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Part III

Colonial encounters

11 Treatied space: North American indigenous treaties in a global context

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Abstract

All communities and individuals living on North American land are, in one sense, 'treaty people' and attention to treaty history is vital to the challenge of addressing the profound environmental, technological, and resource-use changes of the future. This chapter makes the case for re-examination of existing thinking on treaties as the fundamental diplomatic artefacts that have codified and articulated relationships between settlers and Indigenous peoples over time. It argues that indigenous treaties need to take on a more appropriately central place in debates within law, history, literature, political science, and indigenous studies. Despite recent quantitative work by the Harvard political scientist Arthur Spirling, area and tribe-specific studies since the late 1970s, and significant work by Prucha, Deloria & DeMallie, and Wilkins, recent decades have seen that issues linked to representation and culture achieve much greater prominence than the messier intricacies of how treaties have come into being, their contested histories, and their direct political impact upon the present. This has partly been as a result of the conceptual and social changes of the 1960s that brought into sharp relief successive historical failures to uphold treatied relationships.

The case for re-examination of North American Indian treaty history

There is currently a movement to better comprehend the indigenous agency inherent within treaties across time, to transcend existing approaches to them, understand more about their diverse nature, and enhance their intellectual and intersocial valencies. In 1928, the librarian and scholar Lawrence C. Wroth wrote how he wished he had been poured 'the strong wine' of Indian treaties as a student, instead of the 'invincible mediocrity' of the duller literature on the colonial period. This chapter is part of a more liberal pouring of just such 'strong wine' at a point in intellectual life when indigenous North American treaty texts and what surrounds them are beginning to take on a more appropriately central place within debates on literature, history, law, political science, and indigenous studies.

Wroth's emphasis on the literary, aesthetic, and dramatic aspects of treaties worked to shift focus away from their primary intercultural, contractual, and political significance, but he made an important point nonetheless. He identified treaties as the archetypal American literature and recognised them for what they were – some of the most deeply significant foundational records of intercultural dialogue on American soil. However, to Wroth, treaties were an embodiment of the great tragedies of the pre-revolutionary period and he was therefore unsurprised to find a strong private publishing market for them in the eighteenth century. He knew that they were collaborative documents, but being a product of his time, he thought that Indian peoples were fated for doom. For Wroth, Indigenous peoples may have played off one interest against another to their own benefit in the short term, but this was simply evidence that it was 'possible to hold the balance of power and be at the same time the corn between the millstones' of great European interests.[1] Wroth saw treaties as artefacts of ultimate indigenous powerlessness, but today they

are again taking centre stage as models of intercultural practice and as a means for rekindling reciprocally positive interrelationship.

Frustration with the limited ability of 'rights talk' to effect practical, on-the-ground change has prompted reflection backwards, in particular to the late seventeenth and eighteenth centuries, when tribes, bands, and communities engaged to their specific advantage as sovereign entities in bilateral governmental relations, exercised pervasive control over their land and resources, and maintained discreet and coherent internal self-government. Paying attention to the history of the treaties made in such contexts has the potential to focus attention and develop understanding of *indigenous* visions of law, justice, reciprocal relationships, and peace. Early American Indian treaties provide a window into the ways agreements struck between indigenous and settler communities transcended narrow legal/political entitlements or 'rights' and instead encompassed dynamic interdependencies between community health and well-being, access to resources, spiritual life, cultures, and the environment. There is increasing awareness of treaties as they were understood in indigenous contexts – as 'living' documents that were process-orientated, required renewal, often invoked a sacred dimension, and drew upon textured traditions surrounding alliance and trade that were well-established prior to contact with Europeans. Analysing previous treaty and diplomatic texts as well as the conditions of their formulation may now prove especially helpful as Indigenous peoples respond to calls by contemporary activists and thinkers such as those of the Kahnawá:ke Mohawk leader Taiaiake Alfred, that Native peoples 'start remembering the qualities of our ancestors, and act on those remembrances' and 'reject the colonists' control and authority, their definition of who we are and what our rights are, their definition of what is worthwhile and how one should live, their hypocritical pacifying moralities'. Alfred argues that this kind of spiritual revolution is what will ensure indigenous

survival. In a broadly comparable fashion, Michif (Métis) scholar Chris Andersen has called for critical attention to shift towards the 'density' of indigenous existence and its epistemological complexity. In so doing, he echoes an earlier call made by the African-American scholar Robin Kelley that density be taken seriously as a means towards emancipation.[2]

These are responses to an overarching drive to find ways to build indigenous-authored futures, a desire articulated in 2011 by Michi Saagiig Nishnaabeg scholar Leanne Betasamosake Simpson in *Dancing on Our Turtle's Back*. Resolutely setting to one side Audre Lorde's advice that the master's tools will never dismantle the master's house, Simpson instead orientated indigenous thinking inwards and backwards, stating: 'I am not so concerned with how we dismantle the master's house, … but I am very concerned with how we (re)build our own house, or our own houses.'[3]

The debate over whether Indigenous peoples should engage with the dominant states and in what form, and whether indigenous energies should be reserved exclusively for internal development, continues to grow. According to the Anishinaabe scholar Dale Turner, author of *This Is Not a Peace Pipe*, what is needed is more, rather than less, careful involvement with the state. A practical example is his involvement with the development of the Chi-Naaknigewin Constitution of the Anishinabek Nation, proclaimed on 6 June 2012. The Constitution is based upon a ritual or declamatory preamble, Ngo Dwe Waangizid Anishinaabe, that invokes 'the Inherent, Traditional, Treaty, and Unceded Lands of [Anishinaabe] Territories'. In its assertion and re-iteration of the fact that Anishinaabe people, land, and language are all constitutive of Anishinaabe nationhood, the Constitution serves at a minimum two functions: it communicates aspects of Anishinaabe interests and values externally, and reinforces aspects of Anishinaabe values and interests internally. Such a focus upon the renewal of existing relationships between

Indigenous peoples and settler communities may not be where authors such as Glen Coulthard suggest that indigenous energies should best be placed, but it is nonetheless a type of considered engagement with dominant powers with a long and significant indigenous pedigree.[4]

In the U.S. context, the fundamental significance of treaties to indigenous history within the United States remains under-researched, despite interesting recent quantitative work by the Harvard political scientist Arthur Spirling, various North American and tribe-specific studies since the late 1970s, and significant work by Frances Paul Prucha, Vine Deloria Jr and Raymond J. DeMallie, and David E. Wilkins.[5] This is partly as a result of conceptual and social changes in the 1960s and 1970s that brought into sharp relief successive historical failures to uphold treatied relationships. Since then, issues linked to representation, identity, and culture have achieved much greater prominence in comparison to the messy, inherently political, diplomatic intricacies of how treaties came into being and how they impact materially and culturally upon the present. As a result, too few of us are aware that over 600 treaty documents were signed in the United States between the revolutionary war and the onset of the twentieth century, and that today only 367 U.S.-Indian treaties have undisputed status. Be that as it may, treaties remain the fundamental diplomatic entities that have codified and articulated relationships between settlers and Indigenous peoples over time.

All communities and individuals living on American land are, in this sense, ‘treaty people’ and attention to treaty history is vital if we are to successfully re-vision cross-cultural relationships and norms at the onset of the twenty-first century, which heralds profound cultural, technological, and environmental changes. Treaties matter because they are an exceptional avenue of intercultural diplomacy, a means whereby different cultures can arrive at shared norms and a shared language, however articulated. They offer the potential for ‘overlapping consensus’,

the aspiration at the core of the political liberalism described by John Rawls and the social unity within democracy that the liberal democratic ideal espouses.[6] This is not to suggest that attention to treaty history will necessarily yield easily applicable models from the past or that entirely new frameworks should be ruled out as indigenous and settler communities develop agreements in the future.

What seems certain, however, is that some form of fundamental reckoning must be achieved between indigenous and settler laws, which, in turn, is linked to fundamental long-standing unresolved tensions between concepts of international law and state sovereignty.[7] The early colonial period of the seventeenth and eighteenth centuries made for regional balances of power that at specific times and places fostered relationships of parity between indigenous and settler nations, but particularly from the nineteenth century a process occurred whereby indigenous nations were progressively removed from the international legal sphere.[8] The dream of justice for minorities enshrined and respected at an international level, with laws and arbitration operating within an international system, had its genesis during the first half of the twentieth century in the decades following the lowest ebb for Native American peoples – 1890, when Native numbers within the U.S. boundaries reached a nadir of 248,000 and the frontier was deemed by historical authorities to have ‘closed’. The question of the status of indigenous nations as global entities remains unresolved and this fundamental question is at the heart of the perceived failures of the contemporary ‘rights’ agenda.

Prominent legal scholars have tended to relate changes in how treaties operated primarily to how Anglophone governments developed and conceived of their own sovereignty, despite a growing body of historical scholarship emphasising indigenous agency in relation to treaties, and in the North American context, Indigenous peoples having had regional military and political

supremacy up until and across most of the eighteenth century.[9] Thus, seminal studies such as Paul McHugh's 2004 *Aboriginal Societies and the Common Law* explain the strong self-governance exercised by sovereign tribes in the seventeenth and early eighteenth centuries as being acceptable to Anglo-colonial states at that time because sovereignty then was generally understood as a personal relationship between the ruler and the ruled. In the late eighteenth and nineteenth centuries, non-indigenous conceptualisations altered so that sovereignty came to be thought of as a unitary power within a defined geographic area. This made indigenous sovereignty – what Charles F. Wilkinson identified as 'measured separatism' within the U.S. law, because tribes often negotiated treaties that entailed protection, provisions, or support – seem legally anomalous. This, in turn, helped to fuel disastrous drives to enforce indigenous assimilation to national norms. These persisted in policy terms until President Nixon's reversal of American Indian tribal termination and the enshrining of American Indian self-determination within federal law in 1970.[10]

Re-examination of treaties today is particularly valuable as movements for decolonisation continue with treatied obligations relating to trade, land, and resource use at their core. Moreover, indigenous treaties continue to be central to efforts across the globe to protect natural environments for the benefit of all. This has been the case, for example, in relation to legal conflict in 2019 over the TransCanada Keystone XL Pipeline, described as being in specific violation of two treaties struck by the U.S. federal government: the 1855 Lame Bull Treaty with the Blackfoot Confederacy or Niitsitapi, and the 1868 Treaty of Fort Laramie with bands of the Lakota.[11] The Canadian government's purchase of the Canadian Trans Mountain portion of the pipeline – from the Texas multinational Kinder Morgan on 29 May 2018 for C$4.5 billion – has done little to assuage the fears of Indigenous peoples and affiliated groups about the impact of

tanker-traffic on fragile coastal ecosystems, the potential for a major bitumen spill, and the likely impingement of indigenous treatied rights as a result of pipeline activities. The approximately 712-mile Canadian section of pipeline would bring oil from Edmonton, Alberta to the west coast, with profound implications for the Canadian economy, which is geared around resource extraction.

Despite Indigenous peoples being at the forefront of resistance to the pipeline, indigenous responses to it and to its relationship to specific treaties have not been uniform. On the one side, for example, inter-tribal treaties are being employed to protect the environment, including the Treaty Alliance Against Tar Sands Expansion, within which 'allied signatory Indigenous Nations aim to prevent a pipeline/train/tanker spill from poisoning their water and to stop the Tar Sands from increasing its output and becoming an even bigger obstacle to solving the climate crisis'.[12] On the other side, a number of indigenous nations, including some Secwepemc Nations, have officially signed up for Trans Mountain, despite the fact that many feel that the pipeline will pose a severe threat to unceded Secwepemc'ecw territory overall.[13] For example, Chief Nathan Matthew, a leader of the Simpcw First Nation community, made clear in 2018 that the Simpcw agreed to the conditions they had negotiated with the Trans Mountain parent company. These included both direct financial and other economic benefits accruing from employment contracts. As Chief Matthew put it, 'If the project doesn't go, there would be quite a number of contracts … and people wouldn't have the opportunity to work or contract to all of the different pieces of the construction.'[14]

Aside from the importance of indigenous treaties to the protection of the environment, the fact that indigenous treaty-making, both inter-tribally and with other sovereign nations, is not confined to the past is yet another reason for thinking further about treaties in interdisciplinary

contexts. The history of modern treaty-making in Canada, which continues to develop alongside existing treaty commitments, is especially instructive in this regard. Despite a 1969 Canadian federal White Paper that echoed the thinking of then Prime Minister Pierre Trudeau and then Minister for Indian Affairs Jean Chétien that having treaties between nations within Canada was 'anomalous', in the same year the Nisga'a people of the Nass River Valley, British Columbia began pursuit of their inherent treaty rights within the British Columbia Supreme Court. These proved productive and by 1976, negotiations had begun with the Canadian Crown that ultimately resulted in a 1996 treaty guaranteeing Nisga'a self-government and control of around 2000 sq km of Nisga'a land.

The 1975 James Bay and Northern Québec agreement is another point of departure marking a beginning for modern treaty-making in Canada. Here, Cree and Inuit peoples used the media and asserted their unceded rights in court at a critical juncture as Canada sought to benefit from the hydroelectric power inherent in the rivers in the eastern section of James Bay. The resulting 1975 James Bay Treaty provided a model and pathway for a variety of subsequent nation-to-nation agreements where indigenous communities set up municipal and corporate frameworks and engaged as shareholders and stakeholders in the use of natural resources.[15] In the wake of Section 35(1) of the *Constitution Act, 1982*, all existing treaty rights of the aboriginal peoples of Canada were explicitly recognised and affirmed within the constitutional fabric of Canada.

Additionally, outside of the treaty context, First Nations and the government of Canada established various means of generating permanent bilateral agreements, including memorandums of understanding and partnership committees. The province of British Columbia established its own alternative Treaty Commission in 1992, which stands in tension with the 'whole of government approach' to implementing modern treaties that was subsequently

enshrined within Canadian government in 2015. The B.C. Treaty Commission holds that the treaty context in B.C. is distinct because when it joined the Canadian confederation in 1871, only 14 treaties on Vancouver Island (Douglas Treaties) had been signed, and aboriginal title to the rest of the province was 'unresolved'. Although Section 35 of the *Constitution Act 1982* affirmed that aboriginal title and rights in Canada exist whether or not a treaty is in existence, B.C. holds that modern treaties are nevertheless necessary because Section 35 does not define those rights. As Canada's fifth largest province and a region extremely rich in valuable natural resources, the stakes are unprecedentedly high in B.C., and the modern treaty-making process there is one of the most complex ever entered into in the world.

Modern treaty-making

Overall, the positive gloss placed upon modern-day treaties in Canada is that they give all concerned a vested interest in making the agreements negotiated work, they establish effective multilateral arrangements between indigenous, federal, provincial, territorial, and municipal levels of government, they make indigenous governance systems transparent and accountable, and they are likely to lead in time to fuller indigenous self-determination and self-sufficiency.[16] Yet, modern treaty-making remains extremely controversial and the cultural incomprehension and bad faith rooted in asymmetries of power that were characteristic of certain historic treaties are not confined to the past. It is worth considering in this regard the armed stand made in 1995 by the Defenders of the Shuswap/Secwepemc Nation at Ts'peten (Gustafsen Lake). The group protested non-Native occupation of Shuswap Nation lands in the absence of treaties and voiced profound concern about the legitimacy of the modern treaty process per se. The Defenders of the Shuswap are part of ongoing indigenous critique of the way modern treaty-making contrasts with

the model of historic treaty negotiations. In the Canadian context, in contrast to a number of respected treaties made in the past, modern treaties typically minimise the role of indigenous protocols and ceremony, take years to complete, and result in large quantities of densely argued, inaccessible legal prose. The overarching question of how such modern treaties relate to Canada's ongoing financial responsibilities to its Indigenous peoples is not resolved. Further concerns surround the use of a language of extinguishment of indigenous rights within modern treaties, and the fact that they are perceived as working to replace broad, undefined traditional rights with smaller, closely articulated subsets of those rights. Furthermore, the B.C. Treaty Commission has come under specific scrutiny in relation to how the treaty-making process is funded. B.C. has provided grants of 20% of costs to First Nations to engage in treaty negotiations, but the remaining 80% of costs is provided as a loan to be repaid. Arguably, this encourages short-term First Nations engagement in treaty-making, but discourages the prolonged levels of negotiation that may well be necessary so to establish lasting, balanced agreements.[17] Yet, further profound disquiet has been expressed over perceived conflicts of interest in relation to the indigenous individuals chosen to work on changing modern First Nation treaty policies at a federal level. An example is the Canadian Liberal government's repeated choice since 2016 of Kim Baird – former chief of the approximately 358-member Tsawwassen First Nation – to be involved in ongoing federal-level talks with First Nations over modern treaties, despite her having prior links to Trans Mountain. Positive rulings and decisions in relation to the enormous unceded territories of B.C., as well as significant areas of Quebec, Atlantic Canada, and elsewhere, nevertheless offer hope for responsible land use in the future under First Nations stewardship.[18]

Although there are serious limitations and significant scope for improvement, the contemporary Canadian federal commitment to treaties as vehicles for dynamic negotiation of indigenous relationships stands out as progressive in an international context. To give just one contrast, for the Sámi peoples of Sápmi – whose lands span sections of northern Norway, Sweden, Finland, and the Kola Peninsula of Russia – no historic treaties are agreed to exist, although Sámi representatives cite the Lapp Kodicill, an annex to a 1751 agreement between Norway and Sweden that describes Sámi rights. Indeed, despite the fact that a long external intervention from the sixteenth to eighteenth century led to the Nordic countries gaining possession of Sámi territories, the whole question of whether the Sámi experienced colonisation is still disputed.[19] One example of Sámi conflict with the Norwegian government suggests that disputes are likely to continue as pressures over land use sharpen. Leaders and community members protested in 2018 against Norwegian government demands to cull reindeer herds to combat 'overgrazing', and highlighted the absence of treatied environmental and property rights for Sámi peoples as well as Norwegian resistance to formal recognition of their indigenous status. Herder Jovsset Ánte Sara, whose herd faced reduction, brought his complaints to the Norwegian Supreme Court, to no avail. His sister, artist Maret Anne Sara, publicised the forced slaughter by bringing her artwork, involving reindeer heads topped by the Norwegian flag, to court events. Given the pressures to expand extractive mining on Sámi lands, the Norwegian government has been accused of practising eco-colonialism, or as Maret Anne Sara put it in 2019, of acting as 'the invisible monster of new colonialism, with politics and laws allowing stately abuse upon lands, animals, culture and rights'.[20]

In contrast to Canada, where First Nations' rights to be consulted have developed as a result of domestic case law, any rights possessed by the Indigenous peoples in Finland, Norway, and

Sweden to be consulted over land and resource use have been achieved primarily via international negotiations and agreements. Around 90% of Finnish Sámi land belongs to the government, and, like Sweden, Finland has not ratified the 1989 Indigenous and Tribal Peoples Convention of the International Labour Organization No. 169, which protects indigenous land rights. Norway has ratified the convention, but has interpreted it in ways considered inappropriate to its spirit and that place limits upon Sámi influence. In 2005, Sámi peoples did, however, obtain land and water rights under the Finnmark Act. Sámi parliaments were set up in Finland in 1973, Norway in 1989, and Sweden in 1993, being tasked with advising each respective national government.

While Canada can be described as forging new pathways in relation to indigenous treatied space, it is important to recognise that the Government of Canada sees the agreements being struck with Indigenous peoples in the modern era as *sui generis* in terms of international law, that is, as not being international treaties in the same way as conventional treaties struck between other sovereign nations.[21] This is part of a centuries-long process of domestication of indigenous nations' sovereign legal personalities in a global context.

The government of New Zealand extends a similar sense of indigenous treaty-making being legally unique backwards into time and treats the 1840 Treaty of Waitangi, which was originally negotiated with the British Crown and which affirmed Māori rights over tribal fisheries and rights of self-determination, as enforceable only to the extent that the New Zealand parliament legislates it to be so. This remains the case, even though Indigenous peoples in New Zealand had the capacity to strike a treaty that was valid internationally under natural law in 1840. Today, claims related to the Treaty are investigated under the auspices of the Waitangi Tribunal set up in 1975, but profound and fundamental tensions and differences persist in relation to the meaning

of the Treaty from aboriginal and non-aboriginal perspectives. Many maintain that there were two treaties, an English version and te Tiriti, the Māori version. The English translation of the agreement says that Māori leaders gave the Queen sovereignty over their land, a word with no direct translation in Māori. In contrast, the Māori text references 'kawanatanga' or 'governance', reflecting a Māori belief that they ceded to the Queen only a right of governance in return for protection, all the while retaining the Chiefs' right to authority over their own territories. Until te reo Māori attains status as a language within New Zealand law, this conflict will persist.[22]

The limitations of 'rights talk'

Modern treaties are evidence of how, across the globe, international efforts to retain or develop sustainable relationships on indigenous homelands and/or to reassert indigenous nationhood are gaining pace. As this happens, prior examples of indigenous-settler interrelationship and of indigenous forms of diplomacy take on new significance.

It is a shift spurred by dissatisfaction with the rights discourse generated in the wake of the 2007 United Nations Declaration on the Rights of Indigenous Peoples, as well as by complaints about what has been termed the *illusion of indigenous inclusion* within global forums such as the UN Permanent Forum on Indigenous Issues, established in 2000. For commentators such as Cherokee political scientist Jeff Corntassel, one of the central problems is that

> the framing of rights as political/legal entitlements has deemphasised the cultural responsibilities and relationships that indigenous peoples have with their families and the natural world (homelands, plant life, animal life, etc.) that are critical for their well-being and the well-being of future generations.[23]

Paul McHugh echoed similar thinking in his magisterial 2016 discussion, *Aboriginal Title*, stating that 'the possession of legal rights has not made tribes worse off, but equally it is less clear whether it has significantly – or even marginally – improved their general lot'. He pointed out that in Australia, all the social indicators suggest that after 20 years of native title, aboriginal peoples are in fact generally in a worse position.[24]

Whether the rights agenda has improved the lot of Indigenous peoples in the United States has also been up for debate. The 2010 Census recorded that America's over 5.2 million American Indian or Alaska Natives experienced a poverty rate 136% larger than Whites. Commentators point out, however, that such a poverty rate is comparable to that of U.S. Black and Hispanic people.[25] Given this fact, and because levels of social inequality within developed nations continue to grow, increasing pressure is being placed on existing justifications for parsing indigenous disadvantage separately from that of other numerical minorities. As a result, the assertion of indigenous rights now regularly gets subsumed within what are perceived as wider, encompassing discussions of the world's biggest and most pressing problems, including climate change, poverty, food and water security, health, and nuclear and technological changes. Despite widespread international endorsement, it is worth noting that the UN Declaration on the Rights of Indigenous Peoples, like the Universal Declaration on Human Rights, is non-binding and unenforceable.

To many, recent efforts to bring about positive change within indigenous life have been too limited in scope. Resistance by settler-colonial nations such as the United States, Canada, New Zealand, and Australia to the idea of *collective* indigenous rights in relation to the Declaration on the Rights of Indigenous Peoples is thought to have fundamentally limited what could be achieved, even though the United States acknowledged the existence of such rights in 2010.

Overall, human rights discourse since 1989 has been applied in an increasingly individualistic way that denies indigenous self-determination, supports the primacy of state sovereignty, and places limits upon cultural rights. Indigenous people have a right to culture, but Indigenous peoples as a collective do not. Just one of several examples is the case of the Maliseet Indian woman known as Sandra Lovelace, who complained against Canada because she lost her status as an Indian under Canada's Indian Act after marrying a non-Indian. The Human Rights Committee used Article 27 to find for Lovelace on the basis of her right as an individual to her culture. Article 46 (1) of the UNDRIP, however, makes clear that the right to culture 'does not prejudice the sovereignty and territorial integrity of a State party'.[26]

For prominent writers within critical whiteness literature, such as Goenpul scholar Aileen Moreton-Robinson, profound limits upon what could be achieved were in fact solidly in place from the outset. She has described how, even as the Declaration was formulated, settler nations labelled indigenous groups as seeking to promote 'disharmony' while at the same time continued to busily signal their own virtue. 'With missionary zeal', she notes, 'these states have already determined what is best for "their" Indigenous peoples by defining what Indigenous rights are acceptable. In this way they stake a possessive claim to us.'[27] The high-profile impetus towards reconciliation and recognition within Anglophone countries has also been further critiqued as being epiphenomenal to wider issues held to be truly determinant. Dene political scientist Glen Coulthard argues that such issues are structural and linked fundamentally to land and underlying economic systems geared towards the accumulation of capital. The last 40 years, he points out, have seen Indigenous peoples participating in Canadian legal and political practices that have simply reproduced the very racist, sexist, economic, and political configurations of power that many of them engaged with the dominant state to challenge in the first place. Instead, he desires

an indigenous future that transcends this and brings about ‘a resurgent politics of recognition that seeks to practice decolonial, gender-emancipatory, and economically nonexploitative alternative structures of law and sovereign authority grounded on a critical refashioning of the best of Indigenous legal and political traditions’.[28] Such calls have been either welcomed as visionary and inspirational, or relegated and dismissed as utopian and destined to forever remain aspirational. However, the emphasis placed upon settler colonialism as a structurally embedded ongoing process remains intellectually reverberative.

Looking to the past to inform the future

In sum, this is an apposite moment for scholars across disciplines to help in the process of recontextualising treaty history. Modern treaty-making is pursuing its own contested course, particularly in Canada, but historic treaties and our collective understanding of the conditions of their making will remain vital to indigenous-settler relationships in legal, cultural, and social terms in the future. Significant demographic change is also a factor helping to return American Indian treaties to centrality. Since the early 1970s, tribes across the United States have developed a growing capability to litigate. A Native American Indian legal and professional class is now poised to invoke treaty provisions and to advance Indian interests and rights internationally. A leading example in this regard today is the Fond du Lac Ojibwe scholar Maggie Blackhawk, who has made a recent prominent call for American constitutional law to be reconceived to include federal Indian law. Doing so would entail reformulation of the general principles of American public law, which rest upon judgements related to Jim Crow and segregation. It would shed a whole new light on how government power is best constituted, distributed, and limited and

would foreground localism and the bestowal of powers rather than rights, via Congress and the executive, as an optimal means of ensuring minorities thrive.[29]

American Indian peoples have also continued to develop how they engage with the national political process. Record numbers ran for political office in 2018, over 80 Indian candidates at every level, and unprecedented numbers of these were female. Such candidates have a growing base who identify as indigenous and who are on average significantly younger than the American population overall. Around 5.2 million Americans identified as American Indian or Alaska Native alone or in combination with other races in the 2010 census and about 32% of these are aged under 18, compared to 24% of the American population overall. A key political issue in Indian Country, as it is nationwide, is healthcare. Its provision is a clause within specific treaties and is enshrined federally, but Native Americans have a life expectancy 5.5 years less than the national average and the National Congress of American Indians is currently demanding a $36 billion increase in Indian Health Service funding.[30]

The importance of inter-generational or 'longue durée' thinking: American indigenous voices on law and treaty reform

Modern indigenous thinkers arguing forcefully that treaty reform holds the key to Indian resurgence has a long history. In 1972, cross-tribal protesters attempted to deliver to the Nixon administration a reassertion of treatied power and demands for treaty reform within a Twenty Point Position Paper. On several levels, the intellectual status across disciplines of American Indian treaties has yet to recover from this event and its ramifications. The Position Paper and its significance was soon accessibly contextualised by the best-selling author, Standing Rock Hunkpapa Lakota lawyer Vine Deloria Jr, in the collectively authored volume *Behind the Trail*

of Broken Treaties (1974). The text stands as part of serious, sustained multi-volume effort by Deloria and various co-authors to reform and develop legal and treatied relationships between Indian communities and the federal government. Published as the Wounded Knee occupation came to an end, it attracted withering criticism. Yet though described as simplistic, illogical, confused, and as simply proposing the substitution of one federal court for another, the publication nevertheless imagined something that at that time seemed largely unimaginable – a future in which American Indian nations took their place as sovereign nations within international forums and enjoyed 'a status of quasi-international independence with the United States acting as their protector'. Controversially, the book pointed out that a number of Indian nations in 1974 had more land than other sovereign countries such as Israel, a UN member since 1949, and had populations comparable to other small countries.

Above all, *Behind the Trail of Broken Treaties* urged that the United States' 1871 prohibition against treaty-making with Indians be rescinded and that treaties once again become the agreed mechanism for the assertion of American Indian tribal rights. Although regularly accused of the opposite, the book displayed a firm sense of political pragmatism. It recognised, for example, that treaties were 'meant to be broken', were 'nothing more than a construct to describe the relationship of political entities', but yet could nonetheless again become a basis for the assertion of indigenous sovereignty, a concept that in itself was recognised as 'not static or absolute'. Perhaps most significantly, the book was future-oriented and concerned itself with the potential for change across the longue durée, as was the case within a number of Deloria's other publications. Deloria's collection asked penetratingly unsettling questions of a non-indigenous readership habituated to concentrating on immediate problems and to thinking in the short term. These included:

> Can one view the re-creation of the state of Israel after two thousand years of exile and seriously maintain that the Oglala Sioux will never again ride their beloved plains as rulers of everything they see? Or that the might of the Iroquois will not once again dominate the eastern forests?[31]

Underpinning these questions was a confident, extremely long-term, inter-generational, and in that sense, patient, commitment to the process of bringing about restitution and change. Versions of *Behind the Trail of Broken Treaties*' key ideas have continued to resurface in a variety of contexts, with some of the most prominent indigenous voices today being even more ambitious in relation to the scale of change they envision. They are bent upon on altering the existing international order both morally and structurally. For example, scholars such as Sheryl Lightfoot of the Anishinaabe nation spell out that implementing indigenous rights 'will mean that patterns of exploitation, conquest, extraction, and inequality must give way to entirely different, more just, and sustainable forms of global political and economic relations'. All of this is to occur at the same time as the international world order negotiates 'new plural, over-lapping, and multiple types of sovereignties – state and indigenous – within and across state borders, including sovereignties that may or may not be tied to exclusive authority over territories'.[32] This is a Herculean aim, but not a priori an impossible one.

Ideas expressed since the mid-1990s by the non-indigenous Canadian political philosopher James Tully have mapped potential pathways to achieving this aim, with indigenous diplomacy and treaty-making at their core. Tully argues that an 'intercultural middle ground' can be arrived at based upon principles common to Europeans and indigenous Americans, in doing so he echoes a concept of beneficent if asymmetrical communion beloved of liberal thinkers across disciplines within his generation.[33] His 1995 book, *Strange Multiplicity*, argued for non-uniform and

mutable overlapping sorts of constitutional association between indigenous and settler polities, whereby the idea of a political constitution is reconceived as 'an activity, an intercultural dialogue in which the culturally diverse citizens of contemporary societies negotiate agreements on their ways of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity'. Tully argues that the shared norms inherent in the successful diplomacy and treaties struck between the British and indigenous North Americans and later between the British and the French in Canada after the British gained control of New France provide an invaluable template for just such a pluralistic vision for the future. At the root of Tully's vision is an insight drawn from Wittgenstein in *Philosophical Investigations* about the situational nature of knowledge and communication – in essence, an awareness that the general terms used within any political interaction cannot be fully understood outside of the norms of their cultural context. As Tully points out,

> to understand a general term, and so know your way around its maze of uses, it is always necessary to enter into dialogue with further descriptions and come to recognise the aspects of the phenomenon in question that they bring to light, aspects which go unnoticed from one's own familiar set of examples.[34]

John Borrows, a Chippewa of the Nawash First Nation of Southern Ontario and Canada Research Chair in Indigenous Law at the University of Victoria, has been at the forefront of recent efforts to apply aspects of such an awareness to contemporary legal and treaty contexts in Canada. Borrows emphasises a constitutional narrative that centralises the spirit of the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, political crossroads at the creation of Canada as a nation state, when indigenous sovereignty was respected. To a significant number of Indigenous peoples and others, especially in Canada's prairies, the treaties struck with the Crown

at this time were sacred covenants, agreed via mutual respect. This, it is argued, is the consensual tradition that now needs to be restored, or to use an indigenous diplomatic metaphor, 'brightened' or 'polished'. Such a 'brightening' would dispense with the originalism that has characterised many Supreme Court dealings with Indigenous peoples in Canada to date and required that they demonstrate forms of cultural and intellectual life that are frozen in time. In its place, Borrows recommends that any notion of a single, essential indigenous identity is dispensed with in legal, social, and political terms and is replaced by greater understanding of inherent indigenous diversity.[35] Analysis of treaties, including those struck between the British and indigenous groups from 1763 to 1768 in what is now the United States, provides clear evidence of such diversity. Any nuanced comprehension of indigenous diplomacy and legal tradition in relation to foundational treaties such as Niagara, however, will also involve engaging with indigenous metaphor, into spheres of understanding within which humans are not the only parties capable of reasoned political engagement and into the specifics of place-based oral cultures with discrete approaches to gender, kinship, ritual, and material texts such as wampum. This process, whereby the non-indigenous world begins to comprehend the spiritual, moral, tactical, and technical contours of indigenous law, is only just the beginning.[36]

Concluding thoughts: the stone in the midst of all

Treaties today stand at a point of constitutional inflection within post-colonial societies, or societies attempting to become so. Yet without change at international and domestic levels, Indigenous peoples will remain with the set of sub-optimal choices James Tully set out:

> They can accept the authoritative language and institutions, in which case their claims are rejected by conservatives, or comprehended by progressives within the very language and

> institutions whose sovereignty and impartiality they question. Or they can refuse to play the game, in which case they become marginal and reluctant conscripts, or they take up arms.[37]

As discussed in the introduction to this chapter, for Lawrence Wroth, writing in 1928, indigenous Americans were the corn between the millstones of great European powers, inevitably to be ground down and perhaps blown away by the wind. This has not happened. To the contrary, Indigenous peoples are working to exercise interpretative sovereignty in relation to both key treaties of the past and the treaties of today. Perhaps, then, a better metaphor is to think of indigenous treaties as the 'stone in the midst of all', centred in the living stream of history, evidence of intercultural relationship that makes it impossible to forget the actions of ancestors past (Figure 11.1).[38]

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Figure 11.1 William Penn's Treaty with the Indians, 1775.

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[3] Wider study of Lorde's oeuvre suggests that her ideas and those of Simpson are in a number of ways in violent agreement. See Alexis De Veaux, *Warrior Poet: A Biography of Audre Lorde* (New York: Norton, 2006); Stella Bolaki and Sabine Broeck, *Audre Lorde's Transnational Legacies* (Amherst: University of Massachusetts Press, 2015); Leanne Betasamosake Simpson, *Dancing On Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg: Arbeiter Ring, 2011), 93.

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[7] For more, see Dorothy V. Jones, *Toward a Just World: The Critical Years in the Search for International Justice* (Chicago, IL: The University of Chicago Press, 2002).

[8] A landmark case in the Canadian context in this regard was *Simon v. The Queen* in 1985. The court ruled in favour of the appellant – a 'resident Micmac Indian' prosecuted for having a rifle and cartridges so as to hunt – citing the Treaty of 1752, but also stipulated that 'the principles of international treaty law were not determinative … because an Indian treaty is unique and sui generis'. *Simon v. The Queen*, 2 S.C.R. 387 (1985).

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[11] See Rosebud Sioux Tribe & Fort Belknap Indian Community v. Donald J. Trump, case 4:18-cv-00118-BMM, filed 23 April 19 in the United States District Court for the District of Montana Great Falls Division.

[12] 'Treaty Alliance Against Tar Sands Expansion,' December 2016, accessed 27 January 2020, http://www.treatyalliance.org/wp-content/uploads/2016/12/TreatyandAdditionalInformation-20161216-OL.pdf.

[13] The numbers of indigenous nations signing up to the pipeline are being monitored by the Tracking Trans Mountain database. See '#TrackingTransMountain' on Twitter, accessed 27 January 2019, https://twitter.com/hashtag/trackingtransmountain.

[14] Chief Nathan Matthew in Simon Little, '"We've Made Our Decision": B.C. First Nation Speaks Up for Trans Mountain Pipeline,' *Global News*, 24 April 2019, accessed 27 January 2020, https://globalnews.ca/news/4165979/first-nation-support-trans-mountain-pipeline/.

[15] Refer, for example, to the Inuvialuit Treaty, 1984; the Nunavut Land Claims Agreement, 1993; the Final Agreements arrived at with the Canadian government from 1993 to 2005 with the 11 First Nations of the Yukon; the

2003 Tlicho Land Claims and Self Government Agreement and the 2014 Supreme Court of Canada granting of title to the Tsilhqot'in over 1,700 sq km in British Columbia.

[16] See Kim Baird, Clint Davis and Jason Madden, 'Modern Day Treaties Fundamentally Reshaping Canada for the Better,' *CBC News*, 13 February 2016, accessed 27 January 2020, https://www.cbc.ca/news/indigenous/modern-day-treaties-reshaping-canada-1.3440267.

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[19] See Veli-Pekka Lehtola, 'Sámi Histories, Colonialism, and Finland,' *Artic Anthropology* 52, no.2 (2015): 22–36.

[20] Instagram post @maretannesara, October 2019.

[21] See Government of Canada, Expert Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples, Organized by the Office of the United Nations High Commissioner for Human Rights, *Perspectives on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples*, UN Document: Geneva, 15–17 December 2003, 14, accessed 27 January 2020, HR/GENEVA/TSIP/SEM/2003/BP.17, 14

[22] See Alan Ward, 'Interpreting the Treaty of Waitangi: The Maori Resurgence and Race Relations in New Zealand,' *The Contemporary Pacific* 3, no. 1 (Spring 1991): 85–113.

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[24] See P. G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011), x.

[25] See Jens Manuel Krogstad, 'One-in-four Native Americans and Alaska Natives are Living in Poverty,' *Pew Research Center*, 13 June 2014, accessed 27 January 2020, https://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/.

[26] Sandra Lovelace v. Canada, Communication No. 24/1977, Views of the Human Rights Committee adopted on 30 July 1980, UN Doc. No. CCPR/C/13/D/24/1977, at para. 15; UN Human Rights Committee, CCPR General Comment No. 23: The Rights of Minorities (Art. 27), at para. 3.2, UN doc. CCPR/C/21/Rev.1/Add.5. 1994. See Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights,' *European Journal of International Law* 22, no.1 (2011): 141–163.

[27] Aileen Moreton-Robinson, *The White Possessive: Property, Power and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015), 184.

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[32] The idea that the larger Native American Indian Nations should have a seat at the United Nations, with smaller nations being represented there via confederacies reappeared in Anthony Bothwell, 'We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property,' *Annual Survey of International and*

Comparative Law 6, no.1, article 9 (2000): 175–209; Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (New York: Routledge, 2016), 206.

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[37] Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, 56.

[38] The phrase is inspired by W.B. Yeats' poem 'Easter, 1916,' in *Michael Robartes and the Dancer* (Dublin: The Cuala Press, 1920).