Introductions

When I was born in Southern California in 1962, my paternal grandparents, then living in Los Angeles, initiated the process for my enrollment with the Lenape nation (the Delaware Tribe of Indians). At the time, the tribe possessed federal recognition status, reflecting its historic relations with the colonies dating back to the early 1600s, and with the United States dating back to 1778. But in 1979, ten years after my grandparents returned to live in Oklahoma and a decade after President Nixon suspended tribal termination as a policy goal, the Delaware Tribe was terminated by the Bureau of Indian Affairs (BIA) at the political behest of the Cherokee Nation of Oklahoma. In 1996, the Delaware successfully appealed the decision and were reinstated. Within two years, the tribe built a basic infrastructure through federal grants for an elder-care program, child care, language revitalization, and housing. When the Delaware began to explore the possibility of land restoration and gaming

operations in Oklahoma, the Cherokee filed a lawsuit to challenge the Delaware's legal status as a tribe. In 2004, the U.S. Tenth Circuit Court of Appeals ruled in favor of the Cherokee, resulting in the second termination of the Delaware. In 2009, after a controversial memorandum of understanding with the Cherokee Nation regarding Delaware rights to lands and economic development in Oklahoma, the BIA reinstated the tribe.[1]

Like many other Native people in the United States, I was socialized from an early age into the arbitrariness and absolutes of federal categories of Native legal status and rights and into the difficult work the categories do in mediating the social terms and conditions of Native political and interpersonal relations.[2] And yet most of the challenges about my identity have not been on the point of the law. While legal discourses about recognition and enrollment provide one means of articulating these challenges, I have never been asked for my tribal card or proof of enrollment (though I know others who have been). I have, however, been questioned repeatedly on authenticity grounds.[3]

I have often been challenged on blood quantum. Sometimes at annual holiday parties, a member of the Norwegian/Irish maternal side of my family has asked "how much Indian" my father or grandparents *really* were. These types of questions have also been posed from advisors and colleagues. As one of my graduate school advisors suggested to me the week before my qualifying exams, "Maybe you are only doing mixed-blood studies to legitimate your own identity as an Indian?" Or the professor of Egyptology in the College of Ethnic Studies at San Francisco State University (SFSU), who, one morning in the copy room, asked me very loudly about my "exact" blood quantum. When I explained briefly and somewhat awkwardly as others entered the room why I did not answer that question, he replied indignantly, "Well, do you even have an Indian name?" As if my reasons for not answering him were because I did not have any Indian blood and not for those I explained.

All of these questions and remarks are intricately tied to racialized perceptions about physical appearance and biological difference, where degrees of blood are assumed to be equated with degrees of cultural identity. There was the hairdresser who insisted to me that I "did not look like an Indian." As proof, she pulled a photo inserted into the frame of the mirror in front of us. It was a picture of her standing with a group of Native people with whom her daughter had done missionary work the previous summer.

"See how dark they are? Their facial features? Their hair is so thick." She continued to stare at the photo and my reflection in the mirror, returning the photo to its place and giving me a look that I could only infer was one of deep confusion.

In these exchanges, people are looking to resolve preconceptions about Native peoples that my physical appearance and presumed blood degree contradicts. Often these efforts just make me tired, particularly of the disrespect to me and my family that I experience in these kinds of interactions. So much so that on occasions when I have gone out after work for drinks with colleagues, when I just want to relax and unwind, I have disguised the work that I do so that I do not have to deal with the questions about my identity that its disclosure too often solicits. One evening a couple of colleagues (both of them from the sociology department, one Native and one Brazilian) and I went out for a beer in San Francisco's West Portal district. In an unguarded moment I told the bartender that I was a faculty member in American Indian Studies. He quickly dropped what he was doing and asked in due sincerity—and urgency—whether or not I was an Indian. I said yes. He put his hands on the bar and leaned forward, "So, how much Indian are you?" He was so excited to know. I said one-third. He stood back. "Wow. One-third. That's a lot." "I know," I said. He was impressed, happy, and relieved. He returned to his work, obviously resisting the urge to ask me the slew of questions that seemed to flood his mind. Meanwhile, my colleagues had turned their heads to muffle their confused laughter. "Is that even possible?" my fellow Native asked. I took another sip of my beer and began, "I was the product of a ménage à trois. . . ."

Unfortunately for Native peoples throughout the United States, my experiences are not unusual and rarely amusing. Our families, histories, and personal ethics are constantly called into question as everyone else seems to know exactly what a Native person is and looks like and just how far any one of us deviates from it (Barker and Teaiwa 1994; Vizenor 1994; Owens 1998; P. Deloria 2004; Kauanui 2008). But the questions and remarks about blood and appearance are not merely breaches in decorum—a faux pas of social etiquette or arrogance. They are interpersonal instances of deeply entrenched social ideologies and identificatory practices of race within the United States. What is more, these ideologies and practices have been employed to legally and popularly contest the authenticity of Native genealogical ties in order to contest the legitimacy of Native legal status and

rights. If you are not *really* Native, after all, then you do not deserve what are often perceived as the "special benefits" reserved for Native peoples under the law (Barker 2005/2006).

It all begins with federal recognition policies and the historically central role of race and racialization in constructing the "Indian tribe" (Drinnon 1980; Dippie 1982; R. Williams 1990). These policies were necessary for purposes of allocating federal dollars, services, and programs that provisions of treaties and congressional statutes mandated to recognized tribes. Ideologies of race and racial difference demanded tribal cultural authenticity which was assumed to be measurable by their blood-as-cultural degrees of isolation from other societies (Barker 2004; Whitt 2009). In other words, the more isolated a tribe was socially, the more authentic it was presumed to be as a tribe. Language fluency and blood quantum were used as special tools for measuring isolation and, hence, authenticity against the presumed historical forces of assimilation that resulted in language loss and compromised blood degrees.

In fact, congressional records are full of discussions by House and Senate representatives obsessed with the number of original speakers and the prevalence of blood quanta among Native groups (Kauanui 2008). Linguistic and biological differences were assumed to provide scientifically "objective" and "reasonable" indications of cultural authenticity and were the only valid reason for establishing or maintaining the recognition of Native peoples' legal statuses and rights.

These presumptions resulted in federal policies for tribal enrollment, instituted during the administration of the General Allotment Act of 1887 which unevenly deployed language and blood to measure "competency" and land entitlement. Similarly, blood degree was perpetuated for Native Hawaiians by a 50 percent criteria within the Hawaiian Homes Commission Act of 1920 (Kauanui 2008) and for Alaska Natives by a 25 percent criteria within the Alaska Native Claims Settlement Act of 1971.

While originating in federal policy, blood degree criteria were folded into tribal governance and enrollment policies. These policies were instituted within allotment agreements with those tribes in Indian Territory who were originally exempt from the statute (Bledsoe 1909). They were then carried into tribal constitutions established under the terms of the Indian Reorganization Act of 1934 (F. Cohen 1940) in which "Indian" was defined as including "all persons of Indian descent who are members of any

recognized" tribe, "all persons who are descendents of such members . . . residing within the present boundaries" of tribal reservations, and "all other persons of one-half or more Indian blood" (Section 19).

The constitutive role of racist ideologies and identificatory practices in federal recognition, and their impact on tribal governance and enrollment policies, contribute to the always-present futures and social agencies of U.S. national narrations—the grand meta-stories of national progress, civilization, democracy, freedom, liberty, and equality. Therein, the story goes, those whose current positions of power were historically defined within U.S. colonial and imperial formations have evolved past their roles in Native genocide, dispossession, and exploitation to embody an ever-present multicultural humanism that recognizes and celebrates the intrinsic value of Native cultures and identities (Povinelli 2002).[4] These discursive maneuvers enable U.S. nationalism and citizenship to be reinvented as relevant and meaningful. Those who have historically benefited from histories of Native oppression—especially including genocidal violence and land dispossession—can now perceive their positions of power and legal entitlements as somehow inevitable by recognizing and celebrating Native cultures and identities (even more so in claims of ancestral ties to Native royalty! [R. Green 1990]). This recognition and celebration works to perpetuate the *progressive* historical trajectories of national narrations—beginning with tales of Native savagery and ending with those in power finding resolution and affirmation—but only if the Native recognized and celebrated is authentic.

Within the narrative practices of nation formation, laws that regulate Native status and rights are central in defining the conditions of power for those classified as "white." These laws have worked so concertedly over time to normalize the legal, social, and economic positions of privilege for "whites" over Native lands, resources, and bodies that those classified as white have come not only to feel entitled to their privileges and benefits under the law—in fact, expecting the law to continue protecting those privileges and benefits—but also to enjoy the right to exclude them from nonwhites (Harris 1993). The power of exclusion deeply informs the social status and reputation of whites that comes from being legally invested with power and finding the law to protect those investments over time (Frankenberg 1993; López 1996; Lipsitz 1998; Kauanui 2008). Native legal status and rights to sovereignty and self-determination confront the

presumed normalcy and righteousness of this system of entitlements and exclusions. Keeping the threats posed by Native governance and territorial rights at bay demands a reinforcement of racist ideologies and identificatory practices of Native authenticity. Natives are never quite Native enough to deserve the distinction and rights granted to them under the law, which extends "special" rights and privileges to Natives out of the benevolence of those in power. This discursive posturing is fortified further by the "scientific proof" of biological-as-cultural difference that deploys such tools as blood quantum and physical appearance as objective and rational measures of Native authenticity as well as a counter to culturally biased and politically motivated Native genealogical claims and cultural practices that establish affiliation and belonging in other ways (such as by making families through love, adoption, or naturalization).

The rub, as it were, for Native peoples is that they are only recognized as Native within the legal terms and social conditions of racialized discourses that serve the national interests of the United States in maintaining colonial and imperial relations with Native peoples. Natives must be able to demonstrably look and act like the Natives of national narrations in order to secure their legal rights and standing as Natives within the United States.[5] How Native peoples choose to navigate these demands and the implications of their choices within Native social formations is the focus of this book.

In this book I interrogate the configurations and workings of U.S. national narrations and their coproductions by ideologies of race, gender, sexuality, and severe religious conservatism in mediating the social terms and conditions of Native legal status and rights in the United States. But while federal laws and legal discourses are central to these configurations and operations, I examine them specifically from within the historical contexts in which they have mediated Native political and interpersonal relations. In other words, my critical focus is on the political and ethical implications of how Native peoples choose to navigate the legal and cultural demands for their authenticity with one another. The core, indeed sacred, concepts of Native culture and identity that inform these choices are not merely articulated by national narrations about Native peoples; they are articulated by Native peoples within their intellectual, political, and cre-

ative work. Therein, the concepts and assumptions of cultural authenticity within Native communities potentially reproduce the very social inequalities and injustices of racism, ethnocentrism, sexism, homophobia, and religious conservatism that define U.S. nationalism and Native oppression. Until the hold of these ideologies is genuinely disrupted *by Native peoples*, the important projects for Native decolonization and self-determination that define Native movements and cultural revitalization efforts today are impossible. These projects fail precisely in the ways that they reinscribe notions of authenticity that are not only defined in nationalisms to uphold relations of domination between the United States and Native nations, but within Native political and interpersonal relations. Native peoples must take on the challenge of decolonizing their concepts and projects for self-determination that retain the politics of authenticity within them.

Some Methodological Musings on "the Law"

> It is more proper that law should govern than any one of the citizens.
>
> — ARISTOTLE, *Politics*

> We must eschew the model of Leviathan in the study of power. We must escape from the limited field of juridical sovereignty and state institutions, and instead base our analysis of power on the study of the techniques and tactics of domination.
>
> — MICHEL FOUCAULT, "Two Lectures"

This book does not offer a case study or other disciplinary exegesis of the laws that have concerned Native legal status and rights, even as those laws are a critical focus of it.[6] Instead, following the methodological approaches of such poststructuralists as Michel Foucault (1975, 1977) and Stuart Hall (Morley and Chen 1996), I analyze how federal and tribal laws arbitrating the terms and conditions of Native status and rights work in the ongoing processes of social formation. This does not mean that I consider the law to be ahistoric. But contrary to Aristotelian philosophy, I do not treat the law as canonic or as an integral, isolated whole. The law cannot govern from on high or in the abstract, and it is not politically disinterested. The law is a discourse that operates in historically contingent and meaningful ways, articulated to other discourses ideologically, strategically, and irrationally. It informs the constitution and character of the relations of power

and knowledge between Native peoples and the United States, and within Native communities.

Ineluctably, the law enables the state to subject groups and individuals to its authority (Foucault 1979; Hunt and Wickam 1994). This occurs in multiple ways. It occurs through the knowledge the state claims about its subjects, engulfing them under its jurisdiction as police, judges, criminals, terrorists, victims, inmates, guards, ex-cons, and parole officers (Althusser 1971). It occurs through the institutionalization of that knowledge in mechanisms of regulation like surveillance, fines, and incarceration (Ross 1998; Davis 2003). And it occurs through the privatization and diffusion of the state's control throughout multiple service sectors and routine administrative procedures (Ong 1995). These processes normalize the state's domination, even or especially in the context of criticisms of its failures to meet the demands of public safety and national security, requiring still further controls to improve its operations.

Even more important are the complexities of how power is constituted through the actions of those subjected through legal discourse (Althusser 1971; Lacan 1977): the inmate who disciplines himself to avoid punishment (or not) and so makes himself governed as an inmate under the guard's watchful authority, and therefore the state's control (or not); the inmate who represents herself as obedient because she understands the significance of the panopticon, which in turn represents the attendance of surveillance and punishment even in the absence of the guard from the tower (Foucault 1979).

Historical genealogies of how legal discourses are defined and deployed by the state, and how those subjected invite, deflect, ignore, and resist the subjectivities and social conditions they are articulated into, provide a necessary literacy in how power is constituted (Foucault 1977; Ong 1995). They also provide a means for thinking through strategies for opposition that will produce other social formations and other futures (Davis 1983, 2005; Tadiar 2009).[7] Such genealogies reject the conventional, popular treatment of the law as the self-evident arbiter of objectivity, justice, and reason whose developments can be chronicled by case study (Carrillo 2002). By perceiving the law as a discourse, the law is understood within the context of how it is articulated to other discourses and to what (un)intended ends. In this sense, the law has no "necessary, intrinsic, transhistorical belongingness" (Hall, in Grossberg 1996, 142). Its significance comes from how it is articu-

lated to other discourses, as Stuart Hall says of religion: "Its meaning—political and ideological—comes precisely from its position within a formation. It comes with what else it is articulated to. Since those articulations are not inevitable, necessary, they can potentially be transformed, so that religion can be articulated in more than one way" (ibid.).

For instance, given the difficulties of convincing powerful nation-states in North America, the Pacific, and Africa to ratify the Declaration on the Rights of Indigenous Peoples (2007), the United Nations Secretariat of the Permanent Forum on Indigenous Peoples produced a working definition of "indigenous peoples" in 2004. This definition was a response to concerns about the scope of those included as indigenous and their associated legal rights. The definition that resulted characterized "indigenous communities, peoples and nations" as those "having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, [and] consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them" (Secretariat of the Permanent Forum on Indigenous Issues 2004). It also provided that "on an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference" (ibid.).

This definition is important not as a capture of the essence or truth of what it means to be indigenous, or as an indication of the evolution of international law or legal precepts that have finally recognized the human rights of indigenous peoples. It is important because in the over forty years of labored efforts by indigenous peoples from around the world on the Declaration, it instances the political agendas of those aligned through the United Nations to *rearticulate themselves* as "indigenous communities, peoples and nations" with human rights to self-determination (Wilmer 1993; Anaya 1996; Venne 1998; Niezen 2003). These efforts are embedded within the way that international law has historically subjected indigenous peoples to the absolutes of federal plenary power and programs aimed at their genocide, dispossession, and assimilation (Anaya 1996). Not merely in provision but in process, the Declaration represents indigenous peoples' perceptions of the possibilities of *rearticulation*: the potentially revolution-

ary shift (never complete) from hegemonic and essentialist formations to those characterized by the antagonisms of a radical democratic politics (Laclau and Mouffe 1985; Grossberg 1996).

This is not to suggest that the rearticulation of the terms of legal status and rights suddenly produces liberation and revolution or that the terms lose their etymological histories and meanings. This would imply that *self-determination* is significant outside the historical contexts of the colonialisms and imperialisms in which it was made meaningful. Rather, it is about the potential of rearticulation to produce political antagonisms that can lead to other social formations (Laclau and Mouffe 1985; Grossberg 1996). This potential is evident not merely in the text of the Declaration but in the conflicts surrounding its ratification in 2007. These conflicts were marked by four votes against it from Australia, Canada, New Zealand, and the United States (all have since reversed their 2007 votes and endorsed the Declaration).

In other words, the Declaration represents indigenous peoples' efforts to rearticulate themselves to other discourses than those of oppression (as the oppressed), to shift the "intelligibility of their historical situation" (Hall, in Grossberg 1996, 142) from the legal constraints of federal plenary power to the internationally recognized legal status and rights of *peoples* to sovereignty and self-determination. The initial vote against and subsequent reversals make it clear that articulatory practices are not about legal provisions or categories *per se*. They are about the radical politics of antagonist reformation (Laclau and Mouffe 1985). The Declaration is important not because its definitions are "right" or because it has fully produced the transformations sought, but because it posits the possibilities for producing other social formations than those characterized by colonialism and imperialism. Simultaneously, it marks the avid refusal of the United States and its variously dominant classes (not merely economic) against having existing power structures in relation to Native peoples disturbed or viably challenged. The Declaration, then, marks both the potential for reform and the vigilant efforts of many powerful nation-states to keep indigenous peoples subjugated to their respective but related regimes of power.

Given histories of genocide, dispossession, assimilation, and discrimination are enacted and rationalized through the law, it is perhaps ironic or simply confusing that the law would continue to be regarded by indigenous peoples or other disenfranchised people as a tactic of resistance or reform.

But the truth is that indigenous peoples, immigrants, minorities, women, queers, the sick, the poor, and ex-cons (not necessarily mutually exclusive categories) look to the law to be a mediator for a more just life. This is evident in the ways that these diverse communities have mobilized human and civil rights to contend social inequality (Young 1990; Markell 2003), and they do so not because they are delusional or confused. Their mobilization of the law is because the law represents a possibility for reform and even revolution, particularly of the state that administers it (Biolsi 2001). This possibility stands up against the concrete ways that the law has benefited some groups and individuals over others (Harris 1993; Kauanui 2002; Moreton-Robinson 2005; Tsosie 2005). Despite this, the promise of the law to bring about justice and equity in a fair and objective, even rational, way compels many different kinds of political constituencies to look to the law as the thing that will compel the state and those in power to conform to a more just standard of action. And in modest ways, this has been true in some legislative and common law decisions: African Americans and women (not necessarily distinct) have been enfranchised; lesbian and gay couples have secured some domestic partnership or same-sex marriage rights in some states; and some Native groups have reacquired aspects of their traditional governance and territories.

The question that lingers is not *why* Native peoples would use the law as a means of reformation (Biolsi 2001, 181) but *how*, in those uses, they seek to rearticulate their relations to one another, the United States, and the international community. How does the law work? When is it promise, arbiter of justice and fairness, rational and truthful, even in the most glaring of historical contexts when it has not been any of those things? How and when do Native peoples reinterpret the law to define and achieve their political objectives? In the remaining chapters of this book, I focus on the complexities of these and related questions. I consider how within discourses of Native legal status and rights, the law holds out its promise for objectivity, equality, and social change. I examine the place of culture and identity in Native articulations of their legal status and rights. I show that federal law demands a particular kind of Native culture and identity in order for Natives to be recognized as legitimately, legally Native. I argue that Native peoples must choose strategically and ethically how they will negotiate these demands as they articulate their cultures and identities as Natives in claims of their legal status and rights.

Some Theoretical Musings on "the Authentic"

Within Native studies in the United States there is an assumed righteousness and rightness in Native peoples' legal status and rights to sovereignty and self-determination. This owes in part to understandings of the colonial and racist impact of federal law on Native peoples (Berkhofer 1979; Drinnon 1980; Dippie 1982; R. Williams 1990). The law is read as a tool of oppression and interracial conflict rationalizing Native oppression (V. Deloria 1974; Deloria and Lytle 1984; Rawls 1984; Harris 1993; Vizenor 1994; Wilkins 1997; Berger 1997; Harring 1994; Ross 1998; Biolsi 2001; R. Miller 2006). It is understood to emerge from dominant ideologies of race that provide images of an Indian who is always lacking the qualities that would prove she or he possesses the same status and rights, or even just humanity, as the white heterosexual Christian civilized norm (Berkhofer 1979). The law's Indian-who-lacks has been shown to be a complete fabrication or "simulation" (Vizenor 1994) of dominant ideologies of race that rationalize the still-colonial and imperial relations between the United States and Native peoples (R. Green 1990; R. Williams 2005).

The paradigmatic focus within Native studies on federal law and dominant ideology leaves unaddressed a myriad of critical questions about the law and legal discourses (Harring 1994; Lomawaima 1994; Biolsi 2001). This lack of address could be read as contributing to a romantic stabilization or essentialism of the righteousness and rightness of Native legal rights, societies, and/or cultures against the social forces of U.S. oppression. Robert Allen Warrior, in *Tribal Secrets: Recovering American Indian Intellectual Traditions* (1994), and Eva Marie Garroutte, in *Real Indians: Identity and Survival of Native America* (2003), challenge their readers not to be so presuming or dismissive. They argue that such critical work be treated with respect for the historical and cultural contexts in which the authors are writing and the intellectual genealogies from which they write. They argue that the stabilization of Native legal status and rights, and its contrast with federal law and dominant ideology, might be more political strategy than simplistic essentialist formula.

For instance, in *The Nations Within: The Past and Future of American Indian Sovereignty* (1984), Vine Deloria Jr. and Clifford M. Lytle argue that federal law has undermined the means and abilities of tribes to exercise their rights to sovereignty. In their introduction "A Status Higher

Than States," they argue that the United States refuses to fully recognize the unique status of tribes as sovereign nations under the precepts of international and constitutional law. Instead, they maintain, the government asserts plenary power over tribes as domestic dependent "nations within" and then exercises that power in legislation that erodes the viability of tribal rights. With the righteousness of tribal status and rights against the United States so demonstrated, Deloria and Lytle then deliver a scathing critique of the Indian Reorganization Act (IRA) of 1934. They focus on the failure of the "nations within" model, perpetuated by the IRA and related statutes like the Indian Civil Rights Act (ICRA) of 1968, to provide the promised framework for the revitalization of tribal self-government and economic self-sufficiency (see Alfred 1999, 2005). They locate this failure in part within the IRA's negation of the diversity of traditional forms of tribal government in its centralization and corporatization of tribal councils in order to facilitate the administration of federal policies.[8]

Deloria's and Lytle's work raises important questions about the viability of tribal governments and the relevance of customary laws and practices. Writing during President Ronald Reagan's administration and its particular assault on tribal sovereignty (backing legislation that greatly restricted land rights claims and enacting severe budget cuts to the BIA), Deloria's and Lytle's assumption of the viability and relevance of tribal law and governance combats dismissals of its backwardness and insignificance. Subsequent authors, like Taiaiake Alfred (1999) and Wallace Coffey and Rebecca Tsosie (2001), have pushed this critique further to argue that the very cultural beliefs and practices of Native peoples define their sovereignty and not the precepts of international or constitutional law.

These arguments must now be pushed to address the important differences in the ways Native cultures, traditions, sovereignty, and self-determination are perceived and represented by Native peoples. In understanding and working toward Native decolonization, these arguments must take on the consequential differences—in contradiction, in disagreement, and in complexity—of Native perspectives about what their unique cultures and traditions are and how those cultures and traditions matter to them in the governance, territorial integrity, and cultural autonomy that they seek.

For instance, discourses of Native legal status and rights often presume a value distinction between the status and rights of the group and those of the individual (Barker 2006, 2008). In this view, group status and rights

draw from traditional values that place the needs of the community first; individual status and rights reference "Western ideologies" that advance a more self-centered individualism that puts personal liberty and freedom before the needs of the group. Collective status and rights are affirmed by international law, while civil rights are protected constitutionally. Collective rights address "hard" political issues like self-government and territorial integrity, while individual rights address "soft" political matters like personal freedom and equality. The kind of Native culture and identity through which these various distinctions are articulated assumes two things. First, it assumes a coherent and stable set of traditions about the group and the individual, not so much or merely of the past as bounded and protected from "Western influence" today. Second, it assumes an agreement among all Native traditions that the group is more important than the individual, in the sense that those entities are distinguished in "Western" philosophies, ignoring other intellectual genealogies about the group and the individual that might be defined within Native epistemologies. Indeed, ignored is the discursive role of the "group" and "individual" in the different epistemologies and metaphysical assumptions about Natives and Europeans.

In fact, many Natives have dismissed Native women and their allies for asserting the principles of civil rights and gender equity in tribal government as mere Western ideologues. Positioning feminism and gender equality as "outside" and therefore dangerous to traditional values, Native women have been made complicit and even co-conspirators of the colonization of Native communities by "bringing in" and "forcing" feminist principles on tribal governments and communities. This discursive move pretends that Native women's activism has not been focused on matters of Native sovereignty and self-determination. It reflects a deeper erasure within Native political discourses of the very core constitutive role of gender in Native women's concepts, politics, and efforts for Native sovereignty and self-determination (Barker 2006, 2008). In doing so, it reflects the difficulties facing Native conceptualizations of sovereignty and self-determination. As discussed throughout this book, Native people who have expressed frustration, anger, and disagreement with tribal governments for advancing racist, sexist, homophobic, or extremely conservative religious perspectives have been dismissed as anti-Indian and anti-sovereignty. They have been accused of imposing "outside," "Western" ideologies and values like equality and feminism or homosexuality on tribal governments and

communities and so of being complicit with assimilationist efforts aimed at eroding the integrity of tribal cultures. These dismissals and silences have not only chilled public debate and political critique about racist, sexist, and homophobic discrimination and violence within Native communities. They have rearticulated a Native sovereignty and self-determination that perpetuates racism, sexism, homophobia, and severe religious conservatism from within.

In this book, I examine these thick and difficult negotiations. I argue that discourses of Native culture and identity are articulated to discourses of Native legal status and rights in ways that are contextual and conditional. Their particular attachments result from specific struggles over and against "the techniques and tactics of domination" (Foucault 1972, 102) as well as intellectual, political, and cultural histories within Native communities. In other words, Native peoples are not merely the product of the dominant—thinking the "necessary and inevitable thoughts" that belong to their "socio-economic or class location or social position" (Hall, in Grossberg 1996, 142). Their histories matter in consequential ways to the cultures and identities that they claim for themselves as Native, tribal people and that they claim in relation to one another as Natives or tribes. In the agency of social formation, Native peoples participate fully in the configuration of their relationships to the United States and to one another. In that participation, there is great possibility for revolution as well as a deep ethical responsibility for its consequences.

On "the Native" and "Tradition": A Prelude to the Conclusions in Origins

I do not believe that there is a metaphysical Native who possesses essential rights to anything. I do not believe that there is an authentic tradition to be revitalized from a past that transcends "Western ideology." I do not offer this work as a "Native intellectual," authorized by the truths of a Lenape culture and identity.

"The Native" and "tradition" are constructs that function within and are anchored to specific contestations for power between Native peoples and the United States and within Native communities. These constructs result from the political objectives that deploy them. They can no more be extrapolated from their historical situation than they can be from the in-

tentions, passions, devotions, hatreds, and competitions of the groups and individuals that put them to work.

So exactly what am I saying? That Natives do not exist except as mere constructs or inventions? That Native identities are fabrications or simulations, generally of "Western" derivation? That there is no meaning in identifying as Native? That Natives have no traditions of their own? That in the absence of Native authenticity, Native rights to sovereignty and self-determination are flimsy, whimsical, and undeserved? No. And I would like to try to get at the disquiet of these questions by offering a brief etymology of "the Native" and "tradition." However, this etymology leads me to confront a fundamental theoretical conundrum that percolates throughout the book: namely, the paradigmatic authority of theories of assimilation and social evolution in theories of Native culture and identity. These theories assume a historical trajectory for understanding the value and consequence of social change over time along a whole host of progressive lines: from primitive to civilized; from integral and whole to contaminated and fractured; from lived to lost; et cetera. Depending on the perspective, these changes are read as the natural and good result of social development; the inevitable result of contact between a less and a more civil society; a tragic reminder of racially fueled colonial projects aimed at the eradication of all things Native; as indications of compromise, capitulation, or even selling out by Native people to dominant social values and norms. Whatever the conclusion, it seems that cultural authenticity for Native peoples exists only in a pre-colonial—indeed pre-historical—moment that has been forever lost to the natural, inevitable, compromised, or tragic ends of colonialism and imperialism.

Reified by national narrations, these characterizations take for granted the "centrism" of the societies of western Europe and the United States. It presumes that social change for these societies is always about progress, while social change for Native peoples is always about either progress, assimilation, compromise, or loss. It is a narration that celebrates the inevitable and venerated evolution of "the West" against the tragic but unavoidable consequences of that evolution for everyone else. In the end, it seriously distorts the aggressive and violent histories of colonization and imperialism for cultural nostalgia and political apologia (Taussig 1987; Povinelli 2002).

These troubled notions of Native culture and identity attach to Native legal status and rights in ways that force Native peoples to claim the authenticity of a culture and identity that has been defined *for* them. Furthermore, these definitions derive from the very narratives of colonization and imperialism that perpetuate Native domination.

But what if assimilation and evolution are not the best ways to understand histories of social change? What if culture and identity are negotiated within a complex matrix of social interactions and relationships, never whole and integral, always incomplete and unsure, but deeply meaningful and significant?

The Native

"The Native" has multiple genealogies related to but not the same as "the Indian."[9] It originates from the Latin word *nativus* in English use in 1374, meaning innate, produced by birth, to be born, to be related to, to beget, to produce. By 1450, it was used to mean "a person born in bondage." By 1535, it meant "a person who has always lived in a place," and by 1652, it was used to refer to the original inhabitants of European colonies. From 1800, particularly in North America, it was used to mean "the locals."[10] Then, in 1845, "Nativism" took on a particularly anti-immigrant significance, no doubt owing to its etymological links with the "nation" and therefore its use in nationalist ideologies and practices (Onions 1996, 603).

The ideological work of "the Native" is about its political utility. It works to distinguish the descendants of colonials from those who are more recent immigrants (Berkhofer 1979; Vizenor 1994; P. Deloria 1998). For instance, the Daughters of the Lone Star Republic of Texas, formed in 1891, referred to themselves as "Native Texans." This was meant to distinguish their status and rights as descendants of the "pioneering families and soldiers of the Republic of Texas" who "rendered loyal service to Texas prior to its annexation in 1846 by the United States" from those immigrants who arrived after 1846 (Daughters of the Republic of Texas Library n.d.). It thereby displaced—indeed erased—Natives from Texas by suggesting those who descended from the "pioneering families and soldiers of the Republic of Texas" possessed the legal rights of citizenship and land of Natives. This followed from ongoing national narrations. As would happen more and more frequently in the 1800s, "Native," particularly when coupled with

"American," took on the task of differentiating those of English descent from those immigrants of German, Irish, Italian, and other European origins in constructions of the rights and privileges of American citizenship. This citizenship was first and foremost for and by free white men and inextricably linked with property rights (Saxton 1990; Almaguer 1994; López 1996; Lipsitz 1998).

In other words, "Native Americans" worked to preserve and protect a set of legal status and rights to U.S. citizenship and property for those classified as "white." It did so by claiming a Native identity that embodied the rights of possessive descent over the rights of immigrants. Time and again, the legal status and rights of "whites" as "Native Americans" would be affirmed and protected by federal law while that same law stripped Native peoples and recent immigrants of their rights to self-governance, property, and other means to economic self-sufficiency and access to education (Harris 1993).

Beginning in the 1960s, Native peoples reappropriated "the Native" to distinguish themselves as the original inhabitants of the Americas against all other racialized or ethnicized immigrants and minorities. Unlike claims to American citizenship and constitutional rights implied in the terms "African American" and "Asian American," "Native American" intended to distinguish the collective rights of Natives to sovereignty and self-determination under international law from the constitutional or civil protections of immigrants and ethnic minorities (Barker 2002; Kauanui 2002; Wilkins 2002; Champagne 2005).

Today some understand "Native American" to include American Indians, Alaskan Natives, and Native Hawaiians, that is, all of the descendants of the original inhabitants of what are now the fifty states. However, many Native Hawaiians reject this inclusion because they do not want to be placed under the administration of the BIA as "nations within." They prefer to be recognized under the United Nations' classification of Hawai'i as a nation illegally occupied by the United States that qualifies for decolonization (Trask 1993; Silva 2004; Kauanui 2008; Tengan 2008).

Others use "Native" to indicate the indigenous peoples of North, South, and Central America (i.e., of the Western Hemisphere). Many Natives resist this because they perceive it to subsume them under an identification that erases their historical presence in the United States. For example, many Native California Indians have criticized the "hemispheric" perspec-

tive as contributing to an erasure of their unique histories and cultures as distinct from Latin, Aztec, and Mayan contexts.[11]

"The Native," then, is put to work in many ways to represent specific political concerns and agendas. As a consequence, who is and is not included as Native is contingent on the social contexts of its use. To assert that there is a stable, *real* group of people, or an essential, organic individual being referred to as Native, is to assert an essentialist definition of what it means to be Native, when essentialism is about claiming a preexistent, metaphysical truth or essence that is *the* Native against which all others are opposed.

The challenge, then, is not how to capture the truth or the essence of the Native in the category of the Native; it is not about which discourse "gets it right." Rather it is to think through the kinds of historical circumstances that have been created to produce coherence in what "the Native" means and how it functions in any given historical moment or articulatory act. That coherence of meaning is historically contingent and not guaranteed for all time and places (see Morley and Chen 1996). What the Native means will change over time and place as various political constituencies lay claim on determining its significance.

So, of course, Native cultures and identities are not "constructs" if what is meant by "construct" is a falsity or falseness. Native cultures and identities are meaningful to the groups and individuals who give them meaning. But these meanings are not static in time or fixed for all time; they do not refer to realities or essences that exist beyond historical and social context and use.

Tradition

Conventionally, "tradition" is understood as that which is "handed down as belief or practice in a community" (Onions 1996, 935). In the introduction to *The Invention of Tradition* (1983), however, Eric Hobsbawm and Terence Ranger argue that traditions ("governed by overtly or tacitly accepted rules and of a ritual or symbolic nature") are actually more recent constructions ("inventions") toward nationalist ends (1–2). In this, they identify three types: "those establishing or symbolizing social cohesion or the membership of groups, real or artificial communities," "those establishing or legitimating institutions, status or relations of authority," and "those whose main purpose was socialization, the inculcation of beliefs, value systems and conventions of behavior" (9). They found that the

study of traditions had often presupposed the nation's claim to historical cohesiveness and continuity against the reality that traditions are continually being innovated often toward upholding the nation's claims of being cohesive and continuous (12–14). This has certainly characterized histories within the United States of Native traditions. Inflected through racialized notions of biological-as-cultural authenticity, theories of assimilation and social evolution have been used by federal and military officials to rationalize Native oppression on the grounds of Native heathenism and savagery.

In other words, Native traditions have most decidedly not been considered to be valued or even legitimate cultural teachings and ways of life handed down between the generations. This would mean that by the very character of cultural history and identity formation, traditions would change and be changed over time (Owens 1998). Instead, Native traditions have been fixed in an authentic past and then used as the measure of a cultural-as-racial authenticity in the present.

These perspectives have impacted Native peoples in a number of ways. In the mad rush to preserve and catalogue Native cultural artifacts and human remains in the late nineteenth and early twentieth centuries, some archaeologists and anthropologists seemed to care less about how Natives were living than what they remembered or were willing to recount of their ancestors' traditions (Bieder 1986; P. Deloria 1998). Those Natives considered especially worthy of study were those considered to be less assimilated (the infamous "last of" narratives dominating the popular media and sciences of every kind). These theories were authorized in popular, scientific, and legal representations which seemed to validate racist ideologies that produced everything from images of the Vanishing Noble Savage to policy developments like allotment and boarding schools. Throughout, some archaeologists and anthropologists were assumed to be *the* authorities on Native cultures and identities (Rose 1992), so much so that they were made "expert witnesses" in congressional hearings and court cases in which they evaluated the authenticity of Native groups in ways that undercut those groups' legal claims (Clifford 1988; Carrillo 1998).

Anthropology was central to the production of "colonial cosmologies" of Native cultural authenticities and inauthenticities that furthered colonial aims on racist grounds (Raibmon 2006). These representational practices were wholly political and anticipated nationalist agendas (Hobsbawm and Ranger 1983). They belonged to the moment in which they were produced,

informed by the social relations in which they were made meaningful. They reflect, then, the political objectives and social ethics of representing Native traditions and not the truth about Native traditions. Treating Native peoples unethically—robbing their graves; stealing their cultural artifacts; lying about intent, profit, and circulation of work; asserting knowledge or authority over them; betraying them in court—taints anthropologists' methods and conclusions with the stench of political self-interest and self-importance (Dumont 2003, 2008).

Of course, still further, Native articulations of Native traditions make explicit the problematic and complex aspects of Native social politics through which they work. Some Natives have asserted a sovereignty that embraces Western notions of tradition and "nation-ness" (Anderson 1991, 1–2). Others have articulated traditions in discriminatory and hurtful ways with the explicit goal of claiming some and expelling others (Denetdale 2006). But simultaneously, traditions have served as significant sites of political empowerment, coalition, and social work. In the Declaration on the Rights of Indigenous Peoples, traditions stand in for a host of legal rights that are a radical departure from those ascribed to Natives by nation-states. Native groups have likewise used traditions to define cultural revitalization efforts in everything from language retention, agricultural and medicinal practices, and substance abuse programs to K–12 curriculum (Nelson 2008). And, as Owens writes (1998), Natives have insisted that the reality of cultural change and transformation in tradition is not wholly tragic or horrific. In fact, some people, like the Fort Peck Assiniboine woman who described the tribal practice of mutilating the faces of suspected adulterers, or the Pueblo woman who told me about the practice of exiling those who had committed certain types of crimes, think that certain traditions ought to be left in the past. In these multiple articulations, Native peoples shun the notion that the relevance of their cultures and identities is merely collectable, anecdotal, or decorative. They assert traditions as the cultural beliefs and practices that they understand as uniquely their own, not as a yardstick of conformity to an authentic past but as what binds them together in relationship and responsibility to one another in the present and future.

So, it is not about suggesting that Native cultures and identities are "invented" or "false" because they are historically contextual and socially constructed. It is about suggesting that "the Native" and "traditions" are conditional, that they are made meaningful and relevant again and again in

the specific contexts in which they are articulated. Both "the Native" and "traditions" are representational strategies of domination at the same time that they are mechanisms and tactics of antagonism and reformation—sometimes at the same time.

An Overview of the Book

Each chapter that follows puts an act of articulation into historical context and examines the social and legal conflicts within Native communities through which it functions. I focus on how articulatory practices provide a historically conditional perspective on the kinds of social relations and conditions that the United States seeks with or for Native peoples and that Natives seek with one another. I show that the practices are mediated by the terms of national narrations and the agencies those narrations ascribe—to the United States and to Native peoples. The book closes in chapter 7, "Origins," by thinking through the ethical implications of how Natives are (un)made by (their own) status and rights talk.

Until "Origins," the book is divided into three parts. In part I, "Recognition," I argue that U.S. agendas have over-determined the status and rights of Native peoples as "Indian tribes." This has occurred through federal efforts to reproduce Native peoples under the absolutes of federal authority. Within these efforts, the recognition of Native status and rights is really about the coercion of Native peoples to *recognize themselves* to be under federal power within federal terms. The importance of these discursive maneuvers is not merely in the subjugation of Native peoples to federal authority but in the kinds of "Indian tribes" that Native peoples see themselves as and then assert in their relationships with one another. Chapter 1, "Of the 'Indian Tribe,'" unpacks these politics through a brief genealogy of "Indian tribes" in federal law. Chapter 2, "In *Cherokee v. Delaware*," examines these politics in the conflicts between the Cherokee Nation of Oklahoma and the Delaware Tribe of Indians over the terms of Delaware legal status and rights in "Cherokee territory."

In part II, "Membership," I argue that tribal membership criteria are a politic of relationship (un)making, as Native peoples negotiate the terms of their legal status and rights in relation to one another as "Indian members." These processes of identification involve multiple mirrorings of what it means to be Native. In one set of reflections, tribes include and expel

members as they include and expel themselves as tribes within the parameters of federal law. In another set of reflections, members construct and present themselves as members based not only on their concepts of tribal cultures and identities, but also in relation to their perceptions of other tribal cultures and identities. These various mirrorings of group and individual status and rights, federal and tribal policy and criteria, and notions of Native culture and identity are impossible to untangle. Their significance relates to the kind of self-determination Native peoples claim for themselves and in relationship to the international community, as well as the kind of social relations they seek with one another. Chapter 3, "Of the 'Indian Member,'" provides a brief genealogy of the racialization and gendering of membership policies in federal and tribal law. Chapter 4, "In *Martinez v. Santa Clara* (and Vice Versa)," examines the articulatory practices of tribal membership through the gendered politics of tradition and sovereignty. Chapter 5, "In Disenrollment," unravels membership within the racialized and economic contexts of disenrollment practices in California spawned by the Indian Gaming Regulatory Act of 1988.

In part III, "Tradition," I examine the discursive work of traditions in relation to Native definitions of Native governance. Chapter 6, "Of Marriage and Sexuality," focuses on national and tribal debates that exploded in 2004 over marriage and sexuality. At that time, the elected officials and legal counsel for the Cherokee Nation of Oklahoma and the Navajo Nation passed legislation that imitated the U.S. Defense of Marriage Act (DOMA) of 1996 and the rash of state ballot initiatives banning same-sex marriage rights. What is compelling about these laws is that they were rationalized on the grounds that they reflected the traditions of the tribes as decidedly Christian and American conservative. This chapter examines the contestations within the Nations that followed over their respective traditions regarding marriage and sexuality and the kinds of tribes, and rights, those traditions defined.

The difficult stories within this book are not told to indulge tribal secrets or air dirty laundry. The focus on a very modest part of some of the people in U.S.-Native relations and within Native communities who have been disenfranchised and disempowered by articulations of Native culture and identity to Native legal status and rights is intentional and strategic. The unrecognized and the terminated, the *un-* and *dis-* enrolled, and those treated as undesirable for purposes of defining and asserting Native nation-

hood and citizenship have paid the highest price for how Native legal status and rights are defined and asserted by Native peoples. Only from a consideration of the discursive work of status and rights in disciplining Native social and interpersonal relationships can the operations and relations of power within Native communities be better understood. Rather, it is a power that regulates a complex social matrix in which *everyone* is awarded his or her agency and, subsequently, ethical responsibilities as the kinds of nations and citizens each seeks to be.