

Santa Clara Pueblo v. Johnson:

Gender Subordination within the Colonial Structure

The [judicial] investigation procedure, an old fiscal and administrative technique, had developed above all with the reorganization of the Church and the increase of the princely states in the twelfth and thirteenth centuries... The investigation was the sovereign power arrogating to itself the right to establish the truth by a number of regulated techniques. Now, although the investigation has since then been an integral part of western justice (even up to our own day), one must not forget either its political origin, its link with the birth of the states and of monarchical sovereignty, or its later extension and its role in the formation of knowledge

--Michel Foucault, *Discipline and Punish*

Santa Clara Pueblo v. Martinez stands out in the body of federal Indian law as one of the few Supreme Court rulings in favor of tribal sovereignty. Given the rarity of this outcome, there is reason to question the Court's motives: as indigenous author and activist Taiaiake Alfred writes, "From the perspective of the state, marginal losses of control are the trade-off for the ultimate preservation of the framework of dominance" (71).

This essay will explore the "framework of dominance" that is preserved in the *Santa Clara* decision. The case, in which female members of the Santa Clara Pueblo sued the tribe for its implementation of sexist enrollment policies, pits tribal sovereignty against civil rights. By finding in favor of tribal sovereignty, the majority opinion

implicitly sanctions a social structure that, I will argue, replicates the colonialist framework on which federal Indian law is based. A comparative reading of *Santa Clara Pueblo* and *Johnson v. McIntosh*, a case from around 150 years earlier that is considered foundational to federal Indian law, will be used to examine this colonialist framework and the ideologies that support it.

The colonialist framework, I will argue, is dependent upon the Western notion of identity as oppositional and hierarchical. This conceptualization creates a culture of competition in which the stratified distribution of status and resources is justified in essentialist terms, particularly those of race and gender. The naturalization of hierarchy legitimates and is legitimated by the use of force against those at the bottom. This structure stands in stark contrast to the values of traditional Indigenous American societies, in which we find potential antidotes for some of America's most fundamental flaws.

Both *Johnson* and *Santa Clara* are centered around the question of resource distribution; they each involve a sovereign body that has taken the right of access to a resource away from a minoritized identity group—respectively, Indians and women. In each case, the Court considers its own right to overrule the decision of the sovereign, and finds that it cannot. Thus, both decisions ultimately protect sovereign power at the expense of individual rights.

Johnson involves two competing claims to land title. The plaintiffs, Johnson and Graham, had purchased the land in question before the American Revolution directly from the chiefs of the Illinois and Piankeshaw Indian nations. The defendant, McIntosh, was granted the same land by the United States government following the War. In Chief

Justice Marshall's own words, "The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country" (38). Thus, *Johnson* addresses the issue of racialized exclusion to the full rights of property.

In *Santa Clara*, the resources in question are tribal membership benefits. The tribal council had enacted an ordinance that gave membership rights exclusively to children of Santa Clara men—either children "born of marriages between members of the Santa Clara Pueblo" or "of marriages between male members of the Santa Clara Pueblo and non-members" (112). Children of Santa Clara women whose fathers were non-members could not themselves become members. Therefore, the case involved the gendered restriction of the right to pass tribal membership status and benefits to one's children.

Implicit in both cases, therefore, is a particular notion of identity as essential and oppositional: White/Indian, male/female. This conception of identity can be traced to the very foundations of the Western philosophical tradition—which, since its beginnings in antiquity, has been based in oppositions. Writes Nigel Tubbs in *History of Western Philosophy*:

In Ancient Greece the metaphysical relation and the social relation were held together in the immediacy of the ethical order. Truth and the social order were transparent in and as life and death. The master was true as the immediacy of what is, and the slave was error as the immediacy of what is not, or as death, the other to life (148).

Thus identity, in its simplest form, has always been understood as a hierarchical dichotomy: “Life is that which posits itself as *what is*, and over and against *what is not* (Tubbs 4). Life and death, the master and the slave: the Western Self has always been constructed through opposition, through a rejection of its other.

This dualistic conception simultaneously stabilizes and undermines the self. The antithetical nature of Western identity, seemingly so grounded and definite, is fundamentally paradoxical: self-definition through the negation of the other makes this other an inherent aspect of the self. Ultimately, “the I learns of the truth of its contradictory identity from that which it has until then seen as its absolute antithesis” (Tubbs 150). Thus the Western self, caught by its own definition in a perpetual crisis of identity, experiences a constant anxiety about the reality of its own existence. This anxiety has historically been repressed through the violent and oppressive treatment of others, which allows the self to maintain the illusion of its own superior essence (Tubbs 153).

This tendency towards violence and oppression have generally been directed at identity groups who are perceived as weak or lacking. The ideologies of colonialism and sexism, in their positing of an inferior “Other” who can be oppressed and dominated, have always gone hand-in-hand, as Freya Schiwy describes:

The colonial imaginary has employed gender as a metaphor and means of subalternization, a metaphor that resulted not only in the representation of territories as female virgin lands that the conquerors penetrated with the sword in hand. The gendering of colonial imaginaries has operated as a means of rendering European masculinity through Othering. That is, European and Caucasian men

have thought themselves in opposition to colonized (or postcolonial) men who have been represented as effeminate or as part of an irrational nature where nature itself is also bound up with tropes of femininity.

Thus, both women and people of color have been defined, in the West, by an essential lack—that of maleness or whiteness. This ideology of intrinsic white male superiority that permeates Western culture has been used to justify—or perhaps more accurately, to effectively *erase*—the violences perpetrated against both groups. Alfred writes, “Once we fully understand the idea of oppression, it doesn’t take much further insight to see that [Native] men’s inability to confront the real source of their disempowerment and weakness leads to compound oppression for [Native] women” (59). And, recognizing the interdependence of these structures, he notes: “Overcoming both the abuse of our nations by the state and the abuse to which Native women are subjected depends on our recognizing that the two are related” (119).

The framework of identity that underlies both *Johnson* and *Santa Clara* thus implicitly naturalizes the concept of hierarchy, particularly in terms of race and gender. More generally, the oppositional nature of Western identity gives rise to the notion that each individual is at odds with one another; the elevated self stands alone and apart, competing against, rather than cooperating with, other selves. Thus, the Western concept of self necessarily precludes concepts of community and the individual becomes fixated on personal gain through competition. Adrian Pabst writes:

The opposition of the one and the many seems perennial and perhaps even indelible. However, to oppose them is simply to assert that they represent contrary principles and that as such they are incompatible, producing conflict and violence.

This opposition is based upon the undemonstrated and unwarranted assumption that substance is prior to relation and that individuality is absolute... To subordinate reciprocal relation to individual substance is to elevate the self-identity of individuals over above the commonality of being in which all things seem to share (xxx).

In contrast, Indigenous conceptions of self are intimately connected with and defined by notions of the collective. Eric Cheyfitz writes, “For the Indigenous person, identity is not located within the individual but flows in the relations *between* persons, making the ‘we’ not the ‘I’ the central form of recognition” (299). Thus there is no “other” against which notions of self are constructed—identity is not defined through the rejection of an opposite that is inferior or lacking. The interdependence of self and other which is so threatening to the West is not paradoxical in Indigenous thought.

Rather than as binaries, Native relations tend to be understood as forms of kinship, sets of “reciprocal family relations extended throughout the universe” (Cheyfitz 297). These relations are inclusive not only of people but of the natural world as well. The notions of interdependence and mutuality that underlay Native societies give rise to a concept of justice that is fundamentally different from its Western counterpart. Alfred explains,

[C]onsider the question of justice—the source of the notions of right and wrong that underpin all discussions of the nature and use of power. The dominant Western conception of justice is rooted in a fundamentally individualistic, materialistic ideal of equity or sameness. By contrast, indigenous notions of justice arose within the context of belief in a universal relationship among all the

elements that make up our universe. Native ideas centre on the imperative of respectful, balanced coexistence among all human, animal, and spirit beings, together with the earth. Justice is seen as a perpetual process of maintaining that crucial balance and demonstrating true respect for the power and dignity of each part of the circle of interdependency (66).

In the West, the individualistic approach to identity has led to notions of justice that are based around the protection of private property—a concept antithetical to “the traditional relationships of Indigenous American communities to land as the nonfungible matrix of the community” (Cheyfitz 292). The concept of competition as the basis for resource distribution inherently leads to distributive inequality—which has historically been legitimized as the natural outcome of individual differences in ability (Cheyfitz 293). This line of reasoning is vocalized in James Madison’s *Federalist 10*, which argues for the protection of private property against any “wicked project” that would seek to distribute resources equally. *Federalist 10*, an important foundation of the U.S. constitution, goes on to argue that the protection of property rights should be the main concern of Government. Writes Cheyfitz, “That is to say, the first object of government is to protect the interests of the propertied class, with its implicit corollary: the more property, the more protection” (293).

Thus Western notions of government presuppose unequal representation of interests—because property and wealth are taken as measures of the inherent value of the individual. Cheyfitz contrasts this schema of government to those of Indigenous communities:

[The] Indigenous, or kinship-based, relationship to land, which is antithetical to dominant Western ideas of social and economic life, increasingly stressing privatization, presupposes democratic forms of governance, based in consensus, that are antithetical to the representational governmental forms of Western capitalist democracies, located as they are in a majoritarian notion of power within which minority rights are formally but not necessarily substantively recognized. In Indigenous thinking, there are neither majorities nor minorities; there is only the collective (299).

In the Indigenous concept of government, therefore, there is no need for the concept of “natural” or civil rights—which are intended to impose limitations on governmental power in order to protect those whose interests are under- or unrepresented by the government.

Both *Johnson* and *Santa Clara* reveal the actual extent to which such rights limit governmental power. *Johnson* examines the legitimacy of the federal government’s right “to grant the soil, while yet in possession of the natives” (41): if the government has the power “to extinguish the Indian title” (58). *Santa Clara* addresses the bounds of tribal sovereignty in determining tribal membership—specifically, the tribal government’s power to deny membership on a discriminatory basis. In both cases the Court finds that the sovereign, as the ultimate source of authority, has the power to define its own principles of justice and legality and thus has no obligation to uphold individual rights where these rights contradict the sovereign’s own interests.

The notions of justice and power that underlie these decisions are fundamentally Western. In contrast, “[T]he traditional indigenous view of power and justice has nothing

to do with competition or status vis-à-vis others. It focuses on whether or not power is used in a way that contributes to the creation and maintenance of balance and peaceful coexistence in a web of relationships” (Alfred 73). The belief, in the West, in the ultimate power of the sovereign necessarily precludes the external evaluation of that power and the ends that it is used for.

With respect to its own limits, the Court posits itself as a derivative of the sovereign and thus finds that it has no authority to question the sovereign’s actions or to act of its own accord. In *Johnson*, Marshall writes: “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully removed” (59). And in *Santa Clara*, the Court finds that the Indian Civil Rights Act (ICRA), while explicitly stating that “No Indian tribe in exercising powers of self-government shall...deny to any person within its jurisdiction the equal protection of its laws” (115), does not give the Court authority to enforce this legislation. While it acknowledges that precedent establishes “the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms,” the decision declares: “These precedents...are simply not dispositive here” (117). Rather, it finds that “Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal ‘policy of furthering Indian self-government’” (117). This second goal is interpreted to be of greater centrality to the ICRA; thus, the Court is “constrained to

find that [the Act] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers” (124).

Finding for limitations on Court authority in the face of sovereignty, *Johnson* sets a precedent for the legality of power obtained through force. Despite Marshall’s hesitation “to engage in the defence of those principles which Europeans have applied to Indian title” (60), he ultimately finds in *Johnson* that “The title by conquest is acquired and maintained by force. The conqueror prescribes its limits” (60). This is the logic of discovery doctrine, a concept that had been designed by European imperial powers in an effort to bring order to the potentially messy process of colonial conquest. Under discovery doctrine, “discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments” (39). *Johnson* finds that this doctrine necessarily leaves Native rights significantly “impaired” (40), and ultimately gives the discovering nation “an exclusive right to extinguish the Indian title of occupancy” (58). Finally, the decision remarks on the legality of conquest:

[I]f the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with the concomitant principle, that the Indian inhabitants are to be considered merely as occupants,...to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual

condition of the to people, it may, perhaps, be supported by reason, and certainly cannot be rejected by the Courts of justice (63).

Thus, *Johnson* finds the principles of justice and natural rights to be ultimately circumscribed by the practical interests of the sovereign and the hegemonic culture: “as a general rule, . . . the conquered shall not be wantonly oppressed, and . . . their condition shall remain *as eligible as is compatible with the objects of the conquest*” (60; my emphasis). Rather than existing as a prior and universal framework to which the sovereign must adhere, justice is defined *by* the sovereign—the Court, whose own power derives from that of the sovereign, must uphold the principles on which this power is based.

The same logic is echoed in *Santa Clara* on two counts. First, in the Court’s acknowledgement that “Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess” (114)—this doctrine of plenary power is nothing more than a euphemism for “title by conquest”, an ad hoc legal justification for the denial of rights by the sovereign. And second, in its privileging of tribal sovereignty over gender equality, when in so many other cases it has found against tribal sovereignty: this choice upholds the notion that justice is defined by, and amenable to, the interests of the hegemonic culture. Sarah Song, professor of law and political science, writes:

Why has the federal government deferred to tribal sovereignty in certain affairs and not in others? One important reason . . . is the fact of intercultural congruence. The sorts of practices that the federal government has been willing to tolerate in Native American communities are similar to the sorts of practices it has tolerated in the dominant culture. With respect to the Santa Clara Pueblo case, it is

important to acknowledge that America's own tradition of gendered citizenship laws bears striking similarity to the gendered membership rules of the Pueblo.

Into the 1930s, American women endangered their citizenship status by marrying foreign men, whereas American men who married foreign women automatically made their wives into US citizens (127-8).

Thus, the Court's decision was seemingly based, not on the inherent importance of tribal sovereignty (as stated), but on the importance of patriarchy. The protection of patriarchy in the tribe is a mechanism of cultural colonization.

In finding for tribal sovereignty, the *Santa Clara* decision implicitly supports the reproduction of hegemonic Western culture within the tribe. Gender subordination, largely absent from pre-colonial Indigenous societies, was an import from Europe: "One of the first casualties [of European invasion] was the overt and important participation of many women in the leadership of Indian peoples" (Green 33). As Song describes:

Throughout its history, the US government has played a role in redefining gender relations within Native American communities in both direct and indirect ways. From their very first interactions, Christian settlers, missionaries, and government officials disparaged Native men for their lack of manliness on the grounds that they did not command their wives and children as heads of households... In an attempt to 'civilize' Native Americans, the federal government, often collaborating with evangelical Protestant missionaries, urged or forced Christian-model monogamy on Native communities. Political and religious officials contended that the first step in assimilating Native Americans was establishing

monogamous marriage, from which the conventional sexual division of labor, property, and inheritance would follow (121).

Thus, the establishment of patriarchy within Native communities has been both a product and a means of colonization. Patriarchy and gendered oppression represent a rejection of traditional Indigenous values—as Alfred writes, “Gendered violence is endemic in most societies, but the fact that our cultures were founded on gender equality and respect makes it a special betrayal in Native communities” (59). This abandonment of Indigenous culture, and the eventual assimilation of the conquered people into the conquering society, is a goal specifically espoused by *Johnson*:

Most usually, [the conquered] are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected.

The new and the old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people (60).

The *Santa Clara* decision, therefore, upholds tribal sovereignty in order to ultimately reinforce the dominance of the colonizing culture over the colonized.

Further, not only does the replication of patriarchal structures reflect tribal internalization of Western culture—it reflects, specifically, the internalization of the logic of colonialism, in which force is a legitimate means of power. Alfred writes:

A crucial feature of the indigenous concept of governance is its respect for individual autonomy. This respect precludes the notion of ‘sovereignty’—the idea that there can be a permanent transference of power or authority from the individual to an abstraction of the collective called “government.” The indigenous tradition sees government as the collective power of the individual members of

the nation; there is no separation between society and state. Leadership is exercised by persuading individuals to pool their self-power in the interest of the collective good (49).

The notion of “tribal sovereignty” thus represents a fundamental rejection of Indigenous values and a legitimation of the very form of government that has been used to deprive the tribes of power. The fundamentally oppressive nature of sovereignty is well demonstrated by the actions of the Santa Clara Pueblo tribal council.

Alfred notes: “The brutal regime of European technological advancement, intent on domination, confronted its opposite in indigenous societies. The resulting near-extinction of indigenous peoples created a vacuum in which the European regime established its political, economic, and philosophical dominance” (45). This domination, illustrated in both the *Johnson* and *Santa Clara* decisions, is based in philosophical traditions that are—at their core—unstable, violent, and oppressive.

The erasure of Indigenous philosophies is thus detrimental, not only to Native societies, but to Western society as well. The ideals around which Western culture is structured—individualism and competition—are ultimately unsustainable and destructive to communities—a term which I am using in the more extensive and meaningful Indigenous sense to include not only humans but all elements of the universe. Western ideologies of power and government are fundamentally hierarchical, oppressive, and corrupt—a very few benefit, at the expense of the rest. As Cheyfitz remarks, “[I]f the United States specifically and the developed world more broadly wants to move beyond the limits of capitalism’s imagination and its current destructive form of neoliberal globalization, a particular moment in the history of the modern nation-state, which began

its trajectory with the European invasion of the Americas in 1492, then this Westernized world must begin to think seriously in terms of the philosophies that were providing balanced models of social life when unbalanced Europeans arrived violently more than five hundred years ago” (299-300).

It is doubtful, to me at least, that those who currently reap the benefits of Western ideology—in other words, those who wield significant power—have any interest in making such changes. But those people are a vast minority. As I have illustrated here, the “framework of dominance” which structures American society is a tool that is used to oppress both Indigenous people and women, along a vast number of others. And yet this same framework pits these people against each other, such that, as Alfred puts it, “People have been turned into the tools of their own oppression” (101). If there is any hope, it must be in the possibility of overcoming the divisions created by Western ideologies of identity—in a reimagining of the Western “I” as a part of the Indigenous “We”. Because, in the words of the great American Revolutionaries who founded a nation on stolen land, “United we stand, divided we fall.”

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