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ROUNDTABLE

No More Nations Within Nations: Indigenous Sovereignty after the End of Treaty-Making in 1871

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Treaties matter. There exists no better example of this truism than the United States Supreme Court's ruling last summer in *McGirt v. Oklahoma* (and related case *Sharp v. Murphy*). A surprise, groundbreaking decision, *McGirt* held that the treaties that the United States signed with the Muscogee (Creek) Nation in 1832 and 1833 remain binding and that considerable territory in eastern Oklahoma remains, for the purposes of jurisdiction, "Indian country." As legal scholar Ronald Mann wrote, "The decision is a stunning reaffirmance of the nation's obligations to Native Americans."[1]

Associate Justice Neal Gorsuch, who wrote the majority opinion, held that until Congress formally and explicitly abolishes those agreements, the treaties remain in force. The ruling opinion was an unambiguous statement of the importance of treaties. Rather than considering them historical artifacts, treaties persist to this day as binding agreements.[2] And it is worth remembering that fact nearly 150 years after Congress formally put an end to the practice of treaty-making.

In March 1871 Congress ended its nearly century-old practice of formal treaty-making with Indian tribes. A rider attached to the Indian Appropriations Act (IAA) for the fiscal year 1871 simply declared, "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[3] The U.S. government would continue to recognize previously ratified treaties, the rider affirmed, but it could no longer enter into new treaties with Indigenous nations. Until 1871, as Kevin Bruyneel notes, "Treaty-making … stood as the basis upon which indigenous political agency and status in relation to the American political system was framed, recognized, and fought over."[4] But in an instant that March, Congress halted "treaty relations [that] stood in the way of the imposition of the colonial rule that would facilitate … state and national development" during Reconstruction.[5]

Treaty-making was *the* way of conducting business between Indian peoples and the U.S. government between 1777 and 1868, and it was a primary mechanism through which

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the United States acquired much of its land.[6] As Donald Fixico points out, "American Indians hold a unique status in having signed the most treaties of any Indigenous people in the world. After negotiating more than 400 treaties with American officials, a total of 374 were ratified by the U.S. Senate."[7] As binding agreements, these treaties are, along with acts of Congress, the "Supreme Law of the Land," solemn agreements between the United States and Indigenous peoples that the U.S. government obligated itself to uphold.

During and after the Civil War, Congress passed a number of bills, including the Homestead, Railway, and Land-Grant College (Morrill) Acts, all of which had tremendous impacts on American Indian communities and Indigenous sovereignty.[8] These congressional initiatives laid the foundation for subsequent efforts to gobble up Indian lands. "The celebration of consolidated nationhood left little scope for tribal sovereignty. After Appomattox, the idea of independent tribal nations came under increasing attack from land-hungry settlers, ranchers, mining and railroad companies and politicians who found tribal sovereignty an obstacle to economic development and an affront to American society," writes historian Mark Hirsch. "Unwilling to countenance the existence of 'savage' tribes in a 'civilized' nation, Americans insisted that Indians should spurn tribalism and accept Christianity, private property ownership and, eventually, full citizenship and assimilation into Euro-American society. The full-bore assault on tribal culture and institutions fueled pressure for Congress to prohibit future treaty-making with Indian tribes."[9]

The call to end treaty-making had received a much-needed boost from the congressionally appointed Indian Peace Commission, a failed effort whose members suggested in 1868 that the United States cease its recognition of tribes as sovereign nations. President Ulysses S. Grant's so-called Peace Policy advocated for the replacement of corrupt Indian agents with Christian missionaries, but men such as Commanding General of the United States Army William T. Sherman undermined those initiatives. As Clifford Trafzer and other historians have argued, the Peace Policy sought to address systemic mismanagement and corruption in the Indian Office but served, in the end, as another way to promote Indian land dispossession. "[T]ake away their freedoms, and send them to reservations, where missionaries would teach them how to farm, read and write, wear Euro-American clothing, and embrace Christianity. If Indians refused to move to reservations, they would be forced off their homelands by soldiers."[10] Grant's Peace Policy and especially his Board of Indian Commissioners, who sought "to accelerate dispossession, to coerce assimilation, and promote Indian confinement," was ultimately responsible for the congressional move in 1871.[11]

The impact of the end of treaty-making was nearly instantaneous. As historian Francis Paul Prucha points out, after the bill's passage "executive orders … became the dominant means of establishing and modifying … Indian reservations (once done by treaty)."[12] Such presidential proclamations did not require nor seek Indigenous consent and represented a turning point in U.S.-Indigenous relations. The president, often with prodding from the U.S. military, could take whatever and from wherever he wanted, often responding to the desires of special interests.

The 1871 IAA's effect played out most obviously and immediately in the Southwest. All Apache trust lands in Arizona, including the White Mountain Indian Reservation (WMIR), were created by executive order, not treaties or separate congressional action. After 1871, through a series of presidential orders, portions of the WMIR and subsequent Apache reservations were excised for and by farming, mining, and other business interests, territory officials, and federal representatives. In the case of Apache tribes, the 1871 IAA dictated terms for at least the next thirty-eight years, especially when it came to multiple reservation

reductions and severances, including many by executive order. In addition to WMIR, at least fifty-five executive order reservations were established after the 1871 IAA.[13]

The year 1871 was a "fundamental turning point" in U.S.-Indigenous policy, as Vine Deloria Jr., Raymond DeMallie, Bruyneel, and Patrick Wolfe, among others have argued, even if the treaty abolition rider's place as "a conscious and acknowledged departure" from previous government-Indigenous interactions remains uncertain.[14] "The appropriations rider … might … be regarded as only a minor and temporary conflict between the Senate and House of Representatives, because treaty language continued to be used when dealing with Indians," Deloria and DeMallie concede. "But the rider can also be appropriately viewed as the culminating step in what had been a long and often contentious argument over the feasibility of making treaties with Indian tribes," they point out.[15] For Bruyneel, "1871 … represent[s] the moment when the renewed American nation and state expressly made its colonial impression by imposing boundaries to restrict and subsume the spatial, historical, and political life of indigenous nations and tribes."[16]

* * *

This roundtable brings together four scholars to recognize the 150th anniversary of this legislative turning point in the history of U.S.-Indian relations and to reassess its lasting impact and legacies in our contemporary moment. The contributors were asked, based on specific areas of expertise, to answer any or all of the following questions: How did the 1871 IAA impact Indigenous peoples and how did they respond to this legislation? How did the law speed up and facilitate movement and incursions into Indian spaces—in Indian Territory and the Southwest and elsewhere? Why and in what ways does the 1871 IAA matter in the present?

This roundtable attempts to make sense of some of the questions posed about the end of treaty-making in 1871. It begins with the assertion by Michael Oberg that the abolition of treaty-making had little, if any, impact on the Haudenosaunee Confederacy (Six Nations of the Iroquois) in New York State. Looking at the intentions of the first American Indian Commissioner of Indian Affairs, Ely Parker, as well as treaties and the response to treaties by the Haudenosaunee, Oberg elucidates both the complicated character we find in Parker, as well as the long-standing efforts to take Native lands that began long before and continued long after the 1871 legislation. After a brief response from Kevin Bruyneel, Alaina Roberts focuses on the history of the Indian Territory during and after the Civil War to show how colonial settlers coveted the Five Tribes' "all-Native space"—and just how significant treaties from 1866, as well as the 1871 legislation, were. Both Julie Reed and Oberg offer short replies. Reed, like Roberts, also looks to Indian Territory to understand critical Indigenous—particularly the Cherokee Nation's—responses to the 1871 appropriations act. Oberg and Bruyneel reply to Reed's contribution. Finally, Bruyneel presents a rollicking and important essay, including prescriptions, that connects it all together—from 1871 through W.E.B. Du Bois, and eventually to Rev. Dr. William Barber and his Moral Mondays. Roberts offers a final reply to close the roundtable.

Geographic place played an important role in determining the effects of the 1871 IAA on Indigenous communities. Despite similarities in the settler colonial process, as the roundtable participants show, Indigenous peoples throughout the United States felt the impacts of the act differently. Some Indigenous people felt no effects at all. But regardless of regional differences, the statistics regarding Indigenous lands lost after 1871 are somber. Congress passed legislation, including such notorious acts as the 1887 General Allotment (Dawes) Act and 1898 Curtis Act, which led to the loss of at least eighty-six million acres, or nearly two-thirds of all Indigenous lands held by tribal nations before the

passage of the 1871 IAA. And this may be an undercount. The number of actual acres lost is considerably higher if scholars include legislation such as the 1872 General Mining Act, various acts to establish national parks and preserves such as Yellowstone and Yosemite, executive orders, and other machinations.[17]

Historians continue to debate whether the 1871 IAA made it easier to take Indian lands or was just another marker on the long history of Indigenous dispossession and settler attacks on sovereignty. It was likely both. As historian C. Joseph Genetin-Pilawa explains:

> The roots of the [1871 rider] did stem, at least in part, from an increasing frustration on the part of the House that treaties negotiated by the executive branch and ratified by the Senate committed them to budgetary constraints well into the future. However, the 1871 rider can also be seen as the culmination of the groundswell shift away from policy based on treaty rights and Indian sovereignty.[18]

Prucha concurs, observing, "[A]t the end of the nineteenth century and early in the twentieth, special commissions, new laws, and Supreme Court decisions made clear that treaty provisions, once considered sacred, need no longer be adhered to. … The treaty system had deteriorated to the point of collapse." In other words, by 1871 the treaty system was teetering on the brink of collapse.[19]

One hundred and fifty years later, in 2021, several questions remain, some of which have arisen anew since July 2020. The *McGirt v. Oklahoma* case was much on the minds of several respondents in this roundtable, as were the protests in response to the murder of George Floyd at the hands of Minneapolis police.[20] What ripple effects will *McGirt* produce for Indian reservations in any number of places among the more than 550 federally recognized tribes? Will tribes in Arizona or Wyoming, for example, bring forth new claims to recover traditional territories?[21] Will Black Lives Matter activists and their supporters fighting for freedom, liberation, and justice forge new and lasting alliances with Indigenous peoples in their ongoing fight for health, land, water, sky, and sovereignty? Just as activists toppled symbolic Columbus and Confederate statues in a number of places throughout the United States, we can only hope that congressional leaders will in their wisdom repeal the 1871 IAA, while keeping an eye out for additional outdated settler colonial maneuvers to abolish. Perhaps the participants in this roundtable will give us some suggestions.

Each of the main contributions and responses that follow in this roundtable offer cogent arguments that the 1871 IAA was at the very least another assault on the sovereignty of Indigenous nations and another marker along the long history to weaken the grip of American Indians on their homelands. As the recent Supreme Court case *McGirt v. Oklahoma* shows, it is not so easy to erase, in the words of Bruyneel, "Indigenous political activism, sovereignty, and the commitment to defending life and land in resistance to settler colonial hegemony."

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Notes

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2 *McGirt v. Oklahoma*, https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf (accessed Aug. 9, 2020).

3 Indian Appropriations Act, http://recordsofrights.org/records/285/indian-appropriations-act (accessed Aug. 8, 2020).
4 Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations*, (Minneapolis: University of Minnesota Press, 2007), 40–41.
5 Bruyneel, *The Third Space of Sovereignty*, 76. See also John R. Wunder, "No More Treaties: The Resolution of 1871 and the Alteration of Indian Rights to Their Homelands" in *Working the Range: Essays on the History of Western Land Management and the Environment* (Westport, CT: Greenwood Press, 1985), 40.
6 See Kevin Gover, "Nation to Nation: Treaties Between the United States and American Indian Nations," https://www.americanindianmagazine.org/story/nation-nation-treaties-between-united-states-and-american-indian-nations (accessed Dec. 2, 2020).
7 Donald L. Fixico, *Indian Treaties in the United States: An Encyclopedia and Documents Collection* (Santa Barbara, CA: ABC-CLIO, 2018). The Indigenous Digital Archive (IDA) launched an excellent website that puts in one place all of the 374 "Ratified Indian Treaties." See "IDA Treaties Explorer," https://digitreaties.org/ (accessed Dec. 2, 2020). See also National Archives, "Native American Heritage: American Indian Treaties," https://www.archives.gov/research/native-americans/treaties (accessed Dec. 2, 2020).
8 For a fascinating recent look at the Land-Grant College Act, see Tristian Ahtone, "Land-Grab Universities" (Mar. 30, 2020), https://pulitzercenter.org/reporting/land-grab-universities (accessed Apr. 16, 2020).
9 Mark G. Hirsch, "1871: The End of Indian Treaty-Making," https://www.americanindianmagazine.org/story/1871-end-indian-treaty-making (accessed Jan. 15, 2020).
10 Clifford E. Trafzer, *American Indians/American Presidents: A History* (New York: Harper, 2009), 102–3.
11 C. Joseph Genetin-Pilawa, *Crooked Paths to Allotment: The Fight over Federal Indian Policy after the Civil War* (Chapel Hill: University of North Carolina Press, 2012), 94, but also see 17, 73, 94–95.
12 Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (1994; Berkeley: University of California Press, 1997), 312.
13 See also "Executive Orders Relating to Indian Reserves, from May 14, 1955, to July 1, 1902," http://lcweb2.loc.gov/service/gdc/scd0001/2012/20120509002ex/20120509002ex.pdf (accessed July 12, 2020); Prucha, *American Indian Treaties*, 312.
14 Patrick Wolfe, *Traces of History: Elementary Structures of Race* (London: Verso, 2016), 183, fn. 38.
15 Vine Deloria Jr. and Raymond J. DeMallie, "The End of Treaty Making" in *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979*, vol. 1 (Norman: University of Oklahoma Press, 1999), 233–48.
16 Bruyneel, *The Third Space of Sovereignty*, 66.
17 Janet A. McConnell, *The Dispossession of the American Indian, 1887–1934* (Bloomington: Indiana University Press, 1991), 121.
18 Genetin-Pilawa, *Crooked Paths to Allotment*, 25.
19 Prucha, *American Indian Treaties*, 288.
20 Rebecca Nagle, "This Land" podcast, https://crooked.com/podcast-series/this-land/ (accessed Sep. 4, 2020).
21 Debra Utacia Krol, "Supreme Court Ruling Expanded Tribal Land. What Does That Mean for Arizona?," https://www.azcentral.com/story/news/local/arizona/2020/07/11/supreme-court-ruling-expanded-tribal-land-what-does-mean-arizona/5410782002/ (accessed July 11, 2020). See also Savannah Maher, "Rethinking the Wind River Reservation," https://www.wbur.org/hereandnow/2020/09/03/wind-river-reservation (accessed Sept. 3, 2020).

The Way Things Matter

Michael Leroy Oberg

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It is important as we approach the 150th anniversary of the abolition of treaty-making to consider its consequences, to measure its impact on the lives of Native people and Native nations. The congressional enactment of 1871 was less a break from the past than one more step in a long judicial and legislative attempt to erase Native peoples' assertions of nationhood. In that sense it may have mattered less than we think it did. In New York State, for instance, much of which stood on the aboriginal homelands of the Haudenosaunee, the Six Nations of the Iroquois, the abolition of federal treaty-making mattered hardly at all.

Which is ironic, for it was a Tonawanda Seneca, and the first Native American Commissioner of Indian Affairs, who spoke so forcefully in favor of ending the practice of negotiating treaties with Native American nations. A year and a half before Congress in 1871 decided "that hereafter no Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract a treaty," Ely Parker announced his arguments in favor of putting an end to treaty-making in his annual report.[1]

A treaty, Parker wrote, was "a compact between two or more sovereign powers, each possessing sufficient authority and force to compel a compliance with the obligations incurred." Native nations, he believed, lacked this power. "The Indian tribes of the United States are not sovereign nations, capable of making treaties, as none of them have an organized government of such inherent strength as would secure a faithful obedience of its people in the observance of compacts of this character." Ignoring the inability of the United States to compel the obedience of its own settlers, the violent and aggressive conduct and encroachment of which Commissioners of Indian Affairs and Secretaries of the Interior regularly lamented in the post-Civil War era, Parker declared that "it is time this idea should be dispelled, and the government cease the cruel farce of thus dealing with its helpless and ignorant wards." The federal government should stop at once "deluding this people into the belief of them being independent sovereignties, while they were at the same time recognized only as its dependents and wards."[2]

Parker's family had fought fiercely for Tonawanda land rights before the Civil War, but Parker now advocated citizenship for American Indians, supported the government's "Civilization Program," and rejected the sovereignty of Native nations. Each of these positions found advocates among that group of Native American leaders who historian Frederick Hoxie called "Red Progressives," but they were anathema to Tonawanda Senecas and many Haudenosaunee people.[3] After the end of the Civil War, Parker had little influence at the Tonawanda Reservation, his current positions out of touch with his former friends and neighbors. He resigned his office in 1871 under trumped-up charges of corruption and maladministration shortly after Congress passed legislation putting an end to treaty-making.[4]

Because "treaty talk" has played so large a role in shaping understandings of the relations between Native peoples and the United States, in New York as elsewhere, the assumption long has been that 1871 in some way mattered and marked a significant break with the past. Courts meanwhile continue to struggle to define the terms of treaties and

their place in the American constitutional system. Nearly all observers agree that the United States faithlessly violated its own treaties. And Native peoples continue to assert that their nationhood and sovereignty is confirmed and recognized through Indian treaties. Justice Clarence Thomas has suggested that the 1871 enactment was unconstitutional, as the treaty-making power, he believed, is the only instrument allowed in the Constitution to limit the powers of Native nations. Thomas has long questioned the historic justifications for the so-called "plenary power" doctrine, which emerged from a 1903 Supreme Court decision that permitted the United States to unilaterally break its treaties with Native nations.[5]

Those 370 treaties negotiated between the United States and Indian tribes before 1871 served a variety of functions. They brought peace after periods of war, or defined the bounds of lands Native nations retained or ceded. Many included provisions to "Christianize" and "civilize" Native peoples. While treaties recognized a measure of sovereignty, they also served as instruments of colonialism and control, the legal arm of dispossession. Through treaties the United States acquired rights on paper to regulate the trade and commerce of a tribe, as well as a sole and exclusive right to purchase their lands. It was through the instrument of treaties that many millions of acres of Indian lands became part of the United States.[6]

Some of these treaties were fraudulent or deceptive, others coerced. Many extended the power of the United States over Native peoples who, the Supreme Court ruled in 1831, were best viewed not as independent and entirely sovereign governing entities but as "domestic dependent nations" whose relationship to the United States resembled that of "a ward to its guardian."[7]

Attempts to make treaties with Six Nations people did not end in 1871. Since the American Revolution, New York State has claimed and exercised jurisdiction over the Iroquois, sometimes with and sometimes without the sanction of federal authorities. The United States negotiated only a handful of treaties with the Six Nations: at Fort Stanwix in 1784, restoring peace after the Revolution; at Canandaigua in 1794, restoring Seneca land and recognizing the rights of the Six Nations to the "free use and enjoyment of their lands"; and at Buffalo Creek in 1838, a corrupt "removal" treaty intended to force the Iroquois to new homes in the Indian Territory. State authorities, meanwhile, negotiated many times that number, all in an effort to acquire Haudenosaunee land. New York could not become the Empire State without a systematic program of Iroquois dispossession.[8]

In 1883, for instance, Syracuse University Chancellor Charles N. Sims led an effort to break up and allot the Onondaga Reservation through a state treaty he hoped to persuade the Onondagas to sign. Half a decade later so did the state's Whipple Commission, which collected testimony and issued a massive report that called for the break-up of New York's Indian reservations as one of a number of solutions to the state's "Indian Problem."[9] But Chancellor Sims's efforts to persuade the Onondagas to sign a treaty with the state individualizing their landholdings ended in failure. When the ballots were cast, Onondagas voted nearly unanimously against it and, Sims wrote with considerable frustration, "so ended two years of work of philanthropy and diplomacy in the interest of morals, religion, liberty, and good government in the nation of the Onondagas."[10] The Whipple Commission collected its documents, heard its testimony, and failed to achieve anything more owing to Iroquois opposition to the allotment of their lands.

The assault by state officials on Haudenosaunee nationhood began long before 1871 and continued long after. Yet in every instance, and in response to every assault, whether boarding schools or the establishment of missions or the attempts to dispossess them, Haudenosaunee people continued to assert their nationhood. They did so when they

angrily resisted efforts to individualize their landholdings in 1902,[11] when they declared war on their own against the Central Powers in World War I,[12] when they opposed the Indian Citizenship Act of 1924,[13] resisted the Indian New deal a decade after that, and when they declared war against the Axis Powers in their own name in 1942.[14]

The decision by Congress to abolish treaty-making was intended to signal the death of Native American nationhood, but declaring it could not make it so. The Senecas, Cayugas, Onondagas, Oneidas, Mohawks, and Tuscaroras had never relied on the United States or the state of New York to assert or validate their nationhood. Rather, they lived it, and continue to live it.

Notes

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2 Prucha, *Documents of United States Indian Policy*, 133.

3 Frederick E. Hoxie, ed., *Talking Back to Civilization: Indian Voices from the Progressive Era* (Boston: Bedford/St. Martin's, 2001).

4 Laurence M. Hauptman, *The Iroquois and the Civil War* (Syracuse: Syracuse University Press, 1980), 57–58; William H. Armstrong, *Warrior in Two Camps: Ely S. Parker, Union General and Seneca Chief* (Syracuse: Syracuse University Press, 1978), 137–65; C. Joseph Genetin-Pilawa, *Crooked Paths to Allotment: The Fight over Federal Indian Policy after the Civil War* (Chapel Hill: University of North Carolina Press, 2014), 25–26, 84–87.

5 On this point, see Justice Thomas's concurring opinion in *U.S. v. Lara*, 541 US 1993 (2004) and, generally, Ray Martin, "Justice Scalia and Tonto Fistfight in Heaven," *American Indian Law Journal* 5 (2017): 697–731; Dewi Ioan Ball, *The Erosion of Tribal Power: The Supreme Court's Silent Revolution* (Norman: University of Oklahoma Press, 2016).

6 The principal collection of treaties is Charles Kappler, comp., *Indian Affairs: Laws and Treaties* (Washington, DC: Government Printing Office, 1904). On the general history of Indian treaties, see Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty-Making in American Indian History* (New York: Oxford University Press, 2013); Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994).

7 *Cherokee Nation v. Georgia*, 5 Peters 1 (1831). The "plenary power" doctrine appeared in a number of cases, but in none more starkly than *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

8 Michael Leroy Oberg, *Peacemakers: The Iroquois, the United States, and the Treaty of Canandaigua, 1794* (New York: Oxford University Press, 2015); Laurence M. Hauptman, *Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State* (Syracuse: Syracuse University Press, 1999).

9 Chancellor Sims's efforts are chronicled in box 10 of the Charles N. Sims Papers, 1859–1939, housed at the Ernest Stevenson Bird Library Special Collections, Syracuse University, Syracuse, NY. The efforts of the Commission he headed are covered in "The Onondaga Indians," *The Brooklyn Daily Eagle*, Jan. 21, 1883; *The Sun* (New York), Jan. 12, 1884; "A Description Which Does Not Flatter the Tribe," *New York Times*, July 10, 1888. For the Whipple Committee Report, see Assembly Document No. 51, *Report of the Special Committee to Investigate the Indian Problem of the State of New York*, 2 vols. (Albany: Troy Press, 1889).

10 Report of the Commission, Chancellor Charles N. Sims Collection, box 10, Ernest Stevenson Bird Library, Syracuse University, Syracuse, NY.

11 "Six Nations Opposed," *Buffalo Courier*, Feb. 13, 1902; "Threats by Indians," *Buffalo Commercial,* Mar. 6, 1902.

12 "Indians to Declare War Upon Germany," *Post-Standard* (Syracuse), Aug. 1, 1918; "Onondaga Indians Will Make War Against Huns," *Democrat and Chronicle* (Rochester), Aug. 1, 1918.

13 "Indians Reject Offer of the President for Citizenship Rights," *Ithaca Journal*, July 10, 1924.

14 Laurence M. Hauptman, *The Iroquois and the New Deal* (Syracuse: Syracuse University Press, 1981), 56–69; Laurence M. Hauptman, *The Iroquois Struggle for Survival: World War II to Red Power* (Syracuse: Syracuse University Press, 1986), 1–14.

Reply to Michael Leroy Oberg

Kevin Bruyneel

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Michael Oberg aptly concludes, "The decision by Congress to abolish treaty-making was intended to signal the death of Native American nationhood, but declaring it could not make it so." In his essay, Oberg draws out at least two distinct reasons for this. The first is that Indigenous peoples are not passive actors in the face of policies and practices of U.S. settler colonial governance that seek to undermine Indigenous nations' sovereignty and territorial relations. The second is that the U.S. state itself is not a singular, monolithic actor, but more of a web of institutions, actors, and discourses that can work at cross-purposes. In short, without diminishing the reality of the devastations of conquest and colonialism in the U.S. context, we should not have an over-determined reading of the impact of settler state policies such that it erases Indigenous peoples' agency and reifies the form and function of state authority.

Treaties remain an ongoing and vital element in U.S.-Indigenous relations and debates as can be seen in public and political discourse, social movements, and court decisions. This is because Indigenous nations are the ones mobilizing demands for fulfillment of treaty terms premised on the persistence, not the end, of a nation-to-nation relationship with the United States. This is not to say all these efforts succeed, of course, as there are always victories and defeats in politics, especially in a context with such a discrepancy of institutional power as a white supremacist settler colonial state. And yet, 150 years after the formal end of treaty-making, court decisions such as *McGirt* demonstrate that the *making* in treaty-making is an active verb, a product of political and judicial contest by Indigenous peoples, not an archaic process collecting dust in the archives.

The flip side of the point about treaty-making is underscored by Oberg's reference to Clarence Thomas's view of treaties and of U.S. Plenary Power, and that Trump appointee Neil Gorsuch wrote the *McGirt* opinion. This is not to absolve either them or the Supreme Court from their roles in reinforcing the powers and prerogatives of a white settler colonial state, but their views do raise questions—for reasons of their ideologies and reading of history—of how to analyze and deconstruct the role of the state in U.S. Indian policy. The lesson here is that *the state* is an assemblage, bearing and masking its own internal contradictions. In the gaps and tensions of this assemblage reside openings for political mobilization, leverage, and action by Indigenous nations to resist and refuse settler state norms and dictates. This refusal also takes the form of Indigenous nations, such as those of the Haudenosaunee Confederacy, often disengaging from settler colonial institutions, practices, and actors to the degree possible.[1] The best-laid plans of policy-makers may well meet many of their aims, which are often destructive aims the consequences of which persist, but such matters are also rarely so tidy and one-sided. Political history does not follow a straight line, as people and the nations and institutions they comprise do not always go along with and follow the script set out for them.

Notes

1 On political refusal by Haudenosaunee, specifically the Mohawk Nation, see Audra Simpson, *Mohawk Interruptus: Political Life Across the Border of Settler States* (Durham, NC: Duke University Press, 2014).

Who Belongs in Indian Territory?

Alaina E. Roberts

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The 1871 Indian Appropriations Act (IAA) was, at once, an astonishing milestone, and the logical progression in a series of events and deliberate legislative acts that gradually weakened tribal sovereignty. The Civil War provided some politicians the circumstances and ammunition they sought to advocate for increased western settlement and Native dispossession. In relatively quick succession, the Homestead Act (1862), the Treaties of 1866, the IAA (1871), and the Dawes Act (1887) changed the demographics of spaces claimed by Native Americans and led to an increase in the corporate exploitation of the trans-Mississippi West.[1]

Indian Territory (a significant portion of the modern-day state of Oklahoma) had been shaped by external forces since the U.S. government first began to forcibly move Chickasaw, Choctaw, Creek, Seminole, Cherokee, Osage, and other peoples there around the 1820s. These immigrant Indians, and the enslaved people of African descent in their nations, warily interacted with the southern Plains people already living in the region, and raids, thefts, and crimes perpetrated by both groups followed.[2] While the United States created friction between Native Americans through the involuntary removal and resettlement of various Indian nations, this artificially constructed "Indian Territory" was initially meant to be just as its name suggests—a place where Native people would reside without interference from Americans.[3] But the Civil War would challenge the commitments made by American politicians, and the Five Tribes' divided stances on their wartime allegiance provided the U.S. government with dubious justification for infringement upon this all-Native space.

Members of the Five Tribes fought for both the Union and the Confederacy and during the war, in 1862, the Commissioner of Indian Affairs, William P. Dole, recognized that this split sprung from the fact that the Five Tribes lived in an area now claimed by the Confederacy.[4] But some politicians saw the Five Tribes' actions as a chance to renege on their promises to Native people. In the same year in which Dole voiced his understanding of the Five Tribes' circumstances, his own Superintendent of Indian Affairs, W.G. Coffin, wrote that because the Five Tribes had "braves or warriors in arms against the United States government," the U.S. government was absolved from "its obligations under treaty stipulations … the making of new treaties with all those tribes at an early day will be indispensable." These new treaties, Coffin wrote, should be used to force Indians to "take their lands in severalty," so that the "largest portion of the Indian Territory [could be] settled up by an enterprising and industrious white population."[5] Under the guise of Native American disloyalty, Coffin made plans to divvy up Indian Territory. He had begun pitching this idea as early as August 1861, a mere four months after the war started, likely signifying that this idea was not new in his mind, only newly expedient.[6]

In similar fashion, Senator James H. Lane of Kansas proposed a Senate inquiry into extending the boundaries of Kansas into Indian Territory.[7] At the same time, the federal government began to survey Indian land. Surveyor Thomas Spence thought not just of possible exploitation by corporations, but also individual settlers when he observed, "near

Fort Washita and Fort Arbuckle are most eligible and beautiful tracts of country adapted to stock-raising and herding on the grandest scale."[8] Whereas Indian Territory was previously meant to force Native people to reside on largely undesirable land, during and after the Civil War, the region was increasingly viewed as an alluring beacon to white Americans, uniting the interests of former Unionists and Confederates.

The 1862 passage of the Homestead Act, which allowed settlers to claim, at the most, 160 acres of free land in thirty states in the West and Midwest, signified significant American political support for mass expansion throughout the West. Central to this project was the unwillingness of white Americans to agree, en masse, that Native American land was off limits, even after they had created treaties that made this very promise.[9] While the Five Tribes' land was not originally included as part of the Homestead Act, the march of the nineteenth century would change this.[10] After the war, politicians—many of whom were supporters of the Homestead Act—claimed that because the Five Tribes had made treaties with the Confederacy, they must agree to new treaties.

These new treaties, the Treaties of 1866, punished Native nations, essentially treating them as vanquished foes who must sustain sanctions. Indeed, the Five Tribes paid more of a price than their white Confederate counterparts, who were generally offered amnesty from any punishment.[11] Conversely, from the Five Tribes, the United States demanded land cessions, allowance of railroads to pass through and be built in their nations, accommodation of other Indians in their nations, and emancipation and enfranchisement of the enslaved people of African descent in their nations.[12] This treaty was a complete disavowal of tribal sovereignty. Americans' hypocrisy in forcing upon Indian nations a decision about slavery that they, themselves, had just initiated and fought a war to determine, was blatant. But the United States had the upper hand because the Five Tribes risked losing annuity payments still owed them by the U.S. government—payments badly needed in the wake of a destructive conflict—if they did not consent.

In both the broad swath of quality-of-life changes covered by and the irrevocability of the coercive changes outlined, the Treaties of 1866 were a departure from previous Indian policy. They foretold the coming process of the opening up of Indian Territory and the land cessions delineated within them were carried out through the Dawes and Curtis Acts, the precursors to the creation of Oklahoma Territory and then Oklahoma statehood. But before these oft-referenced landmarks, the IAA built on the sentiment of the Treaties of 1866 to proclaim that Indian tribes would no longer be treated as sovereign nations. Rather, they would be considered wards of the federal government. From sovereign nations, to vanquished foes, to wards of the state in ten years—from the start of the Civil War to 1871—American politicians had transformed the way in which they conducted negotiations with Native nations. Thus, while the IAA was certainly not the first legislative act to weaken tribal sovereignty, it was representative of a sweeping change in the way the United States thought about Indian nations. Western Indian land would be open to white settlement and use almost at will, regardless of previous guarantees by the American government. The result in Indian Territory was staggering.

Between 1890 and 1907, the Black population of Indian Territory increased from 19,000 to over 80,000 and the white population increased from 109,400 to 538,500 as a result of the Homestead Act and the opening of the Unassigned Lands, while the Indian population remained stable at roughly 61,000.[13] By 1900, there were around 200,000 recorded whites living legally as spouses or land lessees in the Five Tribes—and many more squatting illegally.[14]

More railroad lines were built and crude oil exploration multiplied, modifying not only the demographics of the region but also the power differential, making Native people minorities—numerically and influence-wise—in the space that was supposed to be their forever home. The railroads introduced large-scale corporate greed into Indian Territory, bringing Indian nations into contact with capitalist behemoths who refused to honor treaties and did not respect Indian property; the railroads also brought individual settlers who served as laborers and entrepreneurs who strove to serve these laborers and the populations that sprung up around the products of their exertion.[15] Even though railroads had to pay for the Indian land they built on through stock exchanges, this initial purchase meant they then had the built-in ability to also purchase the six miles on either side of the railroad track, which quickly wore away at tribal land holdings.[16]

The Five Tribes went to war to defend their land and cultural institutions (which included slavery) and the developments of the postwar period demonstrated that they were right to fear incoming white encroachment. The land cessions to which the Five Tribes were forced to agree—and subsequently Oklahoma statehood—had many negative effects on Native people, including large-scale disenfranchisement for several decades; the introduction of increased white violence; and the theft of oil-rich land holdings, both through legal and illegal means.

But the battle over the degree to which the United States weakened the Five Tribes' land ownership claims and tribal sovereignty in the nineteenth century is not yet over. On July 9, 2020, the U.S. Supreme Court announced its ruling in *McGirt v. Oklahoma*, a case that essentially hinged on whether a crime committed by a Creek man against a Creek man had taken place on Indian land (defined as reservations, allotments, or dependent Indian communities).[17] The court, with Associate Justice Neil Gorsuch writing for the majority, ruled that the Treaties of 1866, the IAA, and the legislation that followed it, namely the Dawes and Curtis Acts, had not actually legally dissolved the Creek Nation's tribal holdings because the U.S. Congress, according to Gorsuch, "has not said otherwise."[18] Still, the Five Tribes must decide how they will interpret this decision and what agreement they will come to with the state of Oklahoma and the U.S. federal government with regard to jurisdiction, taxation, and a host of other issues. What will the end result look like? Only time will tell.

Notes

1 The Dawes Act is also known as the General Allotment Act or the Dawes Severalty Act.

2 Instructions to A.P. Choteau, Special Agent to the Comanches and Others, *Annual Report of the Commissioner of Indian Affairs*, transmitted with the message of the president at the opening of the 2nd session of the 25th Congress, 1837–1838, United States Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs*, for the years 1826–1839, 37–38; David La Vere, *Contrary Neighbors: Southern Plains and Removed Indians in Indian Territory* (Norman: University of Oklahoma Press, 2000), 9–13.

3 Initially set aside by President Thomas Jefferson as a future habitation for southern and southeastern Indian nations who inconveniently possessed lands that white settlers most desired, Indian Territory's borders waxed and waned through various legislation, such as the Indian Intercourse Act of 1834. The area went largely unused for this purpose until Andrew Jackson's presidency. M. Thomas Bailey, *Reconstruction in Indian Territory: A Story of Avarice, Discrimination, and Opportunism* (Port Washington, NY: Kennikat Press, 1972), 5–6.

4 Annie Heloise Abel, *The American Indian as Slaveholder and Secessionist* (Cleveland: The Arthur H. Clark Company, 1919), 252–69.

5 United States Office of Indian Affairs, "Southern Superintendency," Annual report of the commissioner of Indian affairs, for the year 1862, 167–68, http://digital.library.wisc.edu/1711.dl/History.AnnRep62 (accessed Dec. 2, 2019).

6 United States Office of Indian Affairs, "Southern Superintendency," 137.
7 Annie Heloise Abel, *The American Indian as Participant in the Civil War* (Cleveland: The Arthur H. Clark Company, 1919), 223–24.
8 Thomas Spence, *The settler's guide in the United States and British North American provinces adapted to benefit the settlers in the various states and territories, being a synoptical review of the soil, climate, cereal, and other productions, with the minerals, manufactures, etc., etc., of each state separately; carefully arranged and compiled from manufacturing reports, state documents, and stand-alone works now extant, as well as personal observation and notes* (New York: Davis & Kent Publishers, 1862), 234.
9 "An Act to Secure Homesteads to Actual Settlers on the Public Domain," *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875*, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=423 (accessed Apr. 5, 2020). While this land was "free," there were restrictions put upon who could claim it (for instance, you had to be a head of household), and there were permit fees involved.
10 The opening of the Unassigned Lands in 1889 then made a large portion of the lands formerly claimed by the Five Tribes eligible for homesteading through the act.
11 Anne S. Rubin, *A Shattered Nation: The Rise and Fall of the Confederacy, 1861–1868* (Chapel Hill: University of North Carolina Press, 2005), 143, 152; James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988), 849.
12 "Treaty with the Choctaw and Chickasaw, 1866," https://dc.library.okstate.edu/digital/collection/kapplers/id/26759 (accessed May 5, 2016); Clara Sue Kidwell, *The Choctaws in Oklahoma: From Tribe to Nation, 1855–1970* (Norman: University of Oklahoma Press, 2007), 19. The Treaty of 1855, between the United States and the Choctaw Nation, had already provided a precursor for railroads through the nation, as well as for the settlement of Wichita Indians and related nations.
13 United States, *U.S. Bureau of the Census, Extra Census Bulletin: The Five Civilized Tribes of the Indian Territory* (Washington, DC: Government Printing Office, 1894), 7–8; United States, *U.S. Bureau of the Census, Statistics for Oklahoma, Thirteenth Census of the United States, 1910* (Washington, DC: Government Printing Office, 1913), 695. The "Black" population figure includes African Americans from the United States and the former slaves of Indians and their descendants.
14 United States, "Report of the Commissioner of Indian Affairs," in *Annual Report of the Commissioner of Indian Affairs*, for the year 1900, 1899–1900, 116. http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep1900p1/reference/history.annrep1900p1.i0003.pdf (accessed Aug. 24, 2020).
15 Joyce Ann Kievit, "Trail of Tears to Veil of Tears: The Impact of Removal on Reconstruction" (PhD diss., University of Houston, 2002), 227–29.
16 Kidwell, *The Choctaws in Oklahoma*, 89.
17 Oyez, "Carpenter v. Murphy," https://www.oyez.org/cases/2018/17-1107 (accessed July 20, 2020).
18 Supreme Court of the United States, *McGirt v. Oklahoma*, https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf (accessed July 21, 2020).

Reply to Alaina E. Roberts

Julie L. Reed

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Indeed, what will the end result look like? If the history of the period under discussion provides us any clues, the answers may not look remarkably different on the surface than other jurisdictional areas. In the wake of the legislative changes that led up to and immediately followed the 1871 IAA, the Cherokees implemented social welfare policies that had already been undergoing modifications since before removal. The Cherokee Nation as well as the other four tribes, continued to assert their jurisdictional authority over Five Tribes citizens and uphold inter-tribal agreements within the Indian territory.[1]

In essence, they continued to act as the rightful guardians to their "citizen-wards" in defiance of outside actors who wished to undermine the sovereign and time immemorial responsibility to care for and protect clan kin and community.

What this looked like in practice for Cherokees were social welfare institutions recognizable to non-Native Americans: educational institutions, orphan and mental health asylums, and a prison.[2] The latter institution has particular salience in the wake of the *McGirt* decision. The Cherokee Nation's prison built in the early 1870s and opened in 1875 performed symbolic and practical purposes. It demonstrated to outsiders that the Cherokee Nation was a sovereign nation capable of policing its community and maintaining safety and security within its borders. It jailed, imprisoned, and executed people for major and minor crimes parallel to those committed in the states (murder, assault, theft, public drunkenness, and illegal whiskey sales).[3]

The Cherokee Nation's public institutions, on the whole, offered far more culturally responsive systems than those citizens would have faced in the larger United States. Native citizens could rely on having access to translators during all phases of criminal proceedings regardless of their tribal affiliation. The Cherokee Nation regularly advocated on behalf of citizens dragged before the federal courts.[4] And unlike its southern counterparts, the Cherokee Nation, despite its slaveholding past, never used its prison system to reinstate the more brutal aspects of forced labor as other penitentiaries did, nor did it disproportionately fill its prison with formerly enslaved people.[5]

But as Roberts points out, the Cherokee Nation's lack of policing authority over non-Indians left all of Indian Territory vulnerable to the depredations of the hordes of intruders who moved into Indian Territory following the 1862 Homestead Act and the opening of the Unassigned Lands. For crimes committed by non-Indians, Native nations relied on the understaffed, underfunded, and often biased actions of the federal marshals and courts based at Ft. Smith, Arkansas, until 1896 and then in Muskogee, Ardmore, and McAlester until 1907.

And yet, the future is not the past. The Five Tribes can be guided by the best practices of the past and the present to imagine a better future for everyone. What might, to modify a term used by Chief of the Shawnee Ben Barnes recently, the "Cherokeeization" of Indian Country criminal law look like in the wake of *McGirt*?[6] Will it follow the Eastern Band of Cherokee Indians' recent moves and design a community-centered domestic violence court or build a jail?[7] Will it be more just, culturally responsive, and restorative or will it simply replicate the criminal justice systems in Oklahoma that is only now working to bring down what was in 2016 one of the highest incarceration rates in the world?[8] And if it does replicate those very same systems, will non-Indians recognize that living sovereignty, regardless of the sovereign, is imperfect and constantly in need of critique and care?

Notes

1 Andrew Denson, *Demanding the Cherokee Nation: Indian Autonomy and American Culture, 1830–1900* (Lincoln: University of Nebraska Press, 2015), 121–47.

2 My first book explored how ideas about social welfare changed over time within the Cherokee Nation, which culminated in the Cherokee Nation's adoption of universal public education in 1841; its female and male seminaries; and in the post-Civil War period, its prison, mental health facility, and orphanage. For a full discussion of the orphanage, the mental health facility, and the prison, see Julie L. Reed, *Serving the Nation: Cherokee Sovereignty and Social Welfare, 1800–1907* (Norman: University of Oklahoma Press, 2016).

3 For a list of crimes and penalties placed on the books in tandem with its new prison, see Cherokee Nation, *Constitution and Laws of the Cherokee Nation* (St. Louis: R. & T.A. Ennis, 1875), 119, http://hdl.handle.net/2027/njp.32101078162656 (accessed Aug. 9, 2020).

4 "Proceedings of the National Council," *Cherokee Advocate*, Nov. 11, 1876, http://www.newspapers.com/image/665405441/?terms=..22Ft...2BSmith..22..2Bcourt (accessed Aug. 9, 2020).
5 Alexander C. Lichtenstein, *Twice the Work of Free Labor : The Political Economy of Convict Labor in the New South* (London: Verso, 1996); Matthew J Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866–1928* (Columbia: University of South Carolina Press, 1996); William A. Blair, "Justice versus Law and Order: The Battles over the Reconstruction of Virginia's Minor Judiciary, 1865–1870," *The Virginia Magazine of History and Biography* 103:2 (1995): 157–80.
6 "Confronting Racism: Indigenous Perspectives," https://www.facebook.com/IUAHCouncil/videos/958390281256087/UzpfSTYxOTIyNzQ4NDc3NDc5NjozNDQ0OTE1ODM4ODcyNTk5/?__tn__=kC-R&eid=ARAzwqIgZpLZ9PC1iZXVNs8TUBbn_7FPXT_qssHguZtve_mDzQ9OYnHQQ8fzlnprFoB-lxF4w6W5nFjt&hc_ref=ARRarm1CpzcqZVEjyJTbEjBamqZlg9m32N-RWAUtj70zzNMML_b6K3bv3OeqZ6LCYTw&__xts__[0]=68.ARDZZt3ABuQraZG2EQlvIr7ee8r1PyB6UuG_wFi6pmywGx6lyYuc3kKIgmIwyE6tCYU8LnKn6WLEzT5KqXkBZnTIKiGRMCq3S1zryz-W-AQF6jEIiwZSMb3ut5YyK7ESVP3Bpcmv9KIunazUjersm4AyAULAmjQEAwXlqcKuBi_KOdSnxV8L86BM6c7CB5adGZI-bkR290amnbwMuGIiausDEAvynWUgYbcl1CW4SiBCWmVJ1Mh1Fz-DqDlwCEEC95R8EmQHtnYLaDO-3N2-rJ8hPZ_wHr_yA47_ebzNSHyL9TXLzz3uDoxc1supX3GH6p3Vyq8s-LzwDvnPhUa0AYZS9lPgnLLd6trLM8hOQ2a61pNvuBpgXsimCyStVFG1X8Z-btHYj00EjkugAmy94T9MHy5zYwntvuDkMJKmsELRwb_Otbnt0NX4Jt178S7nF2r7Y7Lpx-4hNYIhlfBwKiNghpYd5r3u0wDVJJhBt46Sybpje8xCQZA5iqF20P_u6WkA (accessed Aug. 9, 2020).
7 Scott Mckie B.P., "EBCI Justice Center Ready for Operation," *Cherokee One Feather*, Nov. 21, 2014, https://www.theonefeather.com/2014/11/ebci-justice-center-ready-for-operation/ (accessed Aug. 9, 2020).
8 "How Oklahoma Popped Its Prison Bubble, In Charts," https://www.politico.com/interactives/2020/justice-reform-decarceration-in-oklahoma/ (accessed Aug. 9, 2020).

Reply to Alaina E. Roberts

Michael Leroy Oberg

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How meaningful was the decision by Congress to end treaty-making in 1871? Alaina Roberts sees it both as "an astonishing milestone" and part of a "series of events and deliberate legislative acts that gradually weakened tribal sovereignty." Focusing on the Indian Territory, Roberts argues that along with the 1862 Homestead Act, the Reconstruction treaties imposed upon those Native nations that sided with the Confederacy, and the Dawes Act, the end to treaty-making "led to an increase in corporate exploitation of the Trans-Mississippi West."

If we look at the question from a wider perspective, however, what seems new in the Indian Territory might not be new at all. The 1866 Reconstruction treaties with the "Five Tribes" may have been less innovative than Roberts suggests. New York State began talking about allotting land in its treaties with the Oneidas in the early nineteenth century, as did the U.S. Commissioner of Indian Affairs T. Hartley Crawford in 1838.[1] Some of the earliest federal concentration treaties included plans for allotment, and those plans were put into effect well before the passage of the Dawes Act.[2] Federal and state officials, long before Ely Parker, questioned the efficacy and appropriateness of negotiating treaties with Native peoples. John C. Calhoun, serving as Secretary of War in 1818, said that Indians "neither are, nor ought to be, considered as independent nations," and that "our views of their interest, and not their own ought to govern them."[3] And of course acquisition of tribal lands began well before 1871 in ways that encroached upon the sovereignty of Native nations. There was nothing incompatible about negotiating treaties and the exploitation of Native American lands by a variety of business interests.

Certainly the Indian Appropriation Act of 1871, which included the provision officially ending treaty-making, was "not the first legislative act to weaken tribal sovereignty," and indeed it signified as Roberts points out, "a sweeping change in the way the United States thought about Indian nations." But that long sweep spanned the entirety of the nineteenth century at least. Assertions of nationhood and sovereignty, among the relocated tribes and others, long predated 1871 and continued long thereafter.[4]

Rather than looking at the legislative history, it might be more worthwhile to examine how this particular change in policy was perceived in the Indian Territory. What did it matter on the ground? In the lived experiences of Indigenous peoples who contended with settlers and squatters, timber cutters, cattle rustlers, railroad men, missionaries, and federal agents, how big a deal was a congressional determination to enter into no more treaties with Native peoples?

The year 1871 was indeed important in the long American assault on Indigenous sovereignty. But it did not erase Indigenous nationhood, a point that the recent *McGirt* decision by the Supreme Court made so abundantly clear.[5]

Notes

1 Crawford's annual report for November 1838 in Francis Paul Prucha, ed., *Documents of United States Indian Policy*, 3rd ed. (Lincoln: University of Nebraska Press, 2000), 73–74.
2 See, for example, the Treaty with the Oto and Missouri Indians, Mar. 15, 1854, in Prucha, *Documents of United States Indian Policy*, 88.
3 John C. Calhoun to Jasper Parrish, May 14, 1818, in *The Papers of John C. Calhoun,* ed. W. Edwin Hemphill (Charleston: South Carolina Department of Archives and History, 1969), 2:294.
4 See Andrew Denson, *Demanding the Cherokee Nation: Indian Autonomy and American Culture, 1830–1900* (Lincoln: University of Nebraska Press, 2004); Rose Stremlau, *Sustaining the Cherokee Family: Kinship and the Allotment of an Indigenous Nation* (Chapel Hill: University of North Carolina Press, 2011).
5 *McGirt v. Oklahoma* (2020).

What Are the Costs of "Civilization" and Sovereignty?

Julie L. Reed

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For many of the Five Tribes leaders, the 1871 Indian Appropriations Act (IAA) did not seem at odds with the two features they chose to emphasize and promote: civilization and sovereignty. But as the implications of the IAA wore on, Cherokee leaders realized they would need to deploy the same legal and public relations strategies they used during the long removal era to make their case to the larger United States in order to tackle the onslaught of legislation that flowed from the IAA and undermined the very features they sought to broadcast.[1]

Just five years earlier, following the Civil War, the Cherokee Nation had reestablished its government-to-government relationship with the United States. Reestablishing this relationship was the final major act of Principal Chief John Ross who died in Washington, DC, just after completing the 1866 treaty's negotiation. The Cherokee Nation's bitter division during the Civil War flowed from political divisions of the removal era. Those divisions remained on display in DC as two competing groups, the National Party,

supporters of Ross, who had switched allegiances during the war to back the Union; and the Southern Cherokees, supporters of General Stand Watie, who had supported the Confederacy throughout the war, attempted to negotiate with the United States separately. The Southern Cherokees efforts to undermine Ross's leadership fell apart when some Southern Cherokee leaders argued in favor of splitting the Cherokee Nation's land base and dividing the Nation into two. This split would have also favored railroad interests who were eager to lay tracks through Indian Territory. Ultimately, a subset of Southern Cherokee leaders lent their support to Ross in order to maintain unity and better defend against the anti-Indian interests beyond the Nation.[2]

Setting aside divisions and seeking internal reconciliation in the wake of contentious treaty negotiations took a similar form to what it had in the years following removal divides. Cherokee leaders recommitted themselves to social welfare programs, especially those that promoted their national sovereignty. As the IAA was rolling out in Washington, the Cherokee Nation was conducting a Children's Census to determine the number of children orphaned by war so it could move forward with plans to open an orphanage and expand its public school system. It was also at work revising its legal codes to prepare for its new prison and securing funds to reopen its male and female seminaries.[3] As one of the Five Civilized Tribes, the Cherokees, as they had during removal, embraced the "civilized" moniker and stepped forward as an example to other tribes and to the larger United States of what was possible when the federal government funded assimilative programs *and* let tribes direct those efforts.

The Cherokee Nation grabbed on to features of the IAA that mapped onto their own goals of self-governance. The IAA contained reforms that sought to root out the abuses associated with Indian agents. For its part, the Cherokee Nation was eager to operate without an Indian agent. At least one leader advocated a full-time ambassador assigned to DC.[4] In fact, earlier treaties had provided for a funded delegate to Washington.[5] Had this goal been realized, it would have aided the Nation in what wound up being its most costly defensive strategy in the years to come—numerous delegations to Washington to fend off unwanted and often unwarranted legislation that impacted Indian Territory.

The irony that Cherokees seemed willing to overlook was that they counted on their prior treaties being honored to accomplish their own goals even as the IAA effectively blocked tribes in the future from forging the kinds of treaties with the federal government that would enable them to fund, implement, and support meaningful and culturally appropriate social, legal, and economic systems for their communities. Additionally, the IAA signaled the federal government's intent to act unilaterally toward tribes from that point forward.[6] Whether Cherokee leaders were simply worn down by the war and the negotiations that followed and seeking conciliation or whether they truly believed they could shape the policy in their favor, they were quickly disabused of the latter.

In ten short years, the full implications of the IAA for even those deemed the most "civilized" tribes were clear. Timber interests. Railroads. Reformers. Territorialists. Intruders. Adjacent states.[7] Bills that impacted Indian Territory came from every quarter. Individuals and groups seeking to undermine the political and economic interests of the tribes sent representatives to DC and launched assaults on Native peoples and tribal sovereignty in the press. In response, the Five Tribes did the same. In 1881, the *Cherokee Advocate*, the Cherokee Nation's national paper, ran the following in response to threats from the timber industry, but it applied more broadly:

> When rich corporations, Oklahoma societies, and would be intruders of every degree, compel us to exhaust our resources to defeat attempts to seduce Congress

> into a denial or violation of the obligations of the United States Government to the Indians of this Territory, it is not precisely saying to us "your money or your life," but it is in effect that, and nothing else. The truth is, the effort the Tribes are compelled to make through annual delegations to Washington, to ward off the intended death blow, constantly repeated, keeps them constantly impoverished.[8]

By the 1880s, the Cherokee Nation's "civilized" status was physically, symbolically, and rhetorically bound up with its individual and collective social welfare.

One of the key threats that emerged in the wake of the IAA was the federal government's desire to establish a territorial court in Indian Territory to adjudicate all crimes committed. In 1882, Chief Dennis Bushyhead wrote in the St. Louis *Globe Democrat,* "Now the Indians of the Indian Territory do not want any United States Court, and they do not need any. They have efficient courts of their own."[9] The Cherokee Nation had been operating a judicial system that paralleled most local courts in the United States by the 1820s. In 1843, the Cherokee Nation established agreements with the neighboring Creek Nation to adjudicate crimes involving Cherokee and Creek citizens. It had opened its national prison in 1875. It had begrudgingly accepted the court at Ft. Smith, but certainly did not want to hand over all of its criminal proceedings to the federal government.

The 1885 Major Crimes Act, which enabled the federal courts to adjudicate criminal cases involving eight crimes committed by Native people against other Native people within community boundaries, represented another step to usurp jurisdictional authority of Cherokee officials over Cherokee people. In the aftermath, the Cherokee Nation began enacting reforms aimed at bringing their laws more in line with federal criminal law. The same year the Major Crimes Act passed, Merrill Gates, a Protestant reformer and president of Rutgers College, summed his views on criminal jurisdiction up like this: "We must not only give them law, we must force law upon them." But he did not stop there: "We must not only offer them education, we must force education upon them."[10] The domino effect of the 1871 IAA enabled paternalist reformers like Gates to assert themselves as better suited to govern the individual lives of Native peoples as opposed to their Native nations, even as treaties explicitly guaranteed the Five Tribes those rights.

The net effect of the IAA was to usher in a legislative era that over time sought to erode and disregard the sovereign rights of all tribes, whether classified as civilized or not, with treaties in place or without. These jurisdictional intrusions required constant legislative vigilance on the part of Cherokee leaders as they forestalled attempts to circumvent their sovereignty. In 1896, the Cherokee Nation argued and later won a case in the federal courts that enabled them to carry out a final execution of a Cherokee man convicted of murder in Cherokee courts.[11] The Curtis Act, passed in 1898, allotted tribal communal landholdings and dissolved what remained of the Cherokee Nation's courts. It also paved the way for Oklahoma statehood, which would subject Cherokee people to both state and federal jurisdiction.

In one last gasp to mediate the destruction of tribal sovereignty and to maintain some semblance of local control in Native spaces, the Five Tribes organized a constitutional convention and proposed the State of Sequoyah, which comprised the eastern half of what became Oklahoma.[12] The proposed map of the State of Sequoyah looks remarkably similar to those floating around social media in the wake of the Supreme Court's *McGirt v. Oklahoma* decision, which answered the central question, did McGirt, a Creek Nation citizen, "commit his crimes in Indian country?" The question of criminal jurisdiction in cases involving those living within the boundaries of Native nations has been at the heart of Five Tribes' federal legislative advocacy for more than two hundred years. In July of

2020, the Supreme Court answered yes to a question that Native nations had already asked and answered countless times. For a moment, the Supreme Court fulfilled the Nation's promise at the end of the Trail of Tears.[13]

Notes

1 Andrew Denson, *Demanding the Cherokee Nation: Indian Autonomy and American Culture, 1830–1900* (Lincoln: University of Nebraska, 2015), 89–120.
2 William G. McLoughlin, *After the Trail of Tears: The Cherokees' Struggle for Sovereignty, 1839–1880*, 1st ed. (Chapel Hill: University of North Carolina Press, 1994), 219–40.
3 Julie L. Reed, *Serving the Nation: Cherokee Sovereignty and Social Welfare, 1800–1907* (Norman: University of Oklahoma Press, 2016).
4 Denson, *Demanding the Cherokee Nation*, 113.
5 Ezra Rosser, "The Nature of Representation: The Cherokee Right to a Congressional Delegate," *Boston University Public Interest Law Journal* (2005), https://digitalcommons.wcl.american.edu/facsch_lawrev/473 (accessed July 16, 2020).
6 Denson, *Demanding the Cherokee Nation*.
7 "Timber Monopoly and the Revenue," *Cherokee Advocate*, Aug. 24, 1881; "Report of the Dawes Commission Analyzed and Statement Sharply Controverted," *Cherokee Advocate*, Feb. 20, 1895; "Our Western Lands," *Cherokee Advocate*, Mar. 24, 1882; "Multiple News Items," *Cherokee Advocate*, July 27, 1881.
8 "Timber Monopoly and the Revenue."
9 "From the Globe Democrat," *Cherokee Advocate*, Jan. 6, 1882.
10 Merrill Edwards Gates, *Land and Law as Agents in Educating Indians: An Address Delivered Before the American Social Science Association at Saratoga, N.Y., Sept. 11th, 1885* (1885).
11 Talton v. Mayes, 163 U.S. 376 (1898), https://supreme.justia.com/cases/federal/us/163/376/ (accessed July 16, 2020).
12 Stacy L. Leeds, "Defeat or Mixed Blessing—Tribal Sovereignty and the State of Sequoyah," *Tulsa Law Review* 43:1 (Fall 2007): 5–16; "State of Sequoyah," https://www.loc.gov/item/2013592417/ (accessed July 16, 2020).
13 *McGirt v. Oklahoma, 591 U.S. ___ (2020)*, https://supreme.justia.com/cases/federal/us/591/18-9526/ (accessed July 16, 2020).

Reply to Julie L. Reed

Michael Leroy Oberg

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I am glad that Julie Reed turned her attention to the responses by Indigenous peoples to the 1871 Indian Appropriations Act (IAA), which formally abolished the practice of treaty-making with Native nations. Reed focused upon the Cherokees and, like Alaina Roberts, on affairs in the Indian Territory.

Initially the Cherokees saw little threat in the 1871 enactment. The Nation was engaged in its own process of reconstruction, repairing the grievous damage done during the Civil War. The Cherokees' awareness of the threat posed by the IAA, however, grew over the decade that followed its enactment. Like Native nations elsewhere, the Cherokees faced an invasion of business interests that coveted the Nation's land, and that colluded with federal officials to gain access to it. "The domino effect of the 1871 IAA," Reed argues, enabled both "paternalistic reformers" and government officials "to assert themselves better suited to govern the individual lives of Native peoples as opposed to their Native nations, even as treaties explicitly guaranteed the Five Tribes those rights."

The Cherokees were, as Reed and many other historians have pointed out, skilled and adept builders of institutions in the Indian Territory.[1] They healed themselves after the trauma of their expulsion from the southern states. They reconstructed their nations after the Civil War. The institutions they constructed have always been challenged, scrutinized, and interfered with by federal officials. So if the IAA of 1871 was, as Reed argues, part of a domino effect, which domino was it? The first to fall, or one of many? Reed writes that "the net effect" of Congress's decision to end treaty-making "was to usher in a legislative era that over time sought to erode and disregard the sovereign rights of all tribes, whether classified as civilized," like the Cherokees and others in the Indian Territory, "or not," and "with treaties in place or without." To me, that language seems a bit imprecise. Federal assaults on Cherokee sovereignty began long before 1871, and the very recent *Cherokee Tobacco* case of 1870 had already taught Cherokees who needed convincing that they could not rely upon their treaties to protect them from the federal government.[2]

Reed is right in that the 1871 IAA signaled "the federal government's intent to act unilaterally toward tribes from that point forward." Symptom rather than cause, the IAA did not erase Indigenous nationhood, regardless of Ely Parker's assertions about tribal governments and their powers. Nor did it destroy the commitment of Native peoples to assert their sovereign rights even in the face of incredible odds against extraordinarily powerful and paternalistic forces. One more significant obstacle in a road filled with them, the IAA's significance can be overstated when we focus more on the federal government than on Native peoples who made difficult decisions and devised strategies on how to accommodate themselves to or resist these policies, and navigate their way through the wreckage spawned by America's colonial policies.

Notes

1 Andrew Denson, *Demanding the Cherokee Nation: Indian Autonomy and American Culture, 1830–1900* (Lincoln: University of Nebraska Press, 2004).
2 *The Cherokee Tobacco*, 78 U.S. 616 (1870).

Reply to Julie L. Reed

Kevin Bruyneel

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The Cherokee nation is often at the political, legal, and symbolic center of the history of U.S.-Indigenous relations. This is not about any nation being better, more important, or politically active than any other, but rather about the manner in which, especially in the nineteenth century, one can tell a lot of the tale of the complicated and fraught relationship of the United States with Indigenous peoples through the Cherokee story. One need only take note of the early nineteenth-century Supreme Court cases—in particular *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832), written by Chief Justice John Marshall—that shaped significant elements of the legal framework of U.S.-Indigenous relations. These decisions came about in the midst of the genocidal removal policy under President Andrew Jackson that would lead to the Trail of Tears forced march that cost thousands of Indigenous lives, including at least four thousand Cherokee citizens. Then, decades later, along with the United States, the issue of slavery

and political power rent asunder the Cherokee nation between their National and Southern parties. As Reed makes clear, the lesson here is that accommodation to U.S. practices and Euro-American norms by being a "Civilized Tribe" did not make the Cherokee an exception to rule of oppressive U.S. Indian policy. If there was any doubt, this was evident not too long after the passage of the IAA. As Reed states: "The net effect of the IAA was to usher in a legislative era that over time sought to erode and disregard the sovereign rights of all tribes, whether classified as civilized or not, with treaties in place or without. These jurisdictional intrusions required constant legislative vigilance on the part of Cherokee leaders as they forestalled attempts to circumvent their sovereignty."

Thus, as Reed sets out, for the Cherokee nation the IAA of 1871 and its aftermath marked the need for a more direct political, judicial, and public effort to resist and refuse, rather than trying to accommodate to, U.S. policy measures such as land allotment, federal judicial oversight, settler paternalism, and the predatory invasion of resource industries. The attack on Indigenous sovereignty by the United States reached another level during the late nineteenth and early twentieth centuries. Once again, the Cherokee Nation's story of efforts to assert and defend their sovereignty helps tell the tale of the political challenges and struggle of Indigenous peoples of this period. These efforts were ambitious and creative, such as proposing along with the other Five Tribes the creation of the State of Sequoyah of what is now the eastern half of Oklahoma. Clearly, this did not succeed, but the overall theme one extracts is that of the Cherokee Nation being among the many Indigenous nations during this time that sought to defend their sovereignty by practicing their sovereignty. In the face of a reunified and expansionary post-Civil War white settler nation that sought to break up Indigenous territorial landholdings and assimilate or violently eliminate Indigenous peoples, these efforts faced an even steeper uphill climb. But, as Reed notes by concluding with reference to the *McGirt* decision concerning the Creek Nation and legal jurisdiction of the eastern half of Oklahoma (the State of Sequoya in a parallel frame), the resonances of these practices remain, not to provide simplistic or false hope but to refuse the erasure of Indigenous political activism, sovereignty, and the commitment to defending life and land in resistance to settler colonial hegemony.

When Is the Past Not the Past?

Kevin Bruyneel

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To the question, "Why and in what ways does the Indian Appropriations Act (IAA) of 1871 matter in the present?" I add, "and how might it be *made* to matter in the present?" I begin with the fact that the IAA's most notable clause—"that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty"—is located in a rider.[1] The initial function of the 1871 bill was not to end U.S. treaty-making with Indigenous nations. However, a clause of the bill further marginalized and threatened the safety of Indigenous nations who found themselves in the middle of a power struggle within the U.S. Congress and in the way of the ambitions of a reunified post-Civil War U.S. settler state and society. As a result, over time a seemingly routine funding bill assumed a lasting legacy due to the House of Representative's effort to reduce the power

of the Senate in U.S. Indian policy. I say "over time" because, as I argued in my earlier work, the rider's impact on demarcating 1871 as the year in U.S. political time when the status of Indigenous nations fundamentally shifted was more of a retroactive than an immediate change.[2] Indigenous nations and the U.S. government made bilateral agreements and other arrangements with "treaty language" in the years after 1871.[3] It was in retrospect that U.S. federal institutions defined the act in stricter terms. In particular, Supreme Court decisions in *United States v. Kagama* (1886) and *Lone Wolf v. Hitchcock* (1903) legitimated the "plenary power" of the U.S. federal government over Indigenous peoples by constructing the IAA's language as signaling that 1871 was the year that the status of Indigenous nations as independent political entities seriously diminished in the eyes of the U.S. state.

This retroactive dynamic raises an important theoretical distinction when we ask whether events of the past such as the IAA of 1871 "matter in the present." The distinction is between the notion of political time and basic chronological time. Political time is neither necessarily chronological nor stable, for it is a product of a struggle over the relationship of the past to the present, in which political actors, institutions, and movements mobilize the past—be it history, memories, and myths—to attempt to give shape to, legitimate, or challenge power relations in the present. In this spirit, when thinking about what the 1871 IAA might mean in the present, I want to put it in the context of the definitive U.S. policy regime of its time, that being Reconstruction, and relate it to the demands of contemporary social movements—such as the Moral Mondays movement led by Reverend William J. Barber—for a Third Reconstruction to address inequality and injustice.[4] It may seem incongruous to discuss Indigenous peoples in relation to the Reconstruction Era, as this era is most associated with the effort to generate substantial freedom for Black people, many of whom were newly freed, and freed themselves, from enslavement. The downfall of Reconstruction was due to the failure of the United States to bring to material and political life the promise of freedom for Black Americans after the Civil War, as white supremacy rose up to rule again through the racial terrorism of the Ku Klux Klan and the *herrenvolk* policies of the Jim Crow Era. As W.E.B. Du Bois put it, Reconstruction was a period in which millions of Black people "went free; stood a brief moment in the sun; then moved back again toward slavery."[5] DuBois's words capture the hope and tragedy of this period. It is no diminishment of the political memory of this period, and in fact might add needed perspective, to observe that Reconstruction policies of this era did not seek to enhance the freedom of Indigenous peoples and nations. It is no coincidence that the IAA of 1871 was passed during the Reconstruction Era, for a reconstituted United States eagerly looked to expand westward, with the Morrill Land Grant and Homestead Acts of 1862 and Southern Homestead Act of 1866 being a few of the earlier legislative acts that helped pave the way for the rapid movement of white settlers into the territories of Indigenous nations.

As social movements in our time call forth the lost opportunity of Reconstruction to imagine a better world, how might we recast political time to redeploy the 1871 IAA for the sake of a potential Third Reconstruction that would affirm the freedom and sovereignty of Indigenous nations, instead of undermining it as occurred with the First Reconstruction? Here I take a moment to note the U.S. Supreme Court's opinion in the *McGirt v. Oklahoma* case decided on July 9, 2020, in which the issue at hand was whether the Creek Nation by right of treaty maintained legal jurisdiction over its territory in Oklahoma. In deciding for the plaintiff, McGirt, and thereby for the Creek Nation's jurisdiction, Associate Justice Neil Gorsuch in the majority (5-4) opinion wrote the following: "Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise,

we hold the government to its word."[6] In so doing, Gorsuch provided a five-word bumper sticker slogan for what many Indigenous nations would likely demand in a Third Reconstruction—"the land these treaties promised." To this end, I recall and deploy for political memory the second clause of the rider—"*Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe. …" Just as late nineteenth and early twentieth-century U.S. Supreme Court decisions reconstructed the meaning of the 1871 IAA to legitimate the political time of U.S. plenary power over the sovereignty of Indigenous nations, the deployment of the latter part of the rider about the U.S. obligation to live up to the treaties offers a way to recast the meaning of the IAA to affirm and support Indigenous sovereignty and claims to territory. In this regard, consider the 1868 Treaty of Fort Laramie between the Great Sioux and Arapaho Nations and the United States, ratified during the period of Reconstruction. Among other things, this treaty "reserved the area West of the Missouri River and east of the Rockies for the 'absolute and undisturbed use' of the Sioux," and "recognized the Bozeman Trail area as 'unceded Indian territory' where whites would not be allowed to settle and within which there would be no military posts."[7] While a 1980 court decision led to the Oceti Sakowin (Sioux Nation) being awarded monetary compensation for the illegal U.S. seizure of the Black Hills, the Sioux have refused it, demanding their land back, or in other words, *the land these treaties promised*.[8]

A Third Reconstruction that seeks to evoke the lost opportunity and promise of the First Reconstruction to imagine a better world in our time could call forth the second part of the 1871 IAA rider as a basis to demand that the United States live up to its own promise not to invalidate its treaty obligations to Indigenous nations. I pose this idea for how to make the IAA matter in the present not in a naively optimistic way, as white supremacist settler colonial institutions do not cede power voluntarily nor through argument alone. They must be compelled to do so. In the summer of 2020, we are witnessing a social and political movement do just that: compel meaningful changes in how city and state budgets allocate their funds, refuse the representations of Indigenous people as sports mascots, and challenge the public memory of the likes of Confederate generals and Christopher Columbus. We are in the midst of a viable movement to reconstruct the political time of these lands, in which we can see that the meaning of the past for the present is not set in stone. In fact, many such stones in the form of statues are being toppled to open up space for a politics of memory that places a public commitment to anti-racism and anti-colonialism over and against the celebration of the history of oppression, colonialism, and racism. This then is the time to flip the past on its head, take a new look at tired old Acts, and their riders, to see what might be salvaged and repurposed as ammunition for the radical movements of our time.

Notes

1 *U.S. Statutes at Large* 16:566, excerpted in Francis Paul Prucha, ed., *Documents of United States Indian Policy* (Lincoln: University of Nebraska Press, 1990), 136.

2 Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007).

3 See Vine Deloria Jr. and Raymond J. DeMallie, *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979* (Norman: University of Oklahoma Press, 1999), 233; Frances Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994), 312.

4 Reverend Dr.William J. Barber II, with Jonathan Wilson-Hartgrove, *The Third Reconstruction: Moral Mondays, Fusion Politics, and the Rise of a New Justice Movement* (Boston: Beacon Press, 2016).

5 W.E.B. Du Bois, *Black Reconstruction in America, 1860–1880* (New York: The Free Press 1935), 30.
6 *McGirt v. Oklahoma*, https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf (accessed July 9, 2020).
7 Frederick E. Hoxie, ed., *Encyclopedia of North American Indians* (Boston: Houghton Mifflin: 1996), 647.
8 See Kimbra Cutlip, "In 1868, Two Nations Made a Treaty, the U.S. Broke It and Plains Indian Tribes Are Still Seeking Justice," *Smithsonian Magazine*, Nov. 7, 2018, https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741/ (accessed July 9, 2020).

Reply to Kevin Bruyneel

Alaina E. Roberts

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Historians like to categorize time and space; they create historical "periods" (the Civil War, the Gilded Age, the Progressive Era, etc.) and locate them in specific times and geographical places. Then, as the decades fly by, scholars begin to challenge these locations and time periods and broaden or problematize them. The Reconstruction period, like many periods in American history, has long been cast as one with solely white and Black historical actors: African Americans win their freedom from white slave owners and then, after a glorious decade or so of achievement and possibility, they are betrayed by their white allies. Or so the story went.

But as historians began to question just what (and where) was being "reconstructed," people of other races, particularly Native people, entered the historiography. Daniel Littlefield, M. Thomas Bailey, Celia Naylor, Elliott West, Richard White, myself, and others have written works that explicitly connect not just the time period but the stakes (Black freedom, western expansion, the selective broadening of citizenship) to western Indian nations and Native political actors.[1]

Kevin Bruyneel points to another way we can redefine the era of Reconstruction—by interpreting it as a period in which tribal sovereignty was simultaneously undermined and upheld. Is this possible? He shows that it is when we look at the breadth of experiences of Native people across North America and consider how the foundations of legislation and treaties created during this time period can be (and are already being) used to reify tribal jurisdiction in our time.[2]

I cannot sum up the relevance of our writing this roundtable in the summer of 2020 better than Kevin has, so I will simply end by saying that a Third Reconstruction that encapsulates Black and Native self-determination is possible and hopefully, by the time you read this, you have witnessed it.

Notes

1 Daniel F. Littlefield Jr., *The Cherokee Freedmen: From Emancipation to American Citizenship* (Westport, CT: Greenwood Press, 1978); Daniel F. Littlefield Jr., *The Chickasaw Freedmen: A People Without a Country* (Westport, CT: Greenwood Press, 1980); M. Thomas Bailey, *Reconstruction in Indian Territory: A Story of Avarice, Discrimination, and Opportunism* (Port Washington, NY: Kennikat Press, 1972); Celia E. Naylor, *African Cherokees in Indian Territory: From Chattel to Citizens* (Chapel Hill: University of North Carolina Press, 2008); Elliott West, "Reconstruction in the West," *The Journal of the Civil War Era* 7:1 (Mar. 2017): 14;

Elliott West, "Reconstructing Race," *Western Historical Quarterly* 34:1 (Spring 2003): 6–26; Richard White, *The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865–1896* (New York: Oxford University Press, 2017); Alaina E. Roberts, *I've Been Here All the While: Black Freedom on Native Land* (Philadelphia: University of Pennsylvania Press, 2021); Bradley R. Clampitt, ed., *The Civil War and Reconstruction in Indian Territory* (Lincoln: University of Nebraska Press, 2015); C. Joseph Genetin-Pilawa, *Crooked Paths to Allotment: The Fight over Federal Indian Policy after the Civil War* (Chapel Hill: University of North Carolina Press, 2014).

2 For a more in-depth look at some of Bruyneel's other thought-provoking ideas about how we might redefine Reconstruction, see Kevin Bruyneel, "Creolizing Collective Memory: Refusing the Settler Memory of the Reconstruction Era," *Journal of French and Francophone Philosophy* 25:2 (2017): 236–44.

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Alaina E. Roberts is an Assistant Professor of History at the University of Pittsburgh. Her research focuses on the intersection of African American and Native American history from the nineteenth century to the modern day with particular attention to identity, settler colonialism, and anti-Blackness. In addition to her first book, *I've Been Here All the While: Black Freedom on Native Land* (University of Pennsylvania Press, 2021), her writing has appeared in the *Washington Post, the Journal of the Civil War Era*, and the *Western Historical Quarterly*.

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Kevin Bruyneel is a Professor of Politics at Babson College in Massachusetts. He wrote *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (3rd ed., University of Minnesota Press, 2007); and has a forthcoming book, *Settler Memory: The Disavowal of Indigeneity in the Political Life of Race in the United States*, to be published in the Critical Indigeneities Series at University of North Carolina Press. He is of settler ancestry, born and raised in Vancouver, British Columbia, on the unceded lands of the Musqueam, Squamish, and Tsleil-Waututh Nations.

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