities whose occupancy precedes that of the state and whose existence as collectivities repeatedly has been officially recognized through treaties. The Supreme Court decisions with which I began all register this difficulty. In *Cherokee Nation v. Georgia*, the court explicitly finds that the "acts of our government plainly recognize the Cherokee nation as a state," indicating they are "a distinct political society, separated from others, capable of managing its own affairs and governing itself" (16). Yet the majority opinion also insists, "The Indian territory is admitted to compose a part of the United States," adding, "They occupy a territory to which we assert a title independent of their will" (17). Following a similar line of reasoning, *U.S. v. Kagama* insists "the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil. . . . But they asserted an ultimate title in the land itself" (381), and Justice Rehnquist in *Oliphant v. Suquamish* argues, "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States," although "their exercise of separate power is constrained so as not to conflict with the interests of [the U.S.'s] overriding sovereignty" (208–9). Each of these formulations acknowledges a tension between the kinds of political identity and authority suggested by the ability to enter into formal agreements with the United States and the claim that such otherwise (or previously) "distinct political societ[ies]" are fully enclosed within the boundaries of the state and thus subject in some fashion to its rule.

Presenting U.S.-Indian relations as "peculiar" or "anomalous" marks that tension, but such a description depicts the treaty system and the workings of federal Indian law as neither regular domestic law nor foreign policy. The oddity can seem to inhere in the treaties themselves, a supposed irregularity that U.S. lawmakers sought to

remedy in the late nineteenth century by ending the practice of treaty-making.[11] The "peculiar"-ity of the treaty system, though, is less a function of the constitutional status it confers on Indian policy (enacting it through documents that, in the words of Article VI, make it "the supreme law of the land") than the underlying contradiction to which the treaty system points. Treaties register and mediate a structural disjunction between the continuing existence of autochthonous Native collectivities that predate the formation of the United States and the adoption of a jurisdictional imaginary in which such collectivities are imagined as part of U.S. national space. More than merely recognizing Native peoples as "distinct political societ[ies]" with whom the United States must negotiate for territory, however, the treaty system also seeks to interpellate Native polities into U.S. political discourses, presupposing (and imposing) forms of governance and occupancy that facilitate the cession of land.[12] While in one sense acknowledging Native peoples as "separate" entities from the United States, the treaty-based Indian policy of the late eighteenth and nineteenth centuries also sought to confirm the United States' "ultimate title in the land itself," thereby indicating the stresses generated by the narration of Native nations as domestic. Dispensing with treaties, though, does not eliminate such strain or the normative difficulties it creates for validating U.S. authority over Native populations and lands, instead it simply tries to displace the problem of legitimacy which still returns insistently to trouble U.S. legal discourses.[13]

The potential disjuncture in U.S. jurisdiction opened by the presence of non-national entities with claims to land ostensibly inside the nation is sutured over by proclaiming a "sovereignty" that supposedly alleviates the potential "conflict" between U.S. and Native mappings. Presented as simply logically following from Native peoples' residence on "territory admitted to compose a part of the United States,"[14] the invocation of sovereignty casts them as exceptional, an aberration from the normal operation of law but one contained within the broader sphere of U.S. national authority. "Indian tribes" have only a "possessory right" or "quasi-sovereign" claims, but "ultimate title," the decisions reassuringly indicate, lies with the United States. Yet rather than providing an underlying framework in which to situate Indigenous populations, sovereignty instead appears as a mutable figure that enables their occupancy to be portrayed as "peculiar." Discursively, it

bridges the logical and legal chasm between the political autonomy indexed by the treaty system and the depiction of Indigenous populations as domestic subjects. U.S. political discourses seek to contain the instability of the settler-state by repeatedly declaring the nation's geopolitical unity, but at moments when that avowal is brought into crisis by the continuing presence and operation of Native polities, the topos of sovereignty emerges, as if it exists before and beyond the specific legal questions at stake in any particular case or act of policy-making. As Judith Butler suggests, "it is not that sovereignty exists as a possession that the US is said to 'have.' . . . Grammar defeats us here. Sovereignty is what is tactically produced through the very mechanism of its self-justification" (82).[15] The citation of sovereignty in this completely open-ended but rhetorically foundationalizing way suggests a potentially unlimited capacity to (re)define what will count as the organizing framework of political order.

The performative citation of sovereignty by the United States depends on the creation of a state of exception for Native peoples. The content of "sovereignty" in the decisions is the assertion of the authority to treat Native peoples as having constrained, diminished, political control over themselves and their lands, and such a contention rests on the assumption that despite their existence before and after the founding of the United States as "separate people[s], with the power of regulating their internal and social relations" (*U.S. v. Kagama*, 381–82), they somehow do not have equivalent status to "foreign" nations. As Agamben observes, "the state of exception is . . . the principle of every juridical localization, since only the state of exception opens the space in which the determination of a certain juridical order and a particular territory first becomes possible" (19). The jurisdictional imaginary of the United States is made possible only by *localizing* Native peoples, in the sense of circumscribing their political power/status and portraying Indian policy as an aberration divorced from the principles at play in the rest of U.S. law, and that process of exception quite literally opens the *space* for a legal geography predicated on the territorial coherence of the nation.

While it rhetorically appears to validate or underwrite U.S. law, the figure of sovereignty results from the exception, making possible the founding of the regime of domestic policy. U.S. authority over Native peoples cannot be derived from the constitutional order of law,

instead, in Agamben's terms, "tracing a threshold . . . on the basis of which outside and inside, the normal situation and chaos, enter into those complex topological relations that make the validity of the juridical order possible" (19). Those political collectivities whose occupancy does not fit the geopolitical ideal/imaginary of the state are left abandoned by it, "exposed and threatened on the threshold" of the juridical order that is made possible and validated by their exception (28). From that perspective, settler-state sovereignty can be viewed less as an expression of the nation's rightful control over the land within its boundaries than the topological production of the impression of boundedness by banning—rendering "peculiar," "anomalous," "unique," "special"—competing claims to place and collectivity.[16] This line of thought further suggests that if the validity of national policy is presented as being derived from the underlying fact of sovereignty, such a claim to legitimacy itself relies on the promulgation of an exception that rests on nothing more than the absoluteness with which it is articulated and enforced.

DEPENDENCE, RACE, AND THE TABOOING OF CULTURE

Representing Native populations and lands as occupying an "anomalous" position allows the U.S. government to validate its extension of theoretically unlimited authority over them, rendering them external to the normal functioning of the law but yet internal to the space of the nation. The dominance perpetuated through the ongoing recreation of this state of exception, though, inheres not merely in the exercise of unhampered jurisdiction over Native peoples but in the ways that jurisdiction enables a metapolitical scripting of the terms of collectivity itself. More than circumscribing or disciplining the autonomy of Native peoples, Indian policy recodes their identities, defining and redefining the threshold of political identity and legitimacy and determining how Native peoples will enter that field, including what (kinds of) concepts and categories they will inhabit.[17] The representation of Native peoples as an exception makes possible their incorporation into U.S. administrative discourses in any number of ways along a wide spectrum ranging from polity to bare life. In that process of inscription, the biopolitical and the geopolitical dynamics of

nation-statehood discussed above enter into a dialectical relay, the former serving as a way of resolving the threatened incoherence of the latter by providing a set of tactics through which to recast Native peoples as people.[18] In seeking to cope with the presence of preexisting polities on what it seeks to portray as domestic space, the United States often translates autochthonous, self-governing Native polities as populations, as either collections of bodies in need of restraint/protection or cultural aggregations. In being interpellated into U.S. political discourses in this way, they are managed as residents—as a kind of racialized, endangered, or enculturated body—on land that self-evidently constitutes part of the nation.

Turning again to the Supreme Court cases with which I began, this dynamic can be seen in the mobilization of the figure of dependence. The decision in *Cherokee Nation v. Georgia* invents the notion of "domestic dependent nation," and in justifying the fabrication of this unheard-of status, the court articulates what would become a (if not *the*) central trope of federal Indian law, saying of Native peoples that "[t]heir relation to the United States resembles that of a ward to his guardian." The opinion adds, "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father" (17). That vision of superintendence depends upon infantilization, casting the same group referred to earlier in the decision as a "distinct political society" as a child in need of guidance and safeguarding. This description, though, appears just in the wake of the court's insistence that "those tribes which reside within the acknowledged boundaries of the United States" cannot, "with strict accuracy, be denominated foreign nations" (17). The image of Native nations as hapless minors, "ward[s]," appears retroactively to justify their status as "domestic," but their apparent dependency *follows from* their location "within the acknowledged boundaries" of the nation-state, "dependent" providing a content for "domestic" belonging other than simply the absence/disavowal of "foreign"-ness. A particular jurisdictional mapping, "within," then, comes to appear through the prism of dependence as a qualitatively different kind of relation; Native polities' call for the acknowledgment of their boundaries and autonomy is transfigured instead as a mass of "wants"—a term suggestive of persistent bodily need.

This discursive transmutation of Indigenous peoplehood into bare life is even more pronounced in *U.S. v. Kagama*. Rehearsing the language of "ward"-ship, the decision expands the scope and deepens the sense of the dependency cited in the earlier opinion: "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights" (383–84). Dispensing with the rhetoric of nationhood from the previous decision, the court here envisions "Indian tribes" as groups whose continued existence is utterly contingent on federal care. They are an undifferentiated mass of flesh with no "political" existence apart from whatever "rights" may happen to be granted (or withheld) by the United States. Once again, though, this corporealization of Indians is brought back to the problems they potentially pose for national spatiality:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes. (384–85)

While reinforcing the impression of an assemblage of exposed and endangered bodies, "remnants" whose frailty leaves them on the verge of extinction, the passage ends up justifying U.S. "power" by reference to the supremacy that is understood to be a necessary corollary of the coherence of "the geographical limits of the United States." The sheer vehemence of the statement that control over Indians "must exist in that government" intimates a profound anxiety, the phrase "anywhere else" suggesting a fear that the space of the nation might somehow be(come) alien to itself, an *elsewhere* to which U.S. jurisdiction explicitly is "denied" by the Indigenous inhabitants. The categorization of Indians as "weak and diminished" bodies or a murderous threat to "the safety" of neighboring white communities (a savage "race") appears to provide a reason, in a biopolitical key, for the exertion of authority over them, but it occupies the space of the exception already produced by the encompassing insistence that Native peoples fall within the "theatre" of U.S. governance.

Presenting Indians as bare life—dying "remnants," helpless children, and/or vicious savages—addresses their status within the regime of U.S. policy as if it were a function of natural facts, pre-political or apolitical conditions to which U.S. institutions respond,[19] but the biopolitical figure of dependence presumes a vision of geopolitical incorporation that precedes it, the latter appearing as merely background for the former. But the background keeps coming to the fore, invested in the decisions with a force that rhetorically exceeds and logically disjoints its apparent role as simply setting as opposed to focus or aim. Viewed in this way, the critique of Indian policy as racist only addresses biopolitical tactics without dislodging the geopolitical structure of exception. In *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America,* Robert A. Williams takes such an approach, arguing that the vision of Indians as "uncivilized, unsophisticated, and lawless savages" enshrined in numerous nineteenth-century Supreme Court opinions continues to serve as the basis for Indian law, given the ongoing citation of those cases as precedent: "The stereotypes or images that the Court has thus legitimated and expanded can now be used to legally justify a rights-denying, jurispathic form of racism against those groups" (xxviii, 21). Through the term "jurispathic," Williams, following the legal theorist Robert Cover, refers to the power of the court to make one tradition of law or legal interpretation the exclusive, authoritative one, thereby eliminating alternatives or denying them institutional validity by refusing to sanction them as legally/politically viable options. However, casting that dynamic in Indian policy as primarily one of a "racism" that denies access to "rights" leaves aside not only the question of territoriality but also of Native peoples' status as independent polities. According to Williams, the Supreme Court refuses to apply the "egalitarian principles of racial equality normally applied to all other groups and individuals in post-*Brown* America," instead "deciding . . . Indian rights case[s] according to an overarching metaprinciple of Indian racial inferiority" (127),[20] but if such "egalitarian principles" were applied so that Indians were deemed no different than any other "groups and individuals" in "America," that disposition in and of itself still would not reverse the linked dynamics of internalization and individualization through which Indians are understood as subjects of U.S. domestic law and policy, as firmly *within* the nation and thus subjected to its

metapolitical authority. While no longer positioned as savages or "dependent" children, cast as fully rights-bearing individuals rather than bare life, Native peoples still would signify as collections of persons within the ambit of U.S. jurisdiction rather than as autonomous political collectivities whose identity and status cannot be managed by U.S. institutions.

Thus, although Williams recognizes the difference between Native peoples and those minorities whose horizon of legal aspiration largely is full inclusion in the nation as citizens, offering what he describes as a "singularity thesis" that acknowledges "the unique types of autochthonous rights that tribal Indians want protected under U.S. law" (xxv), his indictment of U.S. modes of racialization cannot fully capture the political work performed by sovereignty, or rather the work that the citation of sovereignty performs in (re)defining and regulating the terms of "political" identity. Inasmuch as the biopolitical discourse of race helps dissimulate the violence at play in the domestication of Native peoples by depicting the terms of U.S. rule as due to the "natural" qualities of Indians, the kind of anti-racist challenge Williams suggests can help disqualify the bodily as a basis for Indian law, thereby clearing conceptual and discursive ground so as to draw attention back to the issue of territoriality.[21] Having done so, though, one still needs to contest not so much the "metaprinciple of Indian racial inferiority" as that of the jurisdictional coherence of national space. In his interpretation of *Oliphant v. Suquamish*, for example, Williams claims that the court's denial of the defendant's authority to prosecute non-Indians depends on little more than a rehearsal of demeaning nineteenth-century stereotypes of Indians from previous decisions, including *Cherokee Nation* and *Kagama*, that have been sanitized by the removal of most of the overtly denigrating language. Yet *Oliphant* asserts, "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty" (209). Even if the Indian/non-Indian distinction were eliminated as a vestige of a noxious regime of racial hierarchy, the "territorial sovereignty of the United States" would remain, along with the dangerously amorphous, infinitely expansive, and uncontestable "interests" that are said to follow from it and that provide the means of "overriding" any

initiative by Native populations to represent and assert themselves as autonomous collectivities.

If anti-racist resistance remains urgent but still insufficient to the task of breaking the stranglehold on the "political" held by the United States as a result of its exceptionalization of Indigenous polities, might the notion of "culture" better serve to challenge settler-state authority? Agamben's argument inadvertently signals the limit of such a strategy. In sketching the notion of bare life, he offers the example of "homo sacer," a status from Roman law for a person who has been convicted of a crime and as such may be killed without prosecution for homicide but who also cannot be sacrificed as an offering to the gods. Agamben asks, "In what, then, does the sacredness of this sacred man consist," and he answers that the "sacred" is the life that has been abandoned "outside both human and divine law" (72–73), further suggesting that "*homo sacer* presents the originary figure of life taken into the sovereign ban" (83). What particularly interests me in his formulation is that in connecting the sacred to sovereignty, Agamben rails against the ways "the ethnological notion of taboo" works "to dissolve the specificity of *homo sacer*" (74), suggesting that the "ambivalence" surrounding the "ethnographic concept of taboo" (as that which generates both awe and horror)

> cannot explain the juridico-political phenomenon to which the most ancient meaning of the term *sacer* refers. On the contrary, only an attentive and unprejudiced delimitation of the respective fields of the political and the religious will make it possible to understand the history of their intersection and complex relations. (80)

The clear distinction between social "fields" is blurred by the tendency of "ethnological" / "ethnographic" analysis to smuggle in alien ideas and categories into discussion of the "political." Yet if *homo sacer,* freed from the confusion of "taboo," is exemplary of the political work of sovereignty, what defines the field of politics? It appears as that which is left once one has stripped away "ethnographic" excess, creating a threshold between "the political and the religious" in which the former emerges through the exception of the latter. The "specificity" of "the juridico-political" as a *kind* of "phenomenon," then, rests on an open-ended process of exclusion itself cast as self-evident, as an obvious

difference between "fields" rather than an act based on the kind of sovereign violence Agamben critiques.

The fact that the "ethnographic concept" of "taboo" is taken to mark the (failure to note the) discrepancy between political and other phenomena is of particular significance in light of the above analysis of the metapolitical invention of statuses for Indigenous peoples. Taken from Polynesian societies, with which European explorers came into contact in the late eighteenth century, the term taboo, or *kapu*, refers to a power of prohibition managed by rulers on the basis of spiritual ideals.[22] A complex phenomenon to which I here cannot devote the consideration it is due, it certainly challenges the notion that in those systems of governance "the political and the religious" were readily differentiable "fields." In other words, Agamben produces a pure vision of politics by disowning the introduction of concepts from other modes of governance as a category mistake, as an intrusion into or deformation of that which is authentically "political." From that perspective, any practice or principle can be dismissed or displaced as an "ethnographic" error, as the inappropriate transposition of one kind of thing into the domain properly occupied by another. In this way, one can see how "the cultural" categorically may be contradistinguished from "the political," producing a threshold of differentiation which the state can deploy in ways that both subordinate the former to the latter and preserve the exclusive power of the state to determine what constitutes the "field" of politics.

The threshold between culture and politics, then, reactivates the same logic of exception through which Native peoples are incorporated into the geopolitical imaginary of the settler-state. This dynamic can be seen in James Tully's influential effort to rethink sovereignty. In *Strange Multiplicity: Constitutionalism in an Age of Diversity*, he describes the "struggles of Aboriginal peoples" as "demands for cultural recognition" that "are aspirations for appropriate forms of self government," and he further notes that "forms of self rule appropriate to the recognition of any culture vary" and that "[t]he language employed in assessing claims to recognition continues to stifle cultural differences and impose a dominant culture, while masquerading as culturally neutral, comprehensive or unavoidably ethnocentric" (4, 35). In Tully's account, "culture" provides an idiom through which to index the ways Native forms of governance may not conform to those "dominant"

within the settler-state while also highlighting how the adjudication of Native claims by the state relies on an unnecessarily homogenizing vision of national culture that forecloses "recognition" of the multiplicity of political formations existing within national space. As Elizabeth Povinelli has illustrated, though, the *recognition* of Indigenous cultural difference within liberal multiculturalist governance tends to reaffirm the coherence of the nation-state, fetishize an anachronizing vision of Native identity, and exonerate continuing forms of imperial superintendence. Focusing on Australia, she argues that "national pageants of shameful repentance and celebrations of a new recognition of subaltern worth remain inflected by the conditional (as long as they are not repugnant; that is, as long as they are not, at heart, not-us and as long as real economic resources are not at stake)" (17).[23] The state's performance of its redemption from a violent colonial past depends on the embrace, or more accurately invention, of a version of aboriginality that is consistent with the moral norms of settler-state law yet still strange enough to generate the frisson of diversity/discrepancy, creating the thrill of Indigenous authenticity while not validating acts or ideas "repugnant" to the sensibilities of non-native citizens. The effort to locate and outline Native cultures occurs against the background of unquestioned settler-state jurisdiction, continuing to code Native populations as both exceptional and as collections of individual domestic subjects. Tully himself repeatedly makes such a move. Characterizing the state's "accommodation" of Indigenous peoples' struggle for self-determination as "an intercultural dialogue in which culturally diverse sovereign citizens of contemporary societies negotiate agreements," he further indicates that "each citizen is a member of more than one culture," taking the nation-state as axiomatic, understanding belonging to it as the precondition for such dialogue, and thus predicating conversation on the subordination of "culture" to "citizen"-ship in the state (184, 207).

As I have been suggesting, then, the topos of sovereignty designates less a content that can be replaced (a racist vision of Indian savagery, a Eurocentric resistance to Native customs) than a process of compulsory relation, one predicated on the supposedly unquestionable fact of national territorial boundaries. While contesting the various discourses that reaffirm the validity of assorted elements of settler-state jurisdiction certainly can do powerful work in challenging and

changing particular policies, creating greater tactical room for maneuver in a range of struggles, such an approach cannot fully address the structuring force of sovereignty, the ways the exceptionalization of Native peoples works to legitimize the unconstrained metapolitical power of the United States to invent, enforce, and alter the statuses/categories/concepts in which Native peoples are made to signify.

THE QUESTION OF (OR QUEST FOR) LEGITIMACY

If U.S. Indian policy in its circulation of the figure of sovereignty has the potential to displace Native polities entirely, why not do so? Why not simply erase this ongoing threat to the jurisdictional imaginary of the nation?[24] To do so would foreground the very unilateral will—the theoretically limitless imperial violence—on which U.S. territoriality rests, exacerbating the very structural crisis of legitimacy the topos of sovereignty works to dissimulate. In other words, the claim of sovereignty appears at moments in which a gap has opened in the operative logics of U.S. law, offering a way of resolving legal and political questions that threaten to undo the geopolitics of the settler-state. If Native peoples are the subjects of treaties, how are they not foreign? Why can the United States pass laws applicable to people on Native lands? On what basis can the federal government claim the right to regulate political entities that predate the existence of the United States? The official answer provided for all of these questions is that Native populations and lands are within the domain over which the United States is sovereign. While tautological, self-serving, and resting on nothing more than outright assertion, this response is an attempt to provide a foundation for the exercise of U.S. authority, seeking to validate the domestication of Native peoples by generating terminologies and doctrines that appear to offer a logical/legal explanation.[25]

Simply to present U.S. superintendence as a function of brute force would undercut the very legitimizing aim of the arguments in which sovereignty is employed, thwarting their effort to cover the inability of U.S. law philosophically to ground itself in the ground of the nation. The citation of sovereignty, therefore, is less a confident and self-assured indication of untroubled control than a restless performance in which the failure to find a normative foundation on which

to rest the legitimacy of national jurisdiction remains a nagging source of anxiety. Justice Clarence Thomas addresses this dynamic in his concurrence to the decision in *U.S. v. Lara* (2004).[26] Thomas observes that there is a contradiction at the heart of U.S. Indian policy. "In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously" (215), and he later adds, "The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty'" (225).[27] Despite the fact that the majority opinion describes tribes' "inherent sovereignty" as the source of their, still circumscribed, criminal jurisdiction, it also indicates that such "sovereignty" can be abridged, restored, and reconfigured at will by Congress, suggesting that the powers reaffirmed by the court under the rubric of tribal sovereignty actually are not predicated on the existence of Native peoples as autochthonous ("separate") entities but instead on the authority arrogated by the U.S. government to redefine the status of Native collectivities according to any principle it wishes. Still substantively conditioned by congressional sanction, the legalism of "inherent sovereignty," not unlike "domestic dependent nation," draws attention away from the untenability of the United States' overriding claim to sovereignty itself, or rather the absence of a legitimate legal claim (or basis for making one) that is registered by the citation of the figure of sovereignty.

That process of invention signals an effort to cloak U.S. imperial modes of exception as something other than, in Agamben's terms, "sovereign violence," to cover the degree to which Native peoples are left "exposed and threatened on the threshold" of national territoriality (*Homo Sacer*, 64, 28). The attempt to locate legitimacy for U.S. jurisdiction in something other than its own imposed, circular obviousness can be found even in the most strident declarations of sovereignty. In *Oliphant*, for example, the majority opinion suggests that "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States" and that they "give up their power to try non-Indian citizens" after "submitting to the overriding sovereignty of the United States" (208, 210). Such moments suggest a point at which Native peoples voluntarily surrender certain forms of political authority. While quite doubtful as a way of characterizing the actual

workings of the treaty system or the ways it was understood by Native signatories (assuming that sale or lease of particular plots of land is tantamount to a wholesale acceptance of unconstrained regulation by the United States over every aspect of Native life), this description does predicate federal power on consent ("ceding," "submitting"), seeking to cast U.S. sovereignty as encompassing yet fundamentally noncoercive.

This effort to find a way to ameliorate the force of settler-state jurisdiction suggests that part of the metapolitical generation of categories, concepts, and statuses is the attempted simulation of legitimacy as well. If the notion of "inherent sovereignty" as employed in U.S. Indian policy is somewhat of a placeholder given its continued subjection to potential congressional reworking (the supposed "overriding sovereignty" of the federal government), it still provides a discursive entry point that can be occupied by Native peoples in ways that expose the domination at play in the deployment of the topos of sovereignty by the settler-state. In other words, exploiting the kind of logical incoherence and underlying normative crisis toward which Thomas points, the discourse of sovereignty can be mobilized to deconstruct U.S. rule by illustrating how the settler-state exerts a monopoly on the production of legitimacy—the ways statuses are imposed on Native peoples in the context of their axiomatic yet constitutionally indefensible subjection to U.S. authority. The countercitation of sovereignty can reveal and contest the operation of such a monopoly by drawing attention to the organizing indistinction between force and law in Indian policy—the operation of a geopolitical state of exception.

This position, though, runs against the grain of two understandings of Native articulations of "sovereignty" prominent in Indigenous political theory: as the adoption of a specific set of principles of governance imposed by settler-states or as a pragmatic attempt to make Indigenous concepts intelligible within state terminologies and to state institutions.[28] The first, presented perhaps most forcefully by Taiaiake Alfred in his essay "Sovereignty," envisions sovereignty as a particular form of government, one derived from alien conventions. The problem for Native peoples in utilizing the discourse of sovereignty is that doing so reifies a "European notion of power and governance" which is fundamentally at odds with Native beliefs and practices: "Sovereignty itself implies a set of values and objectives that put it in direct opposition to the values and objectives found in most traditional

indigenous philosophies" (43).[29] Alfred suggests that "the process of de-colonization" has focused on "the mechanics of escaping from direct state control and . . . gain[ing] recognition of an indigenous governing authority" while losing track "of the end values of the struggle" (41). More than distinguishing between a politics focused on outside "recognition" and one concerned with the needs, desires, and self-understandings of Indigenous peoples, Alfred insists that "Indigenous leaders engaging themselves and their communities in arguments framed within a liberal paradigm have not been able to protect the integrity of their nations," instead "the benefits accrued" by such a strategy requires a de facto "agree[ment] to abandon autonomy" (39).[30] The issue, then, is not only what Native communities want for themselves but also what ultimately will "protect" their "autonomy" from state intervention and management. In describing "sovereignty" as a set of "values" at odds with "indigenous philosophies," Alfred presents "retraditionalization," eschewing settler-state terminologies and ideologies in favor of the "wisdom coded in the languages and cultures of all indigenous peoples" as the vehicle for "achiev[ing] sovereignty-free regimes of conscience and justice" (40, 49), but what I have been arguing is that "sovereignty itself" is empty, a topological placeholder through which to displace, or contain, the paradox of asserting "domestic" authority over populations whose existence as peoples precedes the existence of the state. Thus, adopting a different set of principles—an Indigenous rather than European "notion . . . of governance"—does not secure "autonomy" from settler-state superintendence, from being coded as an "anomaly" axiomatically subject to the metapolitical authority of the settler-state.

While Alfred raises the immensely important questions of whether Indigenous peoples desire a form of government that is structured around the principles of liberalism and whether the acceptance of such a structure does irrevocable damage to traditions that historically have been crucial to such communities, these issues are askew with respect to contesting "sovereignty itself" or mapping, in Agamben's terms, "the very threshold of the political order" of settler-state imperialism. Alfred's argument relies on the juxtaposition of Indigenous political models with European ones without addressing how the settler-state narrates its jurisdiction over national space and justifies its extension of regulatory control over Native peoples. He suggests

that "sovereignty" designates "a conceptual and definitional problem centered on the accommodation of indigenous peoples within a 'legitimate' framework of settler state governance" (34–35), adding that they "must conform to state-derived criteria and represent ascribed or negotiated identities" (43), but he stops short of investigating the ways the topos of sovereignty works to validate a range of discrepant (kinds of) "identities" that Native peoples at various times have been and are called on to inhabit.[31] By giving sovereignty a determinate content, then, Alfred runs into similar problems as those raised by the invocation of "culture." An insistence on difference cannot unsettle the state's assertion of the authority to adjudicate the status of Indigenous polities because "sovereignty" is the vehicle not of implementing a stable set of "values and objectives" but of repudiating any challenge to the territorial imaginary of the nation. Moreover, articulations of difference can be refracted back through the prism of Native "peculiar"-ity, possibly reinforcing the process of exceptionalization. Put another way, Alfred draws attention to a particular type of identity (liberal bureaucracy) imposed by the state rather than the state's fraught and uneven effort to generate legitimacy for its management of Native identities.

As against Alfred's call for eschewing the framework of "sovereignty," Dale Turner insists that the protection of Native peoples involves making their concerns and representations intelligible within the legal and political structures of the settler-state. In *This Is Not a Peace Pipe*, Turner argues that the political terrain on which Native peoples must move has been mapped by the settler-state and that if they are to gain greater traction for their land claims and assertions of governmental autonomy, they will need to express them in ways that non-native people and institutions can understand. "*As a matter of survival*, Aboriginal intellectuals must engage the non-Aboriginal intellectual landscapes from which their political rights and sovereignty are articulated and put to use in Aboriginal communities" (90). Given that non-native political processes already are active in shaping the terms of Indigenous governance and social life, Native peoples cannot afford simply to ignore them or to insist on the significance of "traditional" knowledge in ways that speak past non-native modes of articulation. Turner suggests that such translation is the work of "the word warrior," whose "most difficult task will be to reconcile indigenous

ways of knowing with the forms of knowledge that define European intellectual traditions" (93). "Survival" for Native polities, from this perspective, is predicated on a kind of communication in which discrepant "ways of knowing" can be bridged. However, to what extent does Turner's notion of "reconcil[ing]" knowledges also present the struggle over sovereignty as a function of cultural dissonance between Indigenous peoples and the settler-state? The central question he poses is "how do we explain our differences and in the process empower ourselves to actually change the state's legal and political practices?" (101), but does transposing Indigenous concepts into non-native terminologies intervene in the logic structuring "the state's legal and political practices"? Does such a conversion challenge the jurisdictional imperative and imaginary driving the settler-state assertion of authority over Native peoples?

The idea of "explain[ing]" Indigenous "differences" acknowledges the imperial force exerted under the sign of sovereignty, but it does not contest the state's monopoly over the legitimate exercise of legitimacy, nor does it prevent those "differences" from being reified, regulated, and subordinated as "culture" in the ways discussed earlier. Alongside the discussion of the necessity for translation by "word warriors," though, Turner also calls for a thorough accounting of the violences of settler-state imperialism. "The project of unpacking and laying bare the meaning and effects of colonialism will open up the physical and intellectual space for Aboriginal voice to participate in the legal and political practices of the state" (30–31). Later, he suggests that Indigenous intellectuals should pursue three goals: "(a) they must take up, deconstruct, and continue to resist colonialism and its effects on indigenous peoples; (b) they must protect and defend indigeneity; and (c) they must engage the legal and political discourses of the state in an effective way" (96). What kind of "participat[ion]" and "engage[ment]" do such strategies yield? Although Turner tends to answer this question by focusing on the possibility of explaining Indigenous intellectual traditions, making them comprehensible to non-natives, the above comments offer another option, namely deconstructing the dynamics of settler-state power—problematizing the ways it seeks to generate legitimacy for itself. He describes such intervention as "understanding . . . how colonialism has been woven into the normative political language that guides contemporary Canadian legal and political

practices" (30), and folding deconstruction back into the elaboration of "differences" between Natives and non-natives, he argues, "indigenous peoples must use the normative language of the dominant culture to ultimately defend world views that are embedded in completely different normative frameworks" (81). Highlighting the horizon of "difference" positions deconstruction as a tool for elaborating the distinction between "normative" systems, but what falls away in this formulation is the violence of demanding that Native polities, regardless of the content or contours of their political systems, be subjected to the superintendence of settler-state regimes due to the brute, unfounded assertion of the former's domesticity with respect to the latter. In other words, the kinds of "normative" claims made by the settler-state are not simply distinct from Indigenous ones but are aporetic, themselves predicated on the (thread)bare insistence that the state maintains an "overriding sovereignty." Instead, by "unpacking and laying bare" the logical and legal emptiness of sovereignty, the "space" opened is precisely that which has been placed in the state of exception, illustrating how Native "peculiar"-ity—and the various statuses derived from it—are less a function of a mistranslation of Indigenous difference than the marker of an enforced structural relation.

As Agamben suggests in *Means Without End*, sovereignty "is the guardian who prevents the undecidable threshold between violence and right . . . from coming to light" (113). Emphasizing the normative crisis over which the topos of sovereignty is stretched does not so much make room for Indigenous principles within Euramerican terminologies and institutions as refuse *en toto* the right claimed by the state to assess and adjudicate Native governance, drawing attention to the state's inability to ground Indian policy in anything but the forced incorporation of Native persons and lands into the nation. Might this deconstructive approach not be open to the same pragmatic critique Turner makes of Alfred, that it fails to appreciate the exigencies faced by Native communities and the consequent need to find a more "effective way" of engaging with settler-state policy? Reacting to a similar question with respect to his discussion of the need to challenge the racist stereotypes embedded in the precedents cited by the U.S. Supreme Court, Robert Williams observes, "the legal history of racism in America teaches us that the most successful minority rights advocates of the twentieth century recognized that the real waste of

time was trying to get a nineteenth-century racist legal doctrine to do a better job of protecting minority rights" (xxxii). While his emphasis on the "metaprinciple of Indian racial inferiority" cannot fully address the geopolitics of settler-state jurisdiction, as discussed earlier, his caution here seems quite relevant in considering the value of directly challenging the process by which the United States legitimizes its management of Indigenous peoples. In the three cases on which I have focused, the assertion of Native autonomy threatens to disrupt the U.S. territorial/jurisdictional imaginary and that potential rupture is contained by the citation of "sovereignty"—a concept whose substance keeps shifting and out of which emerge statuses and classificatory schemes that determine the institutional intelligibility of Native identities and claims. That process of exceptionalization has no check—the "plenary power" or "overriding sovereignty" of the United States is taken to license complete control over Native collectivities, including in what ways and to what extent, if any, they in fact will be recognized as collectivities (never mind as self-determining polities). To leave uncontested the topology of settler-state sovereignty, then, is to allow for Native peoples to remain abandoned to, in Agamben's terms, a "zone of indistinction between . . . outside and inside, violence and law" (64).

Moreover, that "zone" is less a function of a self-confident exercise of power than a sign of the normative tenuousness of U.S. authority. As Clarence Thomas's comments suggest, the creation of a concept like "inherent sovereignty" works to cover while not unsettling the "overriding" and potentially limitless authority exerted by the U.S. government, specifically Congress, in Indian affairs, providing the impression of a legal logic that can guide or legitimize U.S. actions. I am suggesting, however, that it might be possible to occupy the contradiction embedded in a formulation like "inherent sovereignty" in ways that neither endorse the category as (continually re)formulated within U.S. Indian policy, disown it as the imposition of an alien norm, nor translate Indigenous traditions into its terms. Instead, the status can be used as a discursive entry point through which to highlight the groundlessness of U.S. claims to Native land and the impossibility of reconciling Indian policy with the principles of constitutionalism, drawing attention to the difficulty of validating the incorporation of Native peoples into the mapping of the jurisdictional geography of the state

except through recourse to violence. Such a strategy emphasizes the coercive imposition of domesticity on Native peoples who neither sought nor desired it, foregrounding the ways the narration of Indigenous polities as subjects of domestic law depends on a process of exceptionalization in which they axiomatically are consigned to a "peculiar," and thus regulatable, internality that forcibly disavows their autonomy and self-representations.[32]

If such a deconstructive argument were successful, in Turner's terms "open[ing] up the physical and intellectual space for Aboriginal voice," what might the resulting relationship look like? I have been arguing that the United States exerts metapolitical authority over Indigenous peoples, setting the terms of what will constitute politics and inventing statuses through which to interpellate Native polities, but I also have suggested that process is animated by a persistent anxiety about the validity of U.S. rule, the invented categories of Indian law marking an effort to generate legitimacy for national jurisdictional mappings. The disjunction between the supposed fact of Indians' domesticity and their existence as independent political collectivities prior to the formation of the United States appears perhaps most visibly in the negotiation of treaties, and that tension supposedly is allayed by the assent of Native peoples to these documents. Yet, as suggested earlier, the discourse of consent at play in the treaty system is not simply an expression of the free will of Native peoples, instead serving as a way of validating the process of land acquisition those agreements enabled. Moreover, while certainly less unilateral than the declaration of authority over Native populations contained in *Kagama* and *Oliphant*, treaties were not free from U.S. efforts to regulate what would constitute viable forms of political subjectivity, representing Native governance and land tenure in ways that facilitated the project of white expansion. That being said, as the process within U.S. constitutionalism most suited to the recognition of extraconstitutional entities, treaty-making seems the most viable vehicle for a "sovereignty-free" politics. Rather than trying to contain the geopolitical difficulties that Indigenous occupancy generates for the imaginary of the settler-state, treaties can serve as sites of negotiation, not simply over particular concrete issues but the terms of engagement themselves.[33] When no longer subordinated to the assertion of an overriding, underlying, preemptive, or plenary authority, such dialogue could perform the kind

of translation Turner describes between different traditions or frameworks of governance, displacing sovereignty in favor of politics. In *Means Without End*, Agamben suggests, "*Politics is the exhibition of a mediality: it is the act of making a means visible as such*. Politics is the sphere neither of an end in itself nor of a means subordinated to an end" (116–17), and in this vein, treaties freed from the end of securing the obviousness of national territoriality become a "mediality" of negotiation. The forms of recognition emerging from that process would not function as part of a mode of regulation and would not be predicated on casting Native peoples as an exception *within* the sphere of U.S. politics and law.

What I have sought to do, then, is to use Agamben's analysis of the violence of sovereignty in its reliance on the production of a state of exception to suggest the absence of a normative framework for U.S. Indian policy and more broadly for the geopolitics of the settler-state. The coding of Native peoples as "peculiar" within U.S. governance depends on the assertion of a territorially based jurisdiction over them that further licenses the regulation of their entry into the shifting field of national politics, generating various (kinds of) categories that they are called on to occupy. While offering rigorous critique of such statuses, including their racializing premises and inability to engage with traditional philosophies and practices, Indigenous political theory largely has not contested the broader ways violence is transposed into legitimacy through the circulation of the enveloping yet empty sign of "sovereignty." Exposing that transposition, potentially through the countercitation of Native sovereignty (giving deconstructive force to what largely operates as a placeholder within settler-state governance), can work to disrupt the attendant metapolitical matrix through which Native identities are produced and managed. As Justice Thomas suggests, "The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty" (225). Emphasizing that failure and thus the location of Native peoples at the threshold between law and violence, between "ordinary domestic legislation" and imperialism, opens the state of exception to the possibility of self-determination, in which Indigenous polities cease to be axiomatically enfolded within the ideological and institutional structures of the settler-state.

Notes

I would like to thank Colin (Joan) Dayan for initially suggesting that my thoughts on this topic could be an essay.

1. *Cherokee Nation v. Georgia*, 16–18; *U.S. v. Kagama*, 381–82; *Oliphant v. Suquamish*, 208–10. These three cases are central precedents for federal Indian law that continue to be cited within contemporary decisions. In *Cherokee Nation v. Georgia*, the plaintiffs were suing to get an injunction against the operation of a series of laws passed by Georgia annexing Cherokee territory to state counties. The court found that "Indian tribes" are not "foreign nations," but instead are "domestic dependent nations," so they are not one of the entities that can bring a suit to the Supreme Court under its constitutionally regulated original jurisdiction. The case, therefore, was dismissed for want of jurisdiction. *U.S. v. Kagama* concerned the murder of one Indian by two others on the Hoopa Valley Reservation, and the issue at stake was the constitutionality of the Major Crimes Act (1885), which made murder on reservation—as well as several other acts—a federal crime regardless of the race of the perpetrators or victims. The court found that Congress had the authority to limit the jurisdiction of Native governments on Native lands due to the presence of the latter within the boundaries of the U.S. In *Oliphant v. Suquamish*, the issue was whether an Indian tribe, specifically the government of the Port Madison Reservation, had the authority to try non-Indian residents; the court found that tribes do not, due to the limits, both explicit and implied, placed on tribal jurisdiction by Congress as well as the general loss of "inherent jurisdiction" over certain matters of governance due to tribes' supposed "status." For discussion of these cases, see Harring; Norgren; Wilkins; and Williams, *Like a Loaded Weapon*.

2. For commentary on Agamben and examples of the circulation of his work, particularly *Homo Sacer*, see Butler; Calarco and DeCaroli; Enns; Friedberg; Norris; Pease; Rancière; and Rasch.

3. In distinguishing Indian policy from the constitutional principles structuring U.S. law, I am neither suggesting that the latter provides a normative framework toward which Indian policy should aspire nor that dissolving Indian policy into the rest of U.S. law would erase or ease the violence I describe. Rather, I am arguing that the production of a national territoriality for "domestic" law depends on the abandonment of Native polities to a state of exception. Conversely, while many scholars have suggested that violence is endemic to the operation of law, a position theorized perhaps most eloquently in the work of Robert Cover, I am suggesting that such violence is different from the imperial force at play in the domestication of Native peoples in that the latter brackets the Constitution in seeking to produce the supposedly self-evident space of U.S. jurisdiction. In this vein, marking the difference between the state of exception and the ubiquitous gap between legal norm and application, Agamben suggests that in the exception "the lacuna does not concern a deficiency in the text of the legislation that must be completed by the judge; it concerns, rather, a *suspension* of the order that is in force in order to guarantee its existence" (*State of Exception*, 31). For critiques of Agamben that

present what he refers to as "exception" as actually framed by law, see Fitzpatrick; Kiesow; and Laclau. For a different discussion of the problems of invoking the "rule of law" in light of U.S. Indian policy, see Smith, "American Studies without America."

4. In "For Whom Sovereignty Matters," Joanne Barker suggests, "There is no fixed meaning for what *sovereignty* is," that it "is embedded within the specific social relations in which it is invoked and given meaning" (21). While acknowledging the multiplicity of the term's uses, I want to suggest, via Agamben, that there is a regularity to its citation in settler-state governance, particularly U.S. Indian policy, and that the variability of its apparent meanings is part of the topological work it performs.

5. In shifting from discussion of particular U.S. legal decisions to "the settler-state," I am not suggesting that U.S. policy can serve as a stand-in for *all* settler-state regimes, especially given their numerous variations. Rather, I seek to suggest that placing Agamben's argument in dialogue with U.S. Indian policy can generate analysis of how the topos of "sovereignty" works to support a particular settler-state regime, and therefore, it might be useful as a way of approaching other settler-states as well.

6. In *American Indian Sovereignty and the U.S. Supreme Court*, David Wilkins observes, "We see . . . that 'federal Indian law' as a discipline having coherent and interconnected premises is wholly a myth" (2).

7. On "biopolitics," see Foucault. Some scholars writing about Agamben, though, seem to confuse his notion of "bare life" with an actual pre-political, natural state rather than seeing it as a way of designating the biopolitical process by which states employ discourses of nature and the body to various ends. See Connolly; Fitzpatrick; and Laclau.

8. I should clarify that I am not trying to compare the Nazi Final Solution to U.S. Indian policy, but gesturing toward the ways taking the camp as paradigmatic of modern statehood can efface the geopolitics of statehood and thus the dynamics of settler-state imperialism. For such a comparison, which utilizes Agamben, see Friedberg. On the problems that attend trying to put different genocides into dialogue, see Byrd. In discussing the Nazi concentration camp, Agamben acknowledges that it can be traced to earlier Spanish and British tactics in which "a state of emergency linked to a colonial war is extended to an entire civil population" (*Homo Sacer*, 166–67), yet he does not explore how the German program of extermination might arise out of imperial ambitions/projects. For discussion of the ways European nationalities (in terms of space and citizenship) were carved out of broader imperial fields through the employment of shifting discourses of race, see Stoler.

9. On Agamben's tendency to fetishize the relation between individuals and the state and to overlook challenges to the latter by collectives/communities, see Laclau; and Rancière.

10. For prominent examples of these dynamics, see Appadurai; Butler; Gilroy; Hardt and Negri; and Kaplan. For discussion of the problem of space in contemporary theory, see Sparke. The process I am describing can be illustrated by the

tendency, in *Homo Sacer* and the work of many other contemporary scholars, to make the refugee/migrant paradigmatic in critiquing the state-form. In *Homo Sacer*, Agamben argues that the figure of the refugee, the stateless person, "who should have embodied the rights of man par excellence . . . signals instead the concept's radical crisis" since the rights that ostensibly derive from being human "show themselves to lack every protection and reality at the moment in which they can no longer take the form of rights belonging to citizens of a state" (126). Humanitarian efforts predicated on the pre-political status of the human "can only grasp human life in the figure of bare or sacred life and therefore, despite themselves, maintain a secret solidarity with the very powers they ought to fight" (133), reinforcing the very logic of biopolitical exception through which sovereignty is exercised. Supposedly "breaking the continuity between man and citizen, *nativity* and *nationality*," the figure of the refugee serves for Agamben as "a limit concept that radically calls into question the fundamental categories of the nation-state" (131, 134), but can that example of the proliferation of "bare life," of persons denied access to the rights of citizenship and thus made vulnerable to unrestrained state violence, speak to collectivities who have "had their nationality *forcibly changed in their own homeland*" (Trask, 30), who have seen themselves and their lands be subsumed by the state?

11. Congress did so through an amendment to an appropriations bill in 1871, although treaty-like "agreements" continued to be negotiated with Native peoples, but they did not have the same constitutional status as treaties. On the history of U.S. treaty-making, see Prucha; and Williams, *Linking Arms Together*.

12. Assumptions central to the treaty system include the existence of a centralized government with the power to enforce its decisions on the population and a clearly delimited land base separate from that of other peoples, parts of which can be sold as property. For discussion of this process of translation, see Alfred, *Peace, Power, Righteousness*; Cheyfitz; Rifkin; and Saunt. For accounts that emphasize treaties' recognition of Native populations as polities, while underplaying the ways the treaty system seeks to script the meaning/contours of political identity, see Allen; Konkle; and Womack. I should be clear that I am in no way suggesting that existing treaties simply can be dispensed with as charades. Treaties under the Constitution are the "supreme law of the land," and when the government seeks to ignore them by presenting them as merely a historical expediency, it vitiates its own claims to be governed by the rule of law.

13. As Joanne Barker notes, the nation defined by the Constitution "was contingent upon it being recognized as legitimate by other already recognized nations," and Indian treaties emerged as "a mechanism for both the exercise of nationhood and the recognition of national sovereignty," showing other countries that the United States could function as a state (4). Although beyond the limits of this essay, then, the assertion of settler-state jurisdiction also needs to be situated within international formations, which while in many ways still reaffirming the absolute territoriality of states against Indigenous claims, also suggest another

scale at which sovereignty is cited, is circulated, and can be contested. On the production and circulation of notions of "sovereignty" within supra-state formations, see Biersteker and Weber.

14. *Cherokee Nation v. Georgia*, 18.

15. In the phrase elided by my use of ellipses, she also suggests that "sovereignty" is not "a domain that the US is said 'to occupy,'" but I am suggesting that sovereignty appears in the service of constituting just such a "domain"—national space itself.

16. As Steven DeCaroli argues, "when the edges of the sovereign field are made to appear arbitrary, the challenge is directed at the heart of sovereignty itself, and . . . those actions that warrant banishment share the characteristic of having called into question the legitimacy of this boundary" (51). Yet he, like Agamben, treats the "boundary" as a figure for the organizing logic of law rather than as designating its literal spatial field of exercise.

17. For discussion of the various statuses created and managed by U.S. Indian policy, especially the judiciary, see Wilkins; and Wilkins and Lomawaima.

18. The importance of this distinction is suggested by the ongoing struggle of global Indigenous movements to have the phrase "indigenous peoples" rather than "indigenous people" included in international covenants, as well as the continuing effort by settler-states (especially Anglophone) to block that usage. See Anaya; Clech-Lâm; and Niezen.

19. As Agamben argues in his discussion of the dynamics of banishment/abandonment through which bare life is constituted as such, "the state of nature is not a real epoch chronologically prior to the foundation of the City but a principle internal to the City" (*Homo Sacer*, 105).

20. The reference here is to *Brown v. the Board of Education* (1954), which struck down the principle of "separate but equal" that had legalized segregation for over fifty years since the phrase first was propagated by *Plessy v. Ferguson* (1896).

21. It is worth noting that race is not the only biopolitical tactic/mode through which U.S. sovereignty operates. Ideologies of gender also have been and are crucial to the organization and validation of settler-state dominance. For examples of Native feminist work that explores this relation, see Jaimes and Halsey; Kauanui and Smith; Ramirez; Shaw; and Smith, *Conquest*.

22. My understanding of *kapu* primarily comes from discussions of Hawaiian history and culture. For examples, see Kame'eleihiwa; Linnekin; and Sahlins.

23. The dynamic Povinelli describes is perhaps most visibly at play in U.S. Indian policy within the process of attaining federal recognition. See Cramer; Field; Garroutte; Gunter; and McCulloch and Wilkins.

24. The United States has at times adopted policies designed to eliminate the existence of tribes as legally recognized entities, but the government subsequently has changed course as a result of challenges to the legitimacy of such actions by other U.S. officials, Native leaders and intellectuals, and concerned non-native organizations. For an overview of the history of U.S. Indian policy, see Deloria and Lytle.

25. In this vein, Agamben observes that "exceptional measures" are "juridical measures that cannot be understood in legal terms," such that "the state of exception appears as the legal form of what cannot have legal form" (*State of Exception*, 1).

26. Finding that tribes have the power to prosecute non-member Indians, the case turned on whether such authority is one that tribes hold by themselves or one delegated to them by the federal government.

27. While Thomas ultimately is trying to argue that Native peoples are merely subjects of U.S. law and not distinct sovereigns, the trajectory of his logic heads in the opposite direction. He observes that "tribes . . . are not part of this constitutional order, and their sovereignty is not guaranteed by it," and if Native polities are extra-constitutional entities, their authority over themselves and their lands cannot be defined or circumscribed by reference to constitutionally licensed principles and institutions. Extra-constitutional entities cannot simply become objects of regular constitutional power ("ordinary domestic legislation") by congressional will, otherwise the Constitution is reduced to simply the unrestricted/unrestrictable operation of governmental fiat. On the "extraconstitutional status of tribal nations," see Wilkins.

28. Both of the scholars addressed below, Taiaiake Alfred and Dale Turner, are addressing Native relations with the Canadian state rather than the United States. However, they offer versions of arguments also made by those focused on U.S. policy, many referencing Alfred in particular, and engaging with their work helps frame the issues I consider as relevant beyond the U.S. context while also contextualizing the United States as a settler-state.

29. For a more extensive elaboration of Alfred's critique of the concept of "sovereignty," see *Peace, Power, Righteousness*.

30. My argument focuses on the confrontation/negotiation between Native polities and the settler-state, rather than on the processes of self-definition and self-determination within the former, and it is from this perspective that I approach Alfred's work. On the everyday negotiation of Native political identities, particularly nationalism, see Simpson. On the ways the relationship between U.S. and Native governments is gendered, see Smith, *Conquest*.

31. See Field; Garroutte; Gunter; Ivison, Patton, and Sanders; Niezen; Povinelli; and Raibmon.

32. In many ways, such a strategy already is at play in Indigenous internationalism, particularly the movement to have Indigenous self-determination recognized as a fundamental right by international institutions like the United Nations. See Anaya; Clech-Lâm; Niezen; Trask; and Williams, *Like a Loaded Weapon*, 170–95.

33. David Wilkins offers a similar formulation, calling for the repudiation of the "plenary power" doctrine and the reaffirmation of a policy predicated on Native consent (309). His argument, though, underplays the metapolitical power exerted over the terms of "consent" through the citation of "sovereignty," whether expressed specifically as plenary power or not.

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