Nenabozho Goes Fishing: A Sovereignty Story

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Abstract: In this essay, we present a brief genealogy of sovereignty, outlining debates about the term itself as well as the challenging legal terrain facing Indigenous nations' assertions of sovereignty today. We draw on the experiences of the Lake Superior and Mississippi Bands of Ojibwe for examples of how sovereignty has been debated and defined, from treaty-making practices establishing a political relationship with the United States to subsequent struggles for recognition of Ojibwe sovereign authority accorded in those same treaties. We find that the courts and Congress have oscillated between protecting and diminishing Indigenous nations' ability to exercise sovereignty. We argue for a return to the relational paradigm used by the Ojibwe in their treaty-making as a remedy for the damage done by the courts and by Congress. Rather than a rights-based approach to sovereignty, a relational paradigm foregrounds responsibilities to one another and to creation, which sustains us all.

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Nenabozho cut a hole in the ice. Placing his decoy into the water, he reflected on the stories of his elders, stories that detailed times of deprivation and struggle. In those times, the animals, fish, and plants established relationships with the Ojibwe, giving their bodies to sustain the people. Nenabozho remembered the suckerfish who gave their lives to ensure the Ojibwe would survive the harsh winter. The Ojibwe fondly refer to February as the Suckerfish Moon to remember and honor this relationship.

Sitting in the ice shack, Nenabozho considered the leaders who came before him. His ancestors carried stories and treaty relationships with them as they traversed creation. They fulfilled their obligations and responsibilities to creation, offering tobacco and petitioning the animals, fish, and plants to take pity on them and give their bodies to sustain the people. The Ojibwe understood the world as deeply interconnected and drew on relational paradigms to account for their responsibilities to cre-

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ation and one another. Importantly, they taught these practices to their children and grandchildren, who in turn passed these traditions on to future generations, ensuring Nenabozho and his brother would know how to meaningfully enact their treaty commitments with creation.[1]

Nenabozho and his brother grew up hearing the elders speak of their responsibilities to creation, noting that these obligations were also enshrined in treaties with the newcomers to this land.[2] His ancestors had ensured the Ojibwe would be able to continue the fulfillment of their responsibilities to creation while also making space for the newcomers to come into these same relationships with the land, water, flora, and fauna. Nenabozho contemplated these historic treaties. He knew his and his brother's right to fish had been protected in the 1837 treaty with the United States.[3] While his elders spoke of the 1837 and 1842 treaties as agreements to share the land, he was concerned that the United States interpreted these treaties differently, as land cessions.

Nenabozho scoffed at the idea that the Ojibwe could sell their territories. He knew these lands were an inheritance from the Creator, a point Ojibwe leaders asserted as they negotiated treaties with the newcomers. As the last of creation to be placed on the land, Nenabozho understood that his relationships with the land, water, animals, and plants (all of whom preceded the Ojibwe) regulated how he could move through and interact with creation.[4] Nenabozho knew he was thoroughly entangled in Ojibwe law.

"But what animates this law?" he wondered. Nenabozho again contemplated his elders' words about the Creator and creation. He was thankful that his ancestors had stressed the importance of living their responsibilities through their everyday interactions with creation. Nenabozho was grateful that his ancestors' words had been captured, to a certain degree, in their treaties with the United States. Article 5 of the 1837 Treaty declared: "the privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes including in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States."[5]

But so much had changed since these words were written on parchment in 1837. Ojibwe enactment of their sovereign authority to hunt, fish, and gather increasingly provoked settler resistance, and Ojibwe were frequently arrested or had their gear confiscated when they hunted, fished, or gathered outside reservation boundaries.

Suddenly Nenabozho heard footsteps on the ice. Fear rose up in him when his gaze met the state game warden – but so too did excitement. For Nenabozho had achieved what he had set out to do. He had made sure to cross the imaginary line across the lake that marked the boundary of the reservation and sought to contain the Ojibwe people's relationship with creation. Technically, he was on contested waters, territory his ancestors had opened up to the newcomers. But he remembered that the treaties also protected Ojibwes' right to live on and with the land as they always had.

In this moment, Nenabozho did not intend to petition the fish to honor their treaties with the Ojibwe – he was not out to catch anything. He was fishing to assert his sovereignty and to remind the newcomers how to honor their responsibilities and obligations to the Ojibwe. Nenabozho handed the state game warden a copy of the 1837 treaty and, when the warden failed to acknowledge it, he accepted his citation. He knew he had the legal test case needed to bring the newcomers back to the treaty table, even if this time the meeting would take place in a courtroom.[6]

Ojibwe have numerous stories of Nenabozho, which recount his movements across Ojibwe country and detail the en-

during marks he left on the landscape and on those he encountered.[7] Whether describing particular animals whose features were transformed or land that was molded anew, the stories teach us that we live in a deeply interconnected world. And the Ojibwe continue to bring new Nenabozho stories to fruition, through ongoing interactions with creation, one another, and the state. *Nenabozho Goes Fishing* is one of these stories. It details the heroic efforts of two brothers of the Lac Courte Oreilles Band of Ojibwe in their fight to protect their right to fish in 1974. The brothers, Fred and Mike Tribble, drew strength from their relatives and stood up against the tidal wave of state law imposed on their people, contravening the historic 1837 and 1842 treaties with the United States. They went to Chief Lake to fish off-reservation, to challenge that body of state law. The Tribble brothers were charged and found guilty by the state of Wisconsin of taking fish off-reservation, possessing a spear, and occupying a fishing shanty without a state permit.

The aftermath of this historic event was aptly named the "Walleye Wars."[8] The Lac Courte Oreilles Band of Ojibwe (Chippewa) filed charges against the Secretary of the Wisconsin Department of Natural Resources, Lester Voigt, challenging the state's authority to regulate the Tribbles' hunting and fishing off the reservation. This defense of Ojibwe treaty rights resulted in the 1983 *Lac Courte Oreilles v. Wisconsin (Voigt)* decision, which upheld Ojibwe rights to hunt, fish, and gather in their treaty territories. Litigation regarding the scope and form of these treaty rights continued until 1991, when U.S. District Court Judge Barbara Crabb ruled that the Ojibwe nations party to the 1837 and 1842 treaties had regulatory authority over their citizens' exercise of treaty rights.[9] But Judge Crabb tempered this regulatory authority, determining that the state also maintained regulatory authority over its citizens' hunting, fishing, and gathering practices. Thus, tribes and the state would need to work together to ensure the protection of natural resources.

As a result, Ojibwe tribes and the state collaborate on setting hunting and fishing quotas in accordance with Judge Crabb's rulings. Yet each party regulates when and how their citizens can fill this quota. Following the recognition of their treaty rights, the Ojibwe increasingly exercised their long-standing spearfishing practices, fishing out of season and using methods the state prohibits its own citizens from employing. They did so in the face of extreme local and regional discontent among sports fishermen and resort owners opposed to Ojibwe spearfishing, an opposition that erupted into violent attacks against the Ojibwe.[10] These protests began to subside in the 1990s, due largely to additional legal protections put in place to protect Ojibwe hunters and an extensive education movement. This movement sought to inform the broader public about treaty rights and to correct misconceptions about the impacts of spearfishing on the walleye population. It was based on joint studies carried out by the Lake Superior Bands, the Great Lakes Indian Fish and Wildlife Commission, the Bureau of Indian Affairs, the United States Fish and Wildlife Service, and the Wisconsin Department of Natural Resources.

This kind of confusion about and misperception of treaty rights is hardly restricted to fishing and hunting. Indeed, the broader American public has little knowledge of Indigenous nations' sovereign authority and political status, whether it is expressed in the exercise of out-of-season fishing or in the operation of casinos. Americans continue to mistake the nature of Indigenous nations' educational benefits, tax status, and licensing authority. These distinct political and legal rights are grounded in sovereignty. Yet sovereignty is usually misunderstood. The courts and Congress have

only added to this confusion, for they have taken inconsistent, seemingly contradictory positions on the sovereign authority of Indigenous nations, often while simultaneously bolstering U.S. sovereignty.

Indigenous nations exercised sovereign authority long before European arrival. Indigenous political and legal traditions regulated internal matters and established and renewed political, social, and economic alliances with other Indigenous nations. Indigenous nations continued these practices with European nations, establishing new alliances while seeking to protect their lands and resources. The United States followed the traditions of their European predecessors, entering into over four hundred treaties with Indigenous nations, over half of which remain in legal force today.[11] Indigenous nations point to the treaties' double meanings: they clearly recognize Indigenous inherent sovereignty, as treaties are by definition agreements between two or more sovereigns, and express the political commitments made by the United States to their Indigenous treaty partners. Shifting federal Indian policies and law, however, have complicated the ways in which Indigenous nations are able to exercise sovereignty.

As U.S. settlement expanded westward, often outpacing treaty-making, the federal government struggled to control its citizens and keep individual states from encroaching on Indigenous lands and political authority. Indigenous resistance took many forms. Nations blocked access to their territories, taxed and fined trespassers, and called for the government to (re)negotiate treaties. Indigenous leaders simultaneously pursued U.S. legal channels in the hope that the federal government would restrain state powers and individual citizens who violated the treaties. For example, the Cherokee Nation sought an injunction against the state of Georgia for violating U.S.-Cherokee treaties and the 1827 Cherokee Constitution by asserting jurisdiction over Cherokee lands and people within state borders. Chief Justice John Marshall determined that the Court had no jurisdiction under Article III of the Constitution, arguing that tribes were neither states nor foreign nations. He described the Cherokee, instead, as a "domestic-dependent nation" whose relationship with the United States resembled that of a ward to its guardian.[12] In *Cherokee Nation v. Georgia*, he determined that the Cherokee, in placing themselves "under the protection" of the United States in their treaty, are *dependent* nations; because their territories fall within the United States' borders, they are also *domestic* nations. However, he noted that this protection also created a "trust responsibility" for the United States. This trust relationship has at times afforded protections for Indigenous nations – largely from the abuses of states – but has also empowered Congress to unilaterally impose legislation "in the best interest of tribes" and the courts to render decisions that have eroded Indigenous nations' abilities to exercise their sovereign authority to the fullest extent.

One year after *Cherokee Nation v. Georgia*, in 1832, Chief Justice Marshall again addressed the political status of the Cherokee, this time describing the Cherokee nation quite differently, as "a distinct political community, having territorial boundaries within which their authority is exclusive."[13] Marshall found that Georgia laws had no force in Cherokee country. While seemingly contradicting his opinion of one year earlier, the distinction in his framing of Indigenous political status spoke more to his concerns about federalism than it did to his views of the sovereign authority of Indigenous nations. In *Cherokee Nation*, Marshall was intent on articulating federal supremacy over Indigenous nations, thus focusing his attention on Indigenous nations' "domestic-dependent" status. Federal supremacy was key to keeping his 1823 land-

mark Indian title case, *Johnson v. McIntosh*, intact. In that case, he asserted federal supremacy over Indigenous lands in contravention to individual states, in the process creatively framing Indigenous nations as having a "mere right of occupancy" to their lands in order to ensure that federal land grants executed prior to the extinguishment of Indian title would remain in force. In effect, Marshall had sought to make legal the United States' self-proclaimed sovereignty over lands they had acquired neither by consent nor conquest. In this framing, U.S. sovereignty was not unbridled, but merely entailed a preemptive right of purchase over Indigenous lands *vis-à-vis* other European nations. Marshall was clear to note that U.S. title to the lands was "burdened" by Indian title and contingent on Indigenous nations consenting to "extinguish" their rights of occupancy via treaties.

In the 1832 case *Worcester v. Georgia*, Marshall turned his attention to the assertion of federal supremacy over the states, reminding the states that they had no authority over Indigenous lands and peoples and that the U.S. relationship with tribal nations was a federal matter. He also used this moment to expand on his earlier decisions, in many ways to qualify the powers acquired by European nations under the doctrine of discovery. He also sought to clarify the powers Indigenous nations retained, despite having placed themselves under the protection of the United States. He noted that the political authority of Indigenous nations was not impaired by the fact that they had placed themselves under such protection.

In his efforts to bolster and solidify U.S. sovereignty, Marshall issued contradictory decisions on the political status of Indigenous nations, enabling the United States to oscillate among varied positions: one positing that Indigenous nations retain all inherent sovereign authority not expressly relinquished in their treaties with the United States, and another proclaiming that Indigenous nations' political authority is subordinate to their "dependent" status and can be stripped if "inconsistent" with this status. These landmark cases became the foundation of the *tribal sovereignty doctrine*. This doctrine is further complicated by the twin doctrines of *plenary power* (detailed below) and *trust*, which have been employed by the United States to superintend the welfare of Indigenous peoples, with often devastating results for Indigenous nations in their exercise of sovereignty. These distinct and sometimes contradictory doctrines create a quagmire of federal Indian law that provides little clarity in efforts to understand Indigenous sovereignty.

Sovereignty is the most critical force animating a nation. However, the concept of sovereignty is difficult to define, both in the wake of shifting U.S. policies and laws and as globalization has illuminated the porous nature of state borders and exposed the fallacy of sovereignty as supreme and absolute. It is nearly impossible today to envision a nation whose sovereignty is not limited by its relationships and responsibilities, both internally to its own citizens and externally to its diplomatic allies.[14] Indeed, the cases detailed above place considerable emphasis on the limitations of *both* U.S. and Indigenous political authority precisely because of their relationships and responsibilities to one another. Further, our understandings of sovereignty have been transformed and reoriented by the changing conditions and characteristics of the nations that have employed the term.[15] Although the term is often attributed to the Westphalian state system derived from European theological and political discourse, it describes at its core the intrinsic political authority that enables the self-governance of all nations. [16]

Different social contexts generate a multitude of meanings of the term "sovereign-

ty."[17] A central variable common to many definitions is sovereignty's *inherent* presence.[18] Sovereignty cannot be granted to a people; rather, it derives from the collective will of the community – an important point contradicting U.S. claims that "tribal sovereignty" is necessarily constrained, incomplete, or dependent on U.S. grants of authority.[19] Chickasaw scholar Amanda Cobb argues that "at base, sovereignty is a nation's power to self-govern, to determine its own way of life, and to live that life – to whatever extent possible – free from interference."[20] She emphasizes an Indigenous understanding of sovereignty as a people's right to live in accordance with their own political and legal traditions.[21] Lumbee political scholar David Wilkins similarly asserts that "tribal sovereignty is the intangible and dynamic cultural force inherent in a given indigenous community, empowering that body toward the sustaining and enhancement of political, economic, and cultural integrity."[22]

The legal and conceptual complications surrounding sovereignty speak to the term's power and the battles that inevitably ensue when it is asserted.[23] Sovereignty is contested among Western political thinkers. It is contested between American Indians and the U.S. government. It should therefore come as no surprise that sovereignty is also contested among Indigenous scholars and activists. The term began to dominate Indigenous political discourse in the mid-1960s and has remained prevalent and powerful. But sovereignty is not without Indigenous critique: some scholars question the use of the term altogether. Taiaiake Alfred asserts that the United States' and Canada's positions on Indigenous nations' sovereignty vary depending on context: sometimes they flatly deny it, and sometimes they theoretically accept it within a framework of federal Indian law that works to subjugate Indigenous political authority.[24] Alfred reminds us that the "actual history of our plural existence has been erased by the narrow fictions of a single sovereignty. Controlling, universalizing, and assimilating, these fictions have been imposed in the form of law on weakened but resistant and remembering peoples."[25] Alfred critiques sovereignty for its alliance with Enlightenment theory, which weds sovereignty with supremacy, coercion, and homogeneity.

The history of American Indians' pursuit of sovereignty within the American political system has been marked by both coercion and assertions of American supremacy. Though the United States continued to sign executive agreements with Indigenous nations into the early twentieth century, Congress effectively brought an end to treaty-making with tribes in 1871, making a significant shift away from negotiation to unilateral imposition of legislation and administrative oversight. By the 1880s, Congress aggressively moved to assimilate Indigenous peoples – to transform them and thus disappear their sovereignty. Allotment policies privatized Indigenous communal land holdings, resulting in an additional loss of 90 million acres of land.[26] Indigenous political authority was further undermined by the dismantling of Indigenous families: boarding schools separated Indigenous children from families and communities and attempted to "Americanize" children by stripping them of heritage cultures, languages, and traditions.

Despite these assaults, Indigenous nations fought to protect their sovereignty. Some turned inward, ensuring that the philosophies, traditions, and languages that give meaning to Indigenous legal and political traditions remained intact in the face of legislative assaults and rapid encroachment on Indigenous lands. Others turned to the courts again and again to call on the United States to honor treaties recognizing the sovereign authority of Indigenous nations over their lands and citizenry. Indeed, the courts were provided ample opportunity to define

the contours of Indigenous nations' sovereignty. The Supreme Court upheld tribal sovereignty in *Ex Parte Crow Dog* (1883), for example, recognizing tribal nations' criminal jurisdiction over crimes committed by one Native person against another within Indian Country. But in the final sentences of this decision, the Court noted that it could only depart from this treaty-protected authority if Congress made a clear expression of intent.[27]

Taking the cue, Congress passed the Major Crimes Act one year later, granting federal criminal jurisdiction over Indigenous peoples within Indian Country. Indigenous nations protested this violation of their treaties. Instead of providing protection, the Court authorized Congressional powers over Indigenous nations. This birthed the legal doctrine known as *plenary power* by asserting that "the power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell." Plenary power was expanded again in 1903 to support Congressional legislation, even if it directly violated treaty provisions.[28] These cases gave rise to the assertions that Congress had not just exclusive authority over Indigenous nations – a constitutionally supported claim – but also unlimited and absolute authority over Indigenous nations, despite the lack of constitutional support for this argument.

The tribal sovereignty and plenary power doctrines have placed tribal nations in a legal bind. The courts have protected tribes' sovereignty by recognizing that Indigenous law is not beholden to the U.S. Constitution,[29] by recognizing that tribal nations retain the authority to define their own citizenship, and by accepting that employment preferences in Bureau of Indian Affairs hiring are consistent with Indigenous peoples' unique legal status.[30] Congress has also restored some aspects of Indigenous sovereign authority that had been stripped by the courts.[31] Nonetheless, the corpus of federal Indian law developed after the landmark Cherokee cases has created more confusion than clarity about Indigenous nations' political authority, complicating the meaning and exercise of sovereignty for Indigenous nations, the federal government, and states.

Indigenous nations have continually pressed for recognition of their sovereignty and protection of their treaty rights. Those nations include the Lake Superior and Mississippi Bands of Ojibwe – which takes us back to the Nenabozho story that opens this essay. In it, two brothers dropped their decoy through a hole in the ice outside reservation boundaries and invited arrest, because their ancestors had protected their right to do so in treaties with the United States. The courts upheld Ojibwe treaty rights first in the *Lac Courte Oreilles v. Wisconsin (Voigt)* decisions in Wisconsin and subsequently in the 1999 *Minnesota v. Mille Lacs* decisions, in which the Supreme Court affirmed that treaty rights had not been extinguished. These were important victories. But such tribal interests were upheld in only five of twenty-eight Supreme Court cases heard between 1991 and 2000.[32] Thus, many Indigenous nations, including the Ojibwe, have sought other arenas in which to exercise and protect sovereign authority.

Following the *Voigt* decisions, the Lake Superior Ojibwe Bands created an intertribal natural resource management and regulatory agency, the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), to conserve and manage the Tribes' treaty-protected natural resources, protect the habitats and ecosystems that support those resources, develop and enhance institutions of tribal self-governance, and preserve Ojibwe traditional and cultural pursuits. In these pursuits, the GLIFWC has effectively utilized Memorandums of Understanding (MOUs) to negotiate and collaborate with various municipalities, fed-

eral agencies, and service providers. For example, 2018 will mark the twentieth anniversary of an MOU regarding Tribal–USDA Forest Service Relations on National Forest Lands within the "ceded" territories of the 1836, 1837, and 1842 treaties. This mutually beneficial agreement facilitates cooperation among the tribes and the Forest Service while enabling the Forest Service to better meet federal trust obligations to the Lake Superior Ojibwe Bands. The MOU has been recognized at the regional and national levels for "its innovations and effectiveness at advancing relations between the Forest Service and the tribes,"[33] demonstrating that localized negotiations and collaborations may represent a better stage for sovereignty struggles than contentious litigation, which has produced wildly contradictory positions on the sovereign authority of Indigenous nations.[34] Nonetheless, one thing is clear: whether in negotiation, collaboration, or litigation, sovereignty remains a central issue in Indigenous-state relations.

For Indigenous nations, sovereignty animates relationships: relationships with the land, water, animals, and plants; and relationships with one another. When encroaching federal and state authorities have harmed the relationships among Indigenous lands and citizens, Indigenous nations have turned to the courts. Indigenous leaders remain hopeful, however, that we can move away from contentious litigation and limiting legislation and return to negotiation to build and renew mutually beneficial relationships.

That, indeed, is the lesson of *Nenabozho Goes Fishing*. When he cut his hole in the ice, dropped his decoy in the water, and invited the game warden to arrest him, Nenabozho meant to use the courts to establish recognition of a particular aspect of Ojibwe sovereignty – the right to fish – as guaranteed and protected in the 1837 treaty, an agreement between two sovereigns entailing rights for both. But Nenabozho was also simply *fishing,* thinking as he did of the larger world of relationships outside the world of courts and congresses, instead focusing on a relationship of laws and ethics and right behavior toward one another. He wanted us not to focus on *who* had authority to make decisions, but instead to consider *how* we might act.[35] He hoped to bring forward the older ways of relating to one another that were built into the early treaties with creation. He imagined a relationship that focuses not on the rights retained or attained via treaties, but rather on the responsibilities and duties we have to one another and to creation.[36] These are the relationships Indigenous people want with other sovereign political entities – relationships oriented toward a mutual future.

ENDNOTES

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