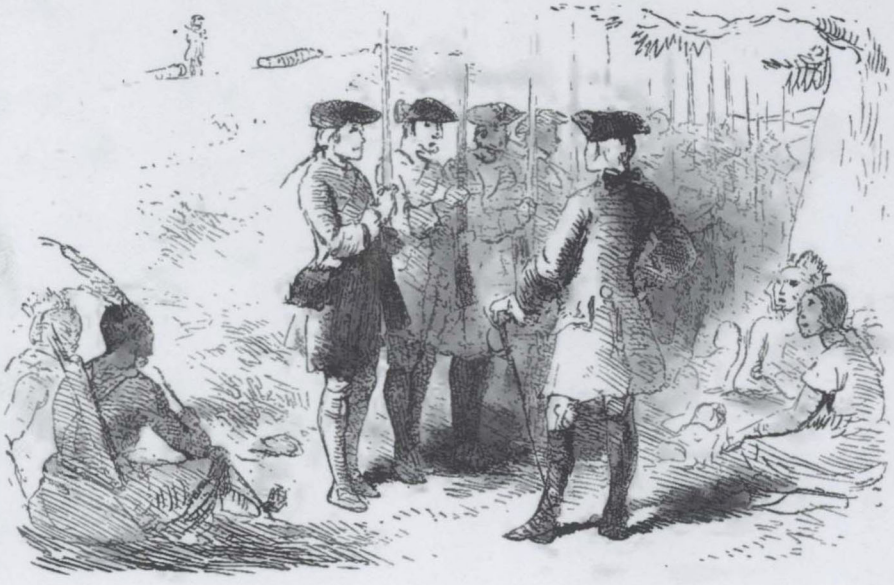
LISA FORD

Settler Sovereignty



JURISDICTION AND INDIGENOUS PEOPLE

IN AMERICA AND AUSTRALIA

1788–1836

SETTLER SOVEREIGNTY

Jurisdiction and Indigenous People in America and Australia, 1788–1836

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Maps

A Note on Maps

The maps in this volume were redrawn from contemporary sources by Philip Schwartzberg of Meridian Mapping. They are as accurate as possible, but must, of necessity, incorporate some of the many inaccuracies in the originals. They are drawn from the following sources:

Georgia, 1796: Tanner, Georgia from the Latest Authorities, *American Atlas* (New York: Reid, 1796).

Georgia, 1823: Tanner, Georgia and Alabama, *American Atlas* (Philadelphia: Tanner, 1823).

Georgia, 1831: Young and Delleker, *Georgia: A New Grand Atlas* (Philadelphia: Finlay, 1831).

Australia, 1798: Governor Hunter, Map of New South Wales in 1798, *Historical Records of New South Wales: Volume 3, Hunter* (Sydney: Charles Potter, 1895), 346.

Australia, 1831: The National Archives: Public Records Office, Colonial Office (TNA: PRO CO) 700/AUSTRALIA 9: Map of Australia. Compiled from the Nautical Surveys made by order of the Admiralty, and other authentic documents, by James Wyld, Geographer to the Queen. Published 1838. Inset: Van Diemen's Land.

Australia, 1838: TNA: PRO CO 700/AUSTRALIA 10: The South Eastern portion of Australia. Compiled from the Colonial Surveys and from details furnished by Exploratory Expeditions, by John Arrowsmith. Published London, 2 August 1838.

Settler Sovereignty

Contents

Introduction

THE LEGAL TRINITY of nation statehood—sovereignty, jurisdiction, and territory—has a recent history that is yet to be told. It is a history suspended between empire and statehood, between local and global. It is about defining sovereignty as the ordering of indigenous people in space: a project undertaken by Anglophone settler polities around the globe between 1822 and 1847.[1]

In 1822, a criminal court in Upper Canada claimed that violence between indigenous people on the streets of Amherstburg could be punished by British law because territorial jurisdiction flowed from British settlement there.[2] In the same year, when Chief Tommy Jemmy executed a Seneca woman for witchcraft, the New York legislature claimed jurisdiction over all indigenous violence within the borders of New York State.[3] In 1830, a convention of judges declared that George Tassel could be tried and executed for killing another Cherokee on Cherokee land within the territorial boundaries of Georgia.[4]

Just six years later, the New South Wales Supreme Court decided that British Imperial law governed violence among Aboriginal people on the grounds that Aborigines had no law and no land rights that could survive the advent of British settlement.[5] Across the Tasman Sea and within weeks of signing the Treaty of Waitangi (1840), the British government demonstrated the meaning of sovereignty by trying a Māori man for killing a settler in New Zealand.[6] In 1847, Ranitapiripiri (alias Kopitipita) was tried for murdering another Māori by "drowning him . . . in the river Manawatu," because every murder in New Zealand came within the jurisdiction of British courts.[7]

Much more was at stake in these trials than murder; they redefined sovereignty and its relationship to territory and jurisdiction. Sovereignty and jurisdiction have always been intertwined, but they have not always been territorial in nature. Though commonly understood to mean "the final and absolute political authority in the political community,"[8] in its long history, sovereignty has described myriad modes of territorial and personal power.[9] In law, sovereignty is practiced through jurisdiction. To this day, jurisdiction imports authority over territorial units, people, things, *or* bodies of law.[10] Settler courts in the 1820s and 1830s, then, did something quite radical.

By exercising criminal jurisdiction over violence between indigenous people, settler courts asserted that sovereignty was a territorial measure of authority to be performed through the trial and punishment of every person who transgressed settler law in settler territory. Perfect settler sovereignty rested on the conflation of sovereignty, territory, and jurisdiction. Their synthesis was both innovative and uniquely destructive of indigenous rights. After 1820, courts in North America and Australasia redefined indigenous theft and violence as crime, and in the process, they pitted settler sovereignty against the rights of indigenous people.

The stakes were clear in George Tassel's 1830 appeal. Counsel argued that Georgia had no jurisdiction to try Tassel for murder because the Cherokee were a sovereign, self-governing people. The convention of judges responded with the logic of territoriality:

> Indeed it is difficult to conceive how any person who has a definite idea of what constitutes a sovereign state, can have come to the conclusion that the Cherokee Nation is a sovereign and independent state. . . . That a Government should be seized in fee of a territory and yet have no jurisdiction over that country is an anomaly in the science of jurisprudence.[11]

The same tenets were recited in the Supreme Court of New South Wales (1836) by puisne judge William Burton. He declared that the Supreme Court could try Jack Congo Murrell for murdering Jabingee because "the aboriginal natives of New Holland . . . had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own." That privilege could only rest with Great Britain, which had "obtained and exercised for many years the rights of Domain and Empire over the country."[12]

Such was the moment of settler sovereignty: the legal obliteration of indigenous customary law became the litmus test of settler statehood.

This book tells its local and global history through two exemplars: the state of Georgia and the colony of New South Wales from 1783 to 1836. It focuses not on legal treatises, but on the transformation of everyday legal practices that brought George Tassel and Jack Congo Murrell into court. In daily practice lies unexpected trans-Pacific continuity. Daily practice makes it clear that the British arrived in Savannah and Port Jackson understanding that Crown sovereignty was limited in nature. It did not contain clear rights to exercise jurisdiction outside major settlements and seldom extended over indigenous people at all. Before the 1820s, neither indigenous people nor settlers were uniformly tried for their violence. Settler violence against indigenous people, indigenous violence against settlers, and indigenous violence against indigenous people were seldom construed as crime. They constituted justice or the threat of war. Violence drew meaning from a shared blend of legal regimes encompassing natural law retaliation, common law culture, and customary indigenous law. This multiplicity did not equate to confusion, however. On both sides of the Pacific, settlers and indigenous people understood the legal frameworks surrounding their conflicts and manipulated them deftly. All understood the spatial and juridical limits of colonial and state sovereignty in the early decades of the nineteenth century. This study recreates the parameters of legal pluralisms and the tendrils that bound them together through time and space.[13]

Territorial jurisdiction became a necessary accoutrement of sovereignty later. In doing so it did not fulfill a genocidal promise inherent in settler colonialism since the seventeenth century.[14] This study shows that settler polities extended jurisdiction in the 1820s and 1830s because they imagined for the first time that it was necessary to shore up the legitimacy of settlement.[15] Curiously and slowly, at the same time and in similar ways, indigenous violence came to pose an intolerable ideational challenge to sovereignty in North America and Australia. After 1800, plural legal practices came under pressure. Evolving global discourses of sovereignty combined with new technologies of governance brought new people and new ideas to settler peripheries. In just two decades, settler and indigenous violence became crucibles of sovereignty talk, as the idea of perfect territorial sovereignty clashed with tenacious pluralities. Territorial jurisdiction became a logical necessity of settler sovereignty for the first time after 1820, a cause and effect of changing local jurisdictional practices. All came to center on the trial and incarceration of indigenous people. This is why, since the 1830s, indigenous subordination has been a founding tenet of settler sovereignty in North America and Australia. This is a global and a local story.

It is a global story because settler polities redefined sovereignty at the same time as it was recast in other centers, peripheries, and places in between. Settler sovereignty forms a peculiar chapter in Lauren Benton's story about the global drive of colonial states to control plural regimes of law in Latin America, America, Asia, Australia, and Africa in the second quarter of the nineteenth century.[16] It forms part of legal reform in the British Empire, which set about interposing magisterial power between masters and slaves, settlers and indigenous people from the Cape of Good Hope to the Caribbean from 1800.[17] Territoriality was contracted and spread by men and women circulating throughout the Anglophone world. British settler colonies were reformed or created after the American Revolution by a very mobile and educated network of bureaucrats and businessmen who moved about the Atlantic, Pacific, and Indian Oceans with Vattel and Blackstone under their arms.[18] Settler sovereignty arrived at the same time as post-Napoleonic European states embarked on a campaign to assert jurisdiction over their plural peripheries, a project that was destructive of European indigenous law and self-governance.[19] Settler polities joined polities throughout the world—South America, Asia, and Europe—in declaring territorial statehood.[20] Indeed, as David Armitage has argued, it was the American War of Independence—a settler rebellion—that started the "contagion of sovereignty."[21] Suspended as they were between processes of colonization, aspirations to self-governance, and the cultural and political networks of the British diaspora, settler polities have special explanatory power in this moment of legal ferment.

Their explanatory power, ironically, rests at the level of the local.[22] The story of settler sovereignty can only be told by sifting out the changing legal meanings attached by participants to the daily struggles of indigenous peoples for resources, for dignity, and for survival. It is also part of the quest for local, settler autonomy. Settler sovereignty was created, after all, by courts in Amherstburg, Milledgeville, Sydney, and Towranga, not in Washington or London.[23] In this respect, settler sovereignty is a paradox of federalism: peripheral states and colonies asserted sovereignty in their own, federal and/or imperial right.[24] The real content of their claims, however, was local, territorial control over the process of indigenous dispossession. As such, it rested on even more local histories. To bring settlers and indigenous people to court for their violence required local settlers to recognize violence as crime. Magistrates and constables had to investigate and arrest perpetrators. Perpetrators had then to be tried before a settler jury. In short, exercising jurisdiction over settler and indigenous violence required local investment in the idea of ter-

ritorial jurisdiction and in the authority of the state to exercise it. It rose through pervasive local complicity. Its most important context is the daily, systemic, and ongoing subordination of indigenous people.

Continuity and Difference

What follows, then, is a local history of ideas and practices in two settler polities: the early national state of Georgia and the colony of New South Wales. It is less a comparison than an exploration of continuity between two very unlike places joined by language, institutions of local government, a history of settlement, and cultures of common law.[25] These places were extraordinarily dissimilar in many respects, yet what little they shared influenced their redefinition of sovereignty in the specific demographic, intellectual, legal, and economic contexts of the early nineteenth century.

I have chosen to focus on Georgia and New South Wales for a number of reasons. The first is because together they exemplify the moment of settler sovereignty. After 1820, Georgia and New South Wales engaged in long debates about the relationship between their sovereignty (state, colonial, or imperial), their jurisdiction, and the legal status of indigenous people. Georgia's debate was fierce and public. In New South Wales, debate was more demure—conducted in courts and councils—but no less transformative. In the process, both created a rich archive of legal argument that culminated in the remarkably similar legal declarations in 1830 and 1836 that indigenous violence must fall within the jurisdiction of settler courts because territorial, settler sovereignty could not tolerate indigenous self-government. Indeed, of all the settler polities that linked territorial sovereignty with jurisdiction over indigenous crime between 1820 and 1850, Georgia and New South Wales did so most proximately. They used the same legal arguments at the same time to articulate the most complete iterations of perfect settler sovereignty produced in the Anglophone world.

One was a state and the other a new colony, yet both were involved in similar processes of colonization within inherently federal structures of governance. Together with New York and Upper Canada, they exemplify the embeddedness of settler statehood in empire and colonization. This is because of the peculiar structural continuities that constituted Anglophone settler colonialism, bound as it was by a combination of economic, demographic, legal, and imperial histories. The most important continuity was the fact that, from the sixteenth century, North America and the Caribbean formed the reference point, the font of experience,

law, and practice that defined British settler colonialism thereafter. Next in importance came institutions of local government grounded in "a culture of legality" rooted in "customs in common" and the common law.[26] These caused similar tensions between local legal practice and central policy because they gave local settlers a monopoly over jurisdictional practice. In Anglophone settlements, magistrates and constables defined the practical limits of the state at the local level. The more legally minded among them also shared a common historical preoccupation with the contest and expansion of jurisdiction. Legal pluralism was a fact of life in early modern Britain, and had a long afterlife in settler peripheries.[27]

In addition, settler colonialisms had several broad, structural continuities. Unlike most British colonial projects, settlers in North America and Australia (and in Britain's Caribbean and South African "Cape" colonies) did not seek to govern through indigenous hierarchies in order to extract commodities. Instead they settled. Where the disease environment was favorable, they reproduced and grew crops chiefly for export. They began as or evolved into colonies of settlement where "immigrants intended to establish societies as similar as possible to those they had left behind."[28]

North American and Australian were distinguished from other Anglophone settler projects in several respects, however. They were demographically distinct projects of colonization. These settlements were founded in regions either with low densities of indigenous population, or where indigenous populations were devastated by European and African disease.[29] Unlike indigenous survivors in the Caribbean islands, surviving indigenous communities in North America and Australia occupied arable or pasture land. Therefore, indigenous displacement, removal, or assimilation remained a precondition of settler expansion long after settlement began. Finally, unlike southern and eastern Africa or parts of meso-America where indigenous populations were much larger, farming in North America and Australia did not proceed on the forcible co-option of indigenous labor. Instead in the Anglophone peripheries I discuss here, most indigenous people labored indirectly for the benefit of colonizers. In early Georgia, Indians harvested wildlife for trade pelts, and in early New South Wales, Aborigines aided in the policing of convicts by killing them when they escaped into the bush.[30] Settler farms were chiefly run by imported free, indentured, or slave labor. Accordingly, these peculiar settler polities were imagined and to some extent organized as places of indigenous exclusion.[31] They had special potential to fold colonization into modern statehood when the global ferment of the nineteenth century changed ideas and practices of law and governance.

Structural continuity does not diminish difference, however. Of this small cluster of polities, Georgia and New South Wales are in many respects the least alike. I have chosen them partly because they form two poles of settler experience, casting light on the gradations between. Georgia was formed as a colony in 1733 on land squabbled over by Spain and Britain for half a century, though it was wholly controlled and peopled by the powerful Creek and Cherokee Confederacies. By 1800, Georgia claimed land from the east coast of North America to the Mississippi, though it was in negotiations with the new federal government to cede most of this land, a move that would soon turn its indigenous frontier into an indigenous bubble in the middle of settled cotton lands. Its borderlands in 1800 were international. Spain controlled Florida to its South, France and Spain took turns claiming Louisiana, and the British had traders and emissaries operating in both. All courted and treated with the well-armed, diplomatically savvy, and culturally interconnected Indian nations that inhabited Georgia's peripheries. In 1800, Georgia was also a colonizing state rather than a British colony—a status it struggled fiercely to control and define against the new federal government and indigenous people.

Yet, of all the differences between Georgia and New South Wales, slavery is the most important. Georgia by 1800 was a society deeply immersed in the ideologies and economics of race slavery. Moreover, race slavery held important ramifications for frontier conflict. Though violence and land were perhaps the most important causes of conflict between Georgia and surrounding Indians,[32] conflict had deeper roots in South Carolina's disastrous attempt to enslave indigenous people in the early eighteenth century, and was exacerbated daily by the escape of slaves into Indian Country. The incorporation of African slaves and of slave labor into Indian agricultural economies, meanwhile, helped to precipitate legal crisis in Georgia.[33]

New South Wales could scarcely differ more in 1800. It was a nascent convict colony, formed as an open-air prison in 1788 and just beginning to reimagine itself as a self-sustaining agricultural community premised on forced convict labor. It was an uncontested zone of British imperialism. Though Britain recognized the priority of Dutch claims to the western half of the continent, only the visits of a few French and Russian explorers attested to any European interest in Australia. Indigenous people there had neither the curse nor the benefit of long experience with European colonization. So in 1800 Aborigines were unarmed, had no European allies and few intercultural brokers, and suffered terribly from smallpox. Accordingly, though Governor

Phillip arrived in 1788 with instructions to "conciliate" with Aborigines, he signed no treaties recognizing their rights to land and self-government. No document shows that this was official policy, though it may have been.[34] The absence of a treaty may also be explained by the fact that, at first, local Aborigines refused to talk, let alone trade, with colonists. Colonists took to kidnapping Aboriginal men to create intermediaries. Thereafter, the modest goals of early convict settlement, very different indigenous customs, and the enormous tactical and epidemiological disadvantage of Australian Aborigines made written treaties unnecessary to ensure the survival of settlement in New South Wales. Indigenous-settler conflict in New South Wales, then, was much less grounded in local networks of exchange and was uncomplicated by the institution of slavery. For indigenous people, conflict revolved around life-or-death access to resources, access hampered by settlers' occupation of land, their monopolization of water, and their relentless destruction of animal habitats.[35]

Despite their manifest difference, Georgia and New South Wales shared practices of legal pluralism that they abandoned at the same time. This historical congruence is so unlikely that it requires investigation. Much of what follows focuses on common pluralities stemming from shared history, shared assumptions, and shared institutions. The transformation of settler sovereignty, however, was also precipitated by what these different settler peripheries exchanged. In the 1820s they exchanged some news. The movement of bureaucrats, commodities, and newspapers between British settler colonies and of whalers crossing the Pacific facilitated the spread of news about indigenous-settler conflict among Anglophone peripheries. New York and Amherstburg, after all, were separated by more than 200 miles but connected by geographically mobile indigenous communities and settler troublemakers in the 1820s.[36] American local papers show that relevant players knew of key legal and political controversies over indigenous legal status throughout the early United States. Georgia certainly knew about New York's claims to territorial sovereignty in the 1820s.[37] New South Wales papers carried news of the removal of Indians from the southeastern United States in the 1820s and 1830s, though there is little evidence that *Tassel* or the Cherokee cases were reported there.[38]

Georgia and New South Wales also shared tentative networks of people. Chief Justice Francis Forbes, who led the first Supreme Court of New South Wales to extend jurisdiction over some indigenous-settler violence in the 1820s, was the grandchild of a southern loyalist, raised in a slaveholding family with property and trade interests in

Georgia. He was deemed thoroughly North American and dangerously republican in some spheres of politics and legal decision-making.[39] More broadly, from the 1810s, New South Wales was staffed by men of the world. Governor Lachlan Macquarie rambled from North America, through Russia and India, before coming to New South Wales in 1810. Governor Ralph Darling served in the Caribbean and Mauritius before arriving in the 1820s. Judge William Burton, who declared that indigenous people in New South Wales had no sovereignty or jurisdiction in 1836, came to New South Wales via the Cape Colony, fresh from claiming extensive powers over African slaves and apprentices for the Crown.[40] Migration and circumnavigation broke homeland communities into immigrant communities in different Anglophone settler polities—communities linked, as the centuries wore on, by ever improving networks of communication.

Georgia and New South Wales shared a unique historical moment. Settler sovereignty was precipitated by transnational economic and demographic events that had special impact on settler peripheries. Britain's victory over France in 1763 secured its dominance as a global imperial power, a dominance that disempowered indigenous North Americans by removing long-standing European allies, and radically disadvantaged Australian Aborigines by forestalling imperial rivals who could ply them with guns.[41] After 1815, both industrialization and post-Napoleonic mass migration fed astounding demographic and economic growth in Anglophone settler peripheries.[42] The American southwest and every New South Wales frontier were suddenly and extensively populated by people, sheep, and cotton fields.[43] The Cherokee Nation, though situated on poor cotton country, was overrun with prospectors when gold was discovered there in 1828.[44] Digging minerals and producing fibers for British and American mills created unprecedented pressure to dispossess, destroy, or subordinate indigenous people.

Finally, in this unique historical moment, Georgia and New South Wales shared books. Among them, Emer de Vattel's *Law of Nations* stands out as a book for the times, peddling a powerful synthesis of neo-Lockean legal and racist thought about indigenous people in North America and Australasia.[45] It underpinned both George Tassel's execution in Georgia in 1830 and Jack Congo Murrell's trial in New South Wales in 1836. Vattel's dismissal of indigenous property rights and indigenous sovereignty joined territory with sovereignty with new clarity—a new clarity that Anglophone settler courts read, after 1820, as an injunction to exercise jurisdiction over indigenous crime in colonial peripheries.