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Indigenous Sovereignty, Common Law, and Natural Law

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Abstract: *Renewed calls for Indigenous sovereignty in North America have led some scholars to search Western philosophy for thinking that affirms these claims. Many suggest that the common law tradition offers resources to do so. In this article, I argue that common law is limited in its capacity to endorse Indigenous political legitimacy. Instead, I suggest that supportive elements in common law are trace remnants of natural law thinking. Further, natural law as a concept resonates with contemporary Indigenous philosophy that maintains that nonhuman nature is suffused with morality and normativity, making the natural law tradition worth considering for defenses of Indigenous sovereignty. I propose beginning with the work of Bartolomé de las Casas. While my aim is not to defend either Lascasian nor Indigenous natural law, I conclude that they should be part of efforts to understand the ongoing conflicts between Indigenous nations and colonial states.*

In recent years in North America, Indigenous peoples, leaders, and scholars have renewed their calls for nation-to-nation relations with the Canadian and American states, claims that have made their way to the highest courts in both places.[1] These voices insist that Indigenous nations should be considered *nations* with inherent sovereignty—not wards, generic ethnic minorities, or other subcategories of citizens alongside others (Wilkins and Stark 2017, 55; Wilkins 1997, 19). Many argue that overt colonial violence has been replaced by a "post-modern imperialism" (Alfred 2005, 58), since the very assumption of American and Canadian sovereignty over territory eliminates Indigenous authority, maintaining the subordinate status of Indigenous peoples (Alfred 2005, 39; Borrows 1997; A. Champagne 2006; Mills 2017; Stark 2017; Tully 1995). By contrast, Indigenous thinkers insist that Native nations remain legitimate, independent of any state recognition (Harring 2002, 456).

Yet because nonindigenous ideas dominate the philosophic, political, and legal spheres, Indigenous and nonindigenous thinkers alike have tried to find some support in non-Native philosophy and legal traditions to claims of Indigenous sovereignty. Many such thinkers argue that the common law tradition has the resources to recognize Indigenous claims.[2] Looking to documents and agreements—including the 1763 Royal Proclamation, the Treaty of Niagara, and US Supreme Court decisions penned by Chief Justice John Marshall—scholars suggest that common law can affirm contemporary Indigenous sovereignty (Borrows 1997; McSloy 1992; Russell 2000; Tully 1994).

In this article, I argue that these accounts are half right. They are correct that Western legal traditions have the capacity to affirm Indigenous sovereignty. But their emphasis on searching for these capacities in the common law tradition is unsatisfying because the main methodology of common law (*stare decisis* or precedent) counteracts their efforts: there are indeed common laws on the books in the United States and Canada that appear supportive of Indigenous claims, but there are also many more that are not (Wilkins 1997). Further, while supportive cases and principles of common law may endorse Indigenous *title* to land under the Canadian or American

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[1] Key cases include *Tsilthqot'in Nation v. British Columbia* in Canada, and *McGirt v. Oklahoma* in the United States.

[2] In this article *common law* refers to the body of law created by court decisions, based on the principle of precedent or *stare decisis.* The article does not take up the matter of contemporary international law.

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states, it is far less clear that this resembles anything close to Indigenous *sovereignty*.

This article has one main claim: that a close look at these common laws reveals either underwhelming support of Indigenous sovereignty or a hidden role of natural rights and natural law—a fact made more significant given that natural law is an important concept in contemporary Indigenous thought, including understandings of sovereignty.[3] This article proceeds in four parts. First, it briefly describes accounts of Indigenous sovereignty and its connection to Indigenous natural law. Second, it shows why scholars argue that received notions of property and Westphalian sovereignty erase Indigenous claims. Next, it assesses efforts to find support for Indigenous sovereignty in the common law tradition, arguing that the most supportive decision in fact appears to be based on natural law thinking. The article concludes with a section suggesting that defenders of Indigenous sovereignty might consider looking to the Western natural law tradition, beginning with the work of Bartolomé de las Casas.

Looking to Las Casas is meant to open a discussion, not conclude an argument. The aim of this article is not to endorse either Lascasian or Indigenous natural law defenses of Indigenous sovereignty, but to show that these similarities are worth considering as we face what Kahnawake political theorist Taiaiake Alfred called a "stalemate" of reconciliation between states and Indigenous peoples (Alfred 2005, 265). Even sympathetic national courts have continually failed to recognize Indigenous sovereignty in the way that Indigenous peoples desire (A. Mills 2017; Borrows 1999; J. B. D. Nichols 2020; Tsilthqot'in Nation v. British Columbia 2014). This article offers some suggestion as to why this is and to how scholars might alternatively see overlap between Indigenous claims and Western political and legal philosophy.

Native American Sovereignty and Indigenous Natural Law

Speaking of "Indigenous" understandings of land and sovereignty in North America brings a risk of flattening the differences among Indigenous nations and peoples into a single pan-Indigenous perspective (Allard-Tremblay 2019, 1). There are many different Indigenous accounts of these concepts. Yet there are numerous Indigenous thinkers who maintain that Native peoples differ less "in the principles that underlie their philosophical beliefs" (Pierotti 2011, 5; cf. Cordova 2007, 3; Little Bear 2000, 77). The account here is tentative, not definitive, and intended to broadly demonstrate the way in which Indigenous sovereignty reflects traditional Indigenous ideas and diverges from modern state sovereignty.

Indeed, Indigenous accounts of national sovereignty differ sharply from the conventional Westphalian definition of the term, arguably occupying a "third space" (Bruyneel 2007). The clearest modern statement of Westphalianism, stressing exclusive jurisdiction over a territory of fixed boundaries, comes from the 1945 United Nations Charter, which reads that nothing in the charter authorizes intervention in matters that are "essentially within the domestic jurisdiction of any state" (UN Charter, Chapter I, Article 2). Indigenous understandings generally do not accept such structures (Stark 2012, 123). Political obligations are not necessarily strictly hierarchical as in the Westphalian context, wherein the state is the supreme authority (Borrows 2010, 249). Indigenous accounts typically suggest that authority is overlapping among bands, clans, and nations, with no overarching state as the ultimate source of order. For this reason, Taiaiake Alfred has argued that "sovereignty" in the Western sense is "inappropriate as a political objective for Indigenous peoples" (Alfred 2002, 464).

Yet he insists that Indigenous nations remain sites of undelegated authority, describing an Indigenous alternative—"Indigenous self-determination," or "Native sovereignty" (465), which Anishnaabe law professor Aaron Mills calls an instance of Indigenous peoples "stipulating alternative meanings for established concepts" (A. Mills 2019, 222). To Alfred, Vine Deloria Jr., Glen Coulthard, and others, Indigenous sovereignty—while varied across North America—is sufficiently cohesive to speak of in a meaningful way. It is foremost important that Indigenous sovereignty does not reside in an abstract government or crown but in a nation, and for this reason Indigenous thinkers seem to use the concepts of "nationhood" and "sovereignty" interchangeably (Alfred 1995, 14–15; Coulthard 2014, 64). Clearly, they are using the term "nation" to refer to a group of people, though Indigenous nations often cannot be easily labelled as groups, as they tend to be described as overlapping cultural, familiar, and religious relations (Alfred 1999, 49, 56; Stark 2012, 122). While "sovereignty" involves territory, nationhood and sovereignty are connected in Indigenous thinking because Indigenous nations are nations in part because of relationships *with* land,

[3] In this article, *natural law* means the idea that nature itself is suffused with a moral order that in some way transcends historical particularities and is (at least to some degree) accessible to humans. N*atural rights* means the idea that this natural law indicates that specific (usually human) subjects have certain capacities and obligations.

relationships inextricable from sovereignty. Patricia Monture-Angus, for instance, explains that Indigenous sovereignty is about "responsibility" and "relationship with" territory and its human and nonhuman inhabitants (Monture-Angus 1999, 35). In Deloria Jr.'s words, it hinges upon cultural identity and practices with nonhuman nature, so as long "as the cultural identity of Indians remains intact no specific political act undertaken by the United States can permanently extinguish Indian peoples as sovereign entities" (Deloria Jr. 1996, 111).

This leads to the third key element of Indigenous sovereignty: acting responsibly over a territory. Alfred and others resist the term "sovereignty" by itself because of its associations with power and ownership over land in a Western sense. Yet just because Indigenous sovereignty avoids the hierarchy or ideas of property as in Westphalianism, it does not mean it is anarchic. Exercising Indigenous sovereignty means acting in a responsible way with the other beings in a territory and includes the duty to prevent irresponsible behavior on and with a territory (Simpson 2017, 24). While Westphalian sovereignty is a legal concept that applies regardless of conduct (unless a state's acts lead to its death), the legitimacy of Indigenous sovereignty depends on how it is used (Stark 2017, 265). And Indigenous understandings of good conduct typically revolve around an account of the community. Living well involves some orientation towards the community, "a living, spiritual entity supported by every responsible" member (Cajete 2000, 276). This does not mean that individual freedom is not valued in Indigenous thought but that the exercise of it must be "consistent with the preservation of relationships and community harmony" (Cordova 2007, 146; Coulthard 2014, 148; Sinclair 1994, 25). Indigenous sovereignty, then, requires a community and members acting for the good of the community.

One example that helps illustrate these ideas in practice is the Cherokee Nation. In the Cherokee language, the term "osdv iyunvnehi" is typically translated into English as "welfare," but its meaning is far more capacious than this (Reed 2016, 5). According to Cherokee historian Julie Reed, it is "more adequately defined as the continual act of perpetuating positive well-being for the community" (5), a concept that clearly appears in contemporary articulations of Cherokee Nation sovereignty by leaders such as Principal Chief Chuck Hoskin Jr. (Polansky 2021). Hoskin insists that the Cherokee Nation seeks "complete sovereignty." But he does not describe this in terms of Cherokee becoming a Westphalian state; rather, Hoskin speaks of a holistic sovereignty comprised of arrangements that contribute to the flourishing of the Cherokee Nation, an excellent political manifestation of what Indigenous scholars write.

Finally, continuity between human life and nonhuman nature is a key element of Indigenous thinking on sovereignty. In Alfred's words, "In most traditional Indigenous conceptions, nature and the natural order are the basic referents for thinking about power, justice, and social relations" (Alfred 2002, 470). This continuity is frequently manifested in Indigenous thinkers using the term "natural law," meaning that humans can find legal and moral guidance from nonhuman nature, including matters of sovereign relations. In using the term, Indigenous thinkers do not mean to copy Western natural law theories but to argue that their philosophies are grounded on the idea that nature is normative and offers moral guidance (Fixico 2003, 13; Gilbert 2019; Kawagley 1995, 17; A. Mills 2019; Stark 2017). Anishnaabe scholar John Borrows has provided the most detailed account of Indigenous natural law. In Borrows's telling, Indigenous natural law begins with the premise that nonhuman nature is infused with meaning from which moral, political, and legal guidance may be derived. "This approach to legal interpretation," he explains, "attempts to develop rules for regulation and conflict resolution from a study of the world's behavior. Law in this vein can be seen to flow from the consequences of creation or the 'natural' world or environment" (Borrows 2010, 28). This does not mean that natural law provides such strict rules that all other law is sidelined, and Borrows demonstrates how Indigenous legal traditions also have deliberative law, positive law, and customary law (35–58). But natural law, insofar as it is present in and with nonhuman nature, at its root transcends the deliberations or decisions that comprise deliberative, positive, and customary law of human society: "no tribunal on earth can change the natural law" (Lyons 1985, 19).

To take one example, Lakota activist Marcella Gilbert suggests that the Dakota Access Pipeline in North Dakota violates "natural law," including the sovereignty of her people and their responsibility to their land. She and her people have a legal and moral obligation to resist its presence (Gilbert 2019). The fact that the pipeline may have been legal in terms of positive or customary law cannot change its violation of natural law. Similarly, Aaron Mills quotes Anishnaabe Elder Harry Bone in outlining the "non-alienability of our lands." As Mills explains, "arguments for the moral priority of indigenous constitutional orders rests upon the claim that we're the ones intended to be here" (A. Mills 2019, 203). The idea appears to be that Indigenous sovereignty—responsibility *with* the land—is an inalienable element of Indigenous natural law and that by maintaining their presence on, and relationship with, land and nonhuman nature, Indigenous nations are working towards a kind of

natural justice that cannot be overruled by "any tribunal on earth."

This summary has focused on Indigenous accounts of political sovereignty over (or more aptly put, *with*) land, and its relation to Indigenous natural law; however, this summary largely applies to personal property too. Personal property ownership is of course present to some degree in Indigenous communities and thinking, but this property, especially in land, is generally far from the Western "fee simple" concept (Manuel 2015, 31). Land is typically not seen as a commodity to be bought and sold on the open market by individuals or corporations; land is not really "owned" but rather lived on and with (LaDuke 1999, 157). This account of property and sovereignty is important, as this article will now show, because of the ways in which it diverges from dominant Western understandings.

Westphalian Sovereignty's Erasure of Indigenous Sovereignty

Scholars attribute Indigenous peoples' failures to regain sovereignty in part to the enduring power and influence of early modern legal and philosophic concepts and their continuing salience (Arneil 1992; Temin 2017; Tully 1993). In the words of James Tully, dominant legal notions of property and sovereignty "misrecognize" Indigenous notions of both (Tully 1993, 138; 1994, 155). In this historical explanation, early modern European theorists, such as Hugo Grotius and John Locke, articulated a legal account of property that made Indigenous property impossible (Arneil 1992; Tully 1993).[4] This definition of property denies that established occupancy is sufficient to claim ownership. For Locke, ownership requires work—and specifically cultivation or *improvement* of the land's productivity (Locke 2016, II. §37, 41, 42, 43, 45, 48). Cultivation is the "standard of industrious and rational use, in contrast to the 'waste' and lack of cultivation in Amerindian hunting and gathering" (Tully 1993, 156).

Since Indigenous peoples supposedly did not cultivate the land, Locke's theory eliminates any property claims they made, making their land terra nullius. Locke defines "industrious use" so tightly to European understandings of farming that even agricultural Indigenous nations are deemed to be using the land inefficiently. The outcome of this theory is that Indigenous property only existed insofar as it could be seized by colonists (R. Nichols 2020). Since uncultivated land did not constitute Indigenous peoples' genuine property, it could become European property through European occupation and cultivation. And since there is a natural right to property, the European occupiers of that land had the right to establish political communities that protected their property rights against Indigenous claims (Lantigua 2020, 244). These political communities, originating in the dispossession of Indigenous title in favor of "genuine" property, thus achieve state sovereignty, completing the connection between property and sovereignty (Locke 2016, II.7). And perhaps more significantly, Indigenous political communities were not considered genuine political communities at all because they did not protect private property (Henderson 2000, 25).

While liberal developments in recent decades may have made Canadian and American politics more outwardly interested in justice for Indigenous peoples, critics argue that both states retain an understanding of private property that erases Indigenous land claims (Tully 1994). This "modern constitutionalism," as Tully calls it, excludes forms of property that do not flow from the crown or constitution, extinguishing traditional Indigenous understanding (A. Mills 2017, 222). Thus, even if Indigenous people or nations legally have property or land, they can only have it under the laws of the Westphalian state, not their own traditional understandings. The sovereignty of Canada and the United States appears as an "undoubtable assumption" (J. B. D. Nichols 2020, 11).

Common Law Resources

Despite this bleak picture of the dominance of Lockean property and Westphalian sovereignty in the United States and Canada, scholars have argued that the common law tradition has some resources to affirm Indigenous claims. In Canada, this is taken to outline a "treaty federalist" approach to the relationship between Canada and Indigenous nations (Borrows 1997; McNeil 1989; McSloy 1992; Russell 2000; Tully 1994; Walters 2017). Kent McNeil looks to the entire body of common law, and others focus on three main resources: the 1763 Royal Proclamation, the 1764 Treaty of Niagara, and the US Supreme Court decision in *Worcester v. Georgia.* This article argues that the aforementioned proclamation and the Treaty of Niagara offer minimal support for Indigenous sovereignty. And while *Worcester* does contain a more robust defense, this support comes from the

[4]This article does not engage in debates over the accuracy of Arneil's and Tully's accounts of Locke and other early modern thinkers.

tradition of natural law and natural rights, not conventional common law. Since there is a tremendous amount of case law on Indigenous property and sovereignty that *does not* affirm Indigenous property and sovereignty, the main significance of *Worcester* is not simply that it exists as part of the common law record, as its mere existence is indeterminate in the face of substantial contradictory cases. Rather, its significance is that it reveals philosophic resources within the Western tradition that made the decision possible.

The Royal Proclamation and the Treaty of Niagara

The first common law source offering some support for Indigenous property and sovereignty is the Royal Proclamation of 1763 and the accompanying Treaty of Niagara. Released in the name of Britain's King George III, the proclamation came after the Seven Years War, as a large group of Indigenous peoples waged war over their treatment in the conflict's concluding treaty (Calloway 2006). At the time, British interests mainly resided in commerce with the coast, not settlement of the interior, and funding the military forces necessary to defend settlers was expensive and resource-intensive (93). The proclamation addressed this problem by drawing a line on the map—the Appalachian Mountains—beyond which was "Indian Territory" not to be settled by Europeans. The relevant section reads:

> 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. (Royal Proclamation of 1763)

Tully claims this passage instantiates into law a recognition of the "coexistence and equality of Aboriginal forms of property and government," since the proclamation is still a valid legal document in Canada (Tully 1994, 174).

Differing slightly from Tully, Anishnaabe jurist John Borrows argues the proclamation's full significance cannot be seen in the text itself and must be understood in tandem with the 1764 Treaty of Niagara (Borrows 1997, 156). A year after the proclamation was issued, British agents met with 2,000 representatives of 24 nations, from Nova Scotia to Mississippi, at Niagara (Calloway 2006, 97). Indigenous nations demonstrated their understanding of the proclamation with a "two-row wampum" belt, a visual representation of two ships—British and Indigenous—travelling down a river on parallel paths, neither interfering with the other (Borrows 1997, 163). To Borrows and many Indigenous thinkers who follow his argument the *Treaty* is evidence the British bound themselves to recognize the independence of Indigenous self-government. Further, the fact that Indigenous nations relied on the treaty to assert their independence from British rule for decades after the 1760s indicates how the arrangement was understood at the time (165). "The supposed 'increasing weight' of colonial history and its disregard for the Treaty of Niagara does not render void the Aboriginal rights under its protection," concludes Borrows (168).

Worcester v. Georgia

The second key part of the North American common law tradition used to support Indigenous property and sovereignty is C. J. Marshall's 1832 decision *Worcester v. Georgia* (Russell 2000; McSloy 1992; Norgren 1988). Though no Native nation or individual was directly involved, the case considered whether American states or Indigenous nations regulated who could enter Indigenous territory. In his decision, Marshall clearly found that Indigenous nations did have some legitimate sovereignty. The decision dismissed the idea that colonists acquired complete sovereignty over Native lands via the doctrine of discovery. In Worcester, Marshall expanded his position from his decision in 1831's Cherokee Nation v. Georgia, where he had deemed Indigenous nations "domestic dependent nations," with internal sovereignty, sovereignty diminished only insofar as they could not make military alliances with foreign states and were required to allow road and water travel on their lands (Norgren 1988). Tully describes the royal proclamation and *Worcester* as explicitly stating in common law the principle of *quod omnes tangit* (QOT) or "what touches all must be agreed to by all," which he calls the "oldest principle of Western law" (Tully 1994, 172). He suggests that *Worcester,* like the proclamation, reflects the common law principles of "equality, political and cultural continuity … shared by Western and Aboriginal traditions, even though … they have not always been adhered to in Western theory" (174). Since the findings of *Worcester* were ignored by Georgia and President Andrew Jackson, what proponents of *Worcester* see is not an ideal era but established precedent for affirming Indigenous sovereignty as well as a reminder to nonindigenous political and juridical bodies to take past obligations seriously.

Complicating the Proclamation and Worcester

While not dismissing these accounts of the proclamation and *Worcester* as wrong or irrelevant, they put too much hope in common law as the instrument that offers support for Indigenous *sovereignty*. At best, it seems the common law tradition offers support for Indigenous *property* within and under the sovereignty of the Canadian and American states.

First, there is the problem of interpretative method. Borrows argues that the "increasing weight" of decisions ignoring the Indigenous sovereignty recognized in the royal proclamation do not invalidate the original rights under its protection. But what method of interpreting common law is required to arrive at this conclusion? It cannot be *stare decisis,* the most fundamental principle of common law, since *stare decisis* would seem to support the most recent precedents, which as Borrows concedes tend not to recognize Indigenous self-governance. If contemporary cases are to be decided on documents from 1763 to 1764 or 1832, judges must have some reason to privilege these over more recent case law. Borrows suggests this could be achieved by borrowing from contract law, where evidence of custom among both parties can be admitted to the original contract (Borrows 1997, 170). Borrows is convincing in his case that Indigenous nations understood—and continue to understand—the proclamation and Treaty of Niagara to recognize their sovereignty, but he is not convincing that this was the general understanding of the British.

While some British figures may have seen the Appalachian boundary as permanent, on balance it is clear colonial authorities considered the boundary temporary and European settlement would gradually move west, if at a slower pace (Calloway 2006, 96). There is a reason the proclamation explicitly says the boundary exists "until our further pleasure be known," with the "our" meaning the crown and not Native peoples (Royal Proclamation of 1763). Henry Ellis, likely the proclamation's author, wrote in a memorandum that Europeans "should not *at present* be permitted to settle" beyond that line on the map (R. A. Williams 1990, 234; emphasis mine). Lumbee legal scholar Robert Williams also stresses that the colonists understood the proclamation to be a part of the British Empire's strategy for managing hostilities with Indigenous peoples, not a genuine recognition of their sovereignty. And while it is certainly true that Indigenous peoples saw the proclamation and Treaty of Niagara very differently, convention and contract law would seem to be insufficient to make these documents mean today what Indigenous people have always taken them to mean.

Second, these appeals to common law for Indigenous sovereignty fail to adequately reckon with the jurisdictional limits of decisions in case law. These limits were put most eloquently by Marshall himself in *Johnson v. M'Intosh,* an earlier case regarding Native sovereignty. In considering the legitimacy of American claims, Marshall wrote that "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted" (Johnson v. M'Intosh 1823). This is his commentary on discovery, which purported to give colonial powers sovereignty over the Americas. The boundaries of the court, Marshall asserted, are such that it cannot rule discovery illegal because the very jurisdiction of the court would be invalidated. As Marshall wrote, if the claim in question "be indispensable to that system under which the country has been settled … it … certainly cannot be rejected by courts of justice" (Johnson v. M'Intosh 1823). Here, Marshall set out the limits of case law decisions. If the Supreme Court ruled that discovery did not apply, based on case law, and that American sovereignty were illegitimate and Indigenous sovereignty remained, the court would be undermining the very grounds on which it had the authority to make decisions in its jurisdiction. It would be the legal equivalent of jumping over its own shadow.

Marshall's reasoning is implicitly present in more recent judicial decisions. In Australia's common law, the high court ruled in 1992 that "the acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled, or interfered with by the courts of that state" (Mabo v. Queensland 1992; cf. Manuel 2015, 168). When in 2014 Canada's supreme court denied that discovery had ever applied to Canada, it failed to say *how* Canada had become sovereign, a fact which understandably frustrates Indigenous observers (Tsilthqot'in Nation v. British Columbia 2014; A. Mills 2017, 223). The court has made the situation even more confusing by insisting that crown sovereignty was not acquired by an act of state (Christie 2003, 88). Yet courts' continued assertion of state sovereignty suggests the same conclusion as *Johnson* and *Mabo*: national courts cannot make decisions regarding the sovereignty of their state based on case law because it is from this sovereignty that their authority to make rulings flows.

Kent McNeil similarly concedes that, for common law, the crown achieved or acquired sovereignty over *territory* (McNeil 1989, 299). The crown can simply ignore Indigenous claims to sovereignty, and common law is silent on this. According to Robert Williams, even dating

back to Edward Coke's systematic account of it in 1600, common law has presumed the crown's absolute prerogative powers in "infidel territory" (Williams 1990, 200). Common law can offer Indigenous peoples recognition of their title to *property*, but this is crucially different to *territory*. In McNeil's telling, common law decrees that Indigenous nations have fee simple ownership of their lands, provided they meet certain occupation criteria (McNeil 1989, 199); however, fee simple ownership is precisely what many Indigenous peoples, activists, and scholars insist that they *do not* want (Manuel 2015, 31; cf. Coulthard 2014, 95).

The argument here is consistent with implicit recognition by scholars and justices working within common law that precedent *tout court* is insufficient when ruling on Indigenous claims. In his recent book, McNeil details how "more knowledge of Indigenous societies" has helped to "dispel prejudiced assumptions and led to an understanding of Aboriginal title more in keeping with the common law and with Indigenous relationships with the land" (McNeil 2019, 7).[5] In short, *stare decisis* does not shackle courts on Indigenous claims.[6] McNeil's point, certainly true in Canada, is that justices have allowed updated and more accurate facts about Indigenous nations' historical use of territory to justify greater legal recognition of Indigenous title. Courts are recognizing new forms of land title that are far from fee simple, such as in *Tsilhqot'in* where it was ruled that Indigenous title holders are owed "meaningful consultation." But while my argument about the limits of *stare decisis* is consistent with McNeil's thesis about how courts have amended their approach; the question remains as to whether even "flawed precedent" common law based on past factual failures could ever recognize Indigenous sovereignty in the manner Indigenous nations claim. After all, McNeil clearly describes his focus on Indigenous title not sovereignty, and his close analysis of *Tsilhqot'in* and other recent cases never suggests that common law could fundamentally challenge the crown's assertion of sovereignty in the way Indigenous scholars do (McNeil 2019, 182–85).

Natural Law

Does this conclusion mean that courts cannot accept Indigenous sovereignty against American or Canadian claims? No. It simply means that Indigenous sovereignty probably cannot be based on common law and *stare decisis*. How, then, is it possible to have any trace endorsement of Indigenous sovereignty in common law decisions? Taking *Worcester* as primary, since all agree it is the most explicit legal acknowledgement of Indigenous sovereignty in North American law, this article argues that John Marshall's recognition of Indigenous sovereignty stems from understandings of *natural law*.

While *Johnson v. M'Intosh* is not typically held up as Marshall's defense of Indigenous nations (d'Errico 2000), in a subtle way it lays the groundwork for his decision in *Worcester* a decade later. As noted earlier, in *Johnson* Marshall denied that a national court can, using national laws, question the "system under which the country was settled"—the system being discovery. Yet Marshall simultaneously hinted that case law may not be sufficient to establish justice. Immediately before suggesting discovery could "certainly not be rejected," he allowed that the effects of American assertions of sovereignty "may be opposed to *natural right*" (Johnson v. M'Intosh 1823; emphasis mine). In *Johnson,* Marshall indeed bowed to American legal supremacy by denying Indigenous sovereignty, limiting Native rights to mere occupancy. But in conceding that his decision may be contrary to natural right, Marshall made it possible to defend Indigenous sovereignty regardless of American claims to legal supremacy.

In *Worcester,* this is precisely what Marshall did. While Locke, Grotius, and other natural rights theorists use the criterion of cultivation or improvement to judge whether individuals' natural right to property applies, Marshall did no such thing: for him, land can apparently be held communally by nations. According to Marshall, "the Indian nations" were "distinct, independent political communities, retaining their original *natural* rights as the undisputed possessors of the soil, from time immemorial." Since the term "nation" means "a people distinct from others," Indigenous peoples are indeed nations. "We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense" (Worcester v. Georgia 1832; emphasis mine). Marshall decreed that Indigenous

[5]Such a recognition is made by J. Hill in *Calder,* C. J. Dickson in *Simon,* and J. Brennan in *Mabo.*

[6]In a more general and theoretical way, David Dyzenhaus made a similar argument. As I understand him, Dyzenhaus follows Hermann Heller in aiming to identify natural, "super-positive" (in Heller's terms) principles that are immanent to legal orders without necessarily delving into the status of these principles vis-à-vis the transcendent and that the use of these principles prevents law from being shackled to *stare decisis*. While he is far from a traditional natural law theorist, he describes his project as a kind of natural law, suggesting a necessity of some consideration of natural law in common law systems: "The natural law position of the kind I develop here holds that there is a moral order immanent in the law as we find it, in social facts about the law as it is, and this moral order responds to the problem of extremely unjust laws" (Dyzenhaus 2022, 23).

tribes are "domestic dependent nations" because of the current state of the relationship between them and the United States, closely following the dissent of J. Thompson in 1831's *Cherokee Nation v. Georgia*. Marshall's majority decision in *Cherokee* essentially affirms his decision in *Johnson*. Thompson, however, insisted in his dissent that the Cherokee Nation remains sovereign, and its rights are "*naturally* the same as those of any other state" (Cherokee Nation v. Georgia 1831; emphasis mine).

Like any common law decision, Marshall places *Worcester* squarely within a history of Indigenous–American relations, suggesting there is nothing radical about his reasoning. While it is true that Marshall echoed some Anglo–American voices in recognizing Indigenous sovereignty, he also intended to drown out many others who insisted the opposite. McNeil rightly accuses Marshall of ignoring "common law principles and constructing a vague theory of Indian title on the basis of premises coming from his understanding of international law," by which Marshall means the natural law and natural rights of nations (McNeil 1989, 301).[7] By appealing to a "natural right" at odds with Locke, Grotius, and others whose accounts had dominated common law, Marshall attempted a partial overthrow of the colonial legal tradition in North America—including his own decision in *M'Intosh*. He did this by appealing to Native nations' *natural* rights, subjective rights derived from natural law that receive their authority independent of and superior to conventional or positive law. Though Marshall provided no lengthy theory of natural law, we can infer from *Worcester* that, for him, (a) nations have sovereignty over territory insofar as nations are "a people distinct from others" and (b) they exist irrespective of whether nations use their territory in manners deemed productive by Europeans.

This section argued that efforts to find support for Indigenous sovereignty in the Western common law tradition are underwhelming. While Indigenous peoples may indeed understand the proclamation and the Treaty of Niagara to be legal agreements granting them self-governance, it is unclear as a matter of common law that their interpretation is tenable. Moreover, common law itself appears constrained by its existence in relying upon the case law of states whose very jurisdiction requires denying Indigenous sovereignty. And while John Marshall's decision in *Worcester* is perhaps the strongest defense of Indigenous sovereignty in North American case law, his reasoning for it seems not *common* at all but rather an understanding of what is right by *nature*. As previously mentioned in this article, natural law and natural sovereignty are active concepts in contemporary Indigenous thought. Given this, this article concludes by suggesting that supporters of Indigenous sovereignty might consider looking to the Western natural law tradition.

Natural Law and Indigenous Sovereignty

Aside from *Worcester,* the suggestion that defenders of Indigenous sovereignty might look to the Western natural law tradition for support may sound odd.[8] After all, natural law justifications have often served to dispossess Indigenous peoples (C. Mills 2014, 22—23). Why should proponents of Indigenous sovereignty consider Western natural law? And where could they even look? This article has already indicated three reasons: common law decisions appear no closer to recognizing Indigenous sovereignty, the *Worcester* decision's natural law roots, and the presence of natural law thinking in Indigenous work. As for where to begin looking, this article considers the work of Bartolomé de las Casas. Though he has received considerable attention in the Latin American and international relations literature, Las Casas has been rarely considered in the North American context.

Las Casas initially arrived in America in the early 1500s as a colonist and was involved in the exploitation of Native peoples, but his life was radically altered by witnessing Spanish violence and the Dominican friars' preaching (Las Casas 2020, 52—53). His natural law political theory can be simplified into three key points. First, political sovereignty inheres in peoples regardless of their relationship to European customs and tradition. While later English colonists asserted dominion by standards of cultivation, Spanish colonists did so by arguing that the Native peoples were non-Christian infidels. Las Casas denied this: "the ownership of things … applies to all human beings in the world with no exclusion of believers or unbelievers," (Las Casas 2020, 100). "Liberty is an innate right of all human beings … from the law of nature" (95). This means that Spanish claims to overrule Indigenous political organizations by discovery were "violent,

[7]McNeil and Burke Hendrix both allow that there are grounds in natural law for a defense of Indigenous title, but do not take up the issue (McNeil 1989, 205; Hendrix 2008, 10).

[8]Though there are numerous examples of peoples resisting oppression on the basis of natural law, including the Satyagraha tradition most associated with Mahatma Gandhi, and the tradition of Black natural law most famously articulated by Martin Luther King, Jr. (Lloyd 2016; Shiva 2021).

unjust, perverse, null and void according to the natural law" (61).

Second is Las Casas' insistence that, by natural law, governments require consent to rule legitimately. He wrote "originally, all authority, power, and jurisdiction of king and rulers came from a free people itself" (96). Since Spanish colonists never even attempted to acquire Indigenous consent, much less receive it, their rule over the New World doubly violated natural law. To that end, it was actually Las Casas who introduced the concept of QOT into political relations. While Tully places QOT in the common law tradition, calling it the oldest principle of Roman law, its meaning prior to Las Casas was different to what Tully suggests. In Roman law, QOT applied to the private domain and agreements among co-owners. In the Middle Ages, canon lawyers used it to justify representation of the laity in the church. But it was Las Casas who "found a new use for" QOT to demonstrate the invalidity of Spanish violations of natural law (Bunsen 2014, 808–9; Pennington, Jr. 1970, 158; Tierney 1997, 284). This new use applied the concept to political communities. So while Las Casas did not invent QOT, he altered it considerably for his understanding of natural law, as he "concluded that, since the Indians were free, they were granted a power and faculty of consenting by natural law" (Tierney 1997, 285). That European powers needed to get the consent of the Indigenous peoples to exercise authority over them was not a principle of established common law but a new Lascasian interpretation equally based in natural law. Tully claims that it is a "basic principle of Western law that the exercise of sovereignty must be based on the consent of those affected by it," by which he no doubt means QOT (Tully 2008, 1:279). But he does not provide any details as to why or how it is a basic principle: certainly, it appears that Locke did not think that it applied in America.[9] Las Casas's articulation of it would seem to be closer to that which Tully has in mind.

Finally, Las Casas's natural law means that political legitimacy and sovereignty exist "only to the extent" they procure "the common good of the people" (Las Casas 2020, 97). Rather than sovereignty existing by recognition or in the capacity to exclude other powers from a jurisdiction, Las Casas maintained it depends upon authority oriented towards the community's common good. Las Casas argued that Indigenous nations were genuine sovereigns not only because they were naturally free and had not consented to Spanish rule but because they were generally governed towards the genuine common good of the people. Long before Spaniards arrived, Las Casas wrote, Indigenous peoples had their own polities "wisely ordered by excellent laws, religion, and custom" (Las Casas 1992, 44–45).

This is not to suggest that Las Casas is a perfect model or that he understood sovereignty and natural law in precisely the same was Indigenous peoples in North America do today.[10] Indeed, Las Casas's contemporary critics would likely resist the suggestion that his work offers natural law resources to defenses of Indigenous sovereignty (Pagden 1987, 143; cf. Castro 2007; von Vacano 2012). The main issue for critics is that however Las Casas was opposed to colonial violence and supportive of traditional Indigenous ways of life, he was still a sort of universalist in his aims for peaceful conversions. We might consider two points in response. First, interpretations of the historical significance of Las Casas' thought differ. While indeed some point to ways in which his work is entangled with empire in a roundabout way, others offer a thorough account of why that approach is insufficient to understand Lascasian thinking and its place in history (Lantigua 2020; Lupher 2006). Second, the resistance to Las Casas often appears rooted in a resistance to any form of universalism—insofar as opponents argue that universal claims inevitably involve imperialism of some form. But a blanket opposition to natural law (which is a form of universalism) means that critics also have to dismiss Indigenous accounts of natural law, since these appear to imply a sort of universalism, even if Indigenous natural law thinkers are cautious making universal claims (A. Mills 2019, 248).

[9]The question of just what Locke personally thought about Indigenous peoples' consent is fraught, as James Tully kindly explained to me. Yet the point holds, as Tully himself has shown, that neither Lockean theory itself nor its subsequent influence puts much emphasis at all on QOT as it pertains to Indigenous peoples.

[10]Since it is not this article's purpose to defend a Lascasian (or Indigenous) account of natural law or sovereignty, the question of whether they are correct is largely put aside. A sustained defense of either would have to engage with the work of Jeremy Waldron and A. John Simmons, among others. This line of thinking tends to resist the idea that communities (rather than individuals) can be sites of authority (Simmons 2001, 307) or that conditions of justice have significantly changed between colonialism's beginning and today (Waldron 1992). Natural law proponents of Indigenous (or Lascasian) sovereignty might respond on two main fronts. First, they may argue that this type of sovereignty is not in the Westphalian sense, and second that the claims to sovereignty are not solely based on historical injustices (A. Mills 2019, 201–202). Burke Hendrix, meanwhile, occupies a middle ground on Indigenous sovereignty claims, as he takes seriously substantive Indigenous philosophy yet remains skeptical of the truth of Indigenous understandings of the world and likely Western natural law ones too (Hendrix 2008, 178). While Indigenous and Western natural law thinkers would engage thinkers like Hendrix on deeper grounds (such as the philosophy of nature) to persuade him that their understanding of nature and morality is true, the very fact that he pays attention to them no doubt contributes to his middle ground between them and Waldron and Simmons.

Conclusion

This article's purpose is analysis, not an apology for a Lascasian/Indigenous natural law approach to Indigenous sovereignty claims. Any apology would have to grapple at length with arguments rejecting the recognition of Indigenous sovereignty or what exactly this sovereignty would look like. While such concerns may be expressed most vocally by Lockean liberals (Flanagan 1998), even John Borrows expresses a similar anxiety when he writes that Indigenous control over land, guided by Indigenous understandings "could impose unacceptable costs on development for others" (Borrows 2010, 258). Then there is the objection from those who argue that Western legal orders and philosophy are so embedded in linguistic and cultural traditions that they are incompatible with Indigenous ones. As Cree law professor Mary Ellen Turpel writes, "the collective or communal basis of Aboriginal life does not really, to my knowledge, have a parallel to individual rights: the conceptions of law are simply incommensurable" (Turpel 1989, 30; cf. Peetush 2003). From this position, there would seem to be little point in suggesting nonindigenous courts could ever truly recognize Indigenous sovereignty or any nonindigenous philosophy could substantively resemble it. First, on substantive grounds, Turpel is undoubtedly correct about the nonneutrality of contemporary Western legal systems vis-à-vis Indigenous ones, but there are reasons to doubt her pessimism that all conceptions of law are simply incommensurable. Since so many Indigenous scholars ground their thinking about philosophy and politics in humans' relationship with nonhuman nature, there would appear to be a fundamental commonality among humans. In Aaron Mills's words, "natural law as constitutionalism creates openness not only for the participation of persons of other faith or cultural traditions within indigenous law but also for them to conceivably be authorities of it" (A. Mills 2019, 249). Since Mills understands nonhuman nature and humans' relationship with it to be the grounds of good legal orders (i.e., rooted constitutionalism), I take him to mean that these grounds are potentially open to all humans, even if various cultural traditions (such as colonial ones) are at present a long way from accessing them. Turpel cites postmodernist thinkers, such as Lyotard, in her argument. They generally suggest that meaning is linguistic or structural in origin and not related to any outside world or "nature." While of course human linguistic meaning is very important in Indigenous traditions, human linguistics is only one part of the natural world. Second, on pragmatic grounds, if Indigenous and Western legal orders are utterly incommensurable, then there would appear to be a situation of *two solitudes.* If there is no fundamental common ground on which Indigenous and Western cultural groups can make justice or goodness claims to each other, then it seems competition and conflict—without the potential for shared morality—would be the inevitable outcome. Given current institutional power arrangements, this is surely not desirable for Indigenous peoples.

Any response to critics would require a detailed defense of the credibility of Indigenous natural law and other natural law theories. Clearly, proponents defending Indigenous sovereignty on these grounds have their work cut out for them. From the middle of the nineteenth century (Marshall's era) until now, natural law went from being almost universally acknowledged and frequently cited in American courts to being almost entirely explicitly absent. For a number of reasons, including the explosion in written case records, a general sense that natural law was underdeterminative, and then later that nature as such was not morally informative, lawyers came to agree that the courtroom was not the appropriate place for natural law discussions (Banner 2021, 179). A return to explicitly using natural law arguments—Indigenous or otherwise—would require assuaging those concerns that resulted in natural law's decline in the first place.

Though this article is not a call for Indigenous nations and their allies to simply switch to making Lascasian arguments to nonindigenous peoples and courts, the approach could be entertained. There is also no reason why such a move is a strategic dead end, especially considering the continued failure of common law precedents to achieve the results Indigenous nations desire, recent scholarship considering the necessity of some form of natural law (Dyzenhaus 2022, 23), and that its reasoning never truly vanished (Banner 2021, 235–45). Las Casas and fellow travelers in his natural law vision are not explicit authorities for Canadian or American courts, though Felix Cohen long ago demonstrated "the Spanish origins of Indian rights in the law of the United States" (Cohen 1942). Cohen shows how early US Supreme Court cases regarding Indigenous issues "freely cite Spanish decisions, statutes, and other authorities" (18). Grotius and Vattel, both non-Spaniards, are the philosophers cited by name in these early decisions, but Cohen demonstrates that the passages friendly to Indigenous claims (i.e., without the Grotian discrimination based on cultivation) are either "copied or adapted" from the words of Spanish thinkers (17). The U.S. government continues to cite both Grotius and Vattel as authorities ("Department of Defense Law of War Manual" 2015, 18, 40, 58, 60, 87, 101).

Indigenous sovereignty claims will continue to fundamentally contradict assertions of Westphalian sovereignty by Canada and the United States (Haida Nation v. British Columbia (Minister of Forests) 2004). Canadian court decisions that rely upon common law, such as *Tsilhqot'in*, may impose more steps that must be taken for Canada to exercise complete sovereignty over Indigenous nations. U.S. court decisions, such as *McGirt v. Oklahoma*, may continue to find instances where American expansion did not dot the i's and cross the t's. But for Indigenous nations, these decisions will continue to demonstrate that the states surrounding them do not recognize that Indigenous nations hold authority "not from conquest or the queen but from their own continued existence as Native sovereignties" (Harring 2002, 456). Colonial denials of Indigenous sovereignty have had grievous consequences for Indigenous nations, from 1492 until today. Those of us devoted to thinking about political questions have an obligation to try and understand how and why these consequences continue to occur; this article suggests that natural law should be part of these efforts to understand.

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