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# THE SUPREME COURT'S INDIAN LAW DECISIONS: DEVIATIONS FROM CONSTITUTIONAL PRINCIPLES AND THE CRAFTING OF JUDICIAL SMALLPOX BLANKETS

*Gloria Valencia-Weber\**

It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.<sup>1</sup>

## I. THE RELATIONAL METAPHOR: SMALLPOX BLANKETS AND SUPREME COURT CASES

### *A. The Artifacts of Relationships with Indian Nations*

The metaphorical concept of smallpox blankets arises from two sources: the cultural practices of publicly shaming harmful actors and the historical experience of the indigenous peoples in the United States (U.S.), the tribal sovereigns, who were deliberately exposed to deadly microbes. Many cultural frameworks publicly shame actors who persistently deviate from norms and fail to respect humans and the environmental life of our world. In the author's upbringing, those whose wrongful behavior inflicted injuries were called "los sin vergüenzos" (those without shame).<sup>2</sup> The offending parties ultimately forced the community to publicly expose the destructive be-

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<sup>1</sup> Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

<sup>2</sup> This article is dedicated to the elders, especially Amalia Mendivil Valencia, who nurtured the humanity of their children and community, and to Angie Debo, scholar and ethical guide.

havior as a corrective. The exposure was necessary for the well-being of the community and the wrongdoers, whose reform could produce reconciliation and a future with mutual respect and enriching relationships.

Smallpox blankets and the Supreme Court's Indian law cases are inseparable from historical relationships between the American Indian sovereigns<sup>3</sup> and Euro-Americans. These specific objects and decisions are a result of the historical relationship. Smallpox blankets infected American Indians as the result of intentional acts where the donor knew of the deadly microbes. Normal "uninfected" blankets enabled the political, commercial, and personal relationships pursued between the indigenous peoples and the outsiders.<sup>4</sup> While innocent ventures could lead to disease outbreaks, the concern here is for the intentional in the relationships mandated when the Euro-Americans encountered the Natives and had to deal with mutual, as well as conflicting, interests. For the Native Americans, the blankets were objects to bind the parties in explicit understandings as well as friendship to transcend discrete events. This indigenous value of blankets, which continues today, made the infested blankets especially destructive of trust and good-will.<sup>5</sup> Out of these types of rela-

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<sup>3</sup> Identifiers are often interchanged in referring to the indigenous nations within the boundaries of the United States. "American Indian" and "Native American" are used in this paper to refer to the first sovereigns within the borders of the United States and their members. Over 550 federally recognized tribes, in the lower forty-eight states and Alaskan Natives, comprise the sovereigns in nation-to-nation relations with the United States. 65 Fed. Reg. 13,198-13,303 (March 10, 2000).

<sup>4</sup> Personal relationships, trade, and formal relations, as in treaty-making, included the use of blankets. "In a peace treaty between Governor Richard Nicolls of New York and the Esopus Indians, dated October 3, 1665, the tribe ceded a tract of land to the governor in exchange for blankets, powder, and other implements." DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 33 (2001).

<sup>5</sup> Extralegal resolution of a contemporary controversy, the use of the name and image of Crazy Horse on malt liquor, resulted in an official apology by John W. Stroh III of the Stroh's Brewing Company to the descendants of Crazy Horse from the Cheyenne River Sioux, Oglala Sioux, and Rosebud Sioux tribes. In a lengthy ceremony in South Dakota, Stroh III delivered the apology. Then the Stroh's company "presented the family with 32 Pendleton blankets, 32 sweet grass braids, 32 tobacco ties and seven thoroughbred horses. Seven breweries produced and distributed Crazy Horse Malt Liquor in 32 states." David Melmer, *Crazy Horse Wins—Again: Stroh Apologizes Amid Great Ceremony*, INDIAN COUNTRY TODAY, May 9, 2001, at A1, col. 3. The litigation and ceremony fit the construct of a cultural shaming when Crazy Horse, a renowned and beloved leader of the Lakota Sioux, vigorously opposed the use of alcohol by Lakota people. The legal history of the case is complex and involves the tribe's efforts to exercise jurisdiction over non-Indians. See *Estate of Witko v. G. Heileman Brewing Co.*, No. Civ. 93-204, 23 Indian L.R. 6104 (Rosebud Sioux S. Ct. 1996) (In action for knowing and willful tortious interference with customary rights of privacy and respect for the decedent and his family, the Court reversed trial court findings as to personal and subject matter jurisdiction and its dismissal of Lanham Act claim, but affirmed the dismissal of the Indian Arts and Crafts claim.). Subsequently, the federal courts rendered their decisions. See *Hornell Brewing Co. v. The Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998) (holding that the tribal court did

tionships came the foundational principles, the constitutional construct, of how the state or federal government would act in affairs with the Indian nations.

The smallpox metaphor is offered with full regard for historical facts and the appropriateness of the fit between the blankets and the cases. Blankets infected with smallpox had hidden organisms that, at minimum, debilitated the victim and among the especially vulnerable, like the American Indians, almost certainly resulted in death.<sup>6</sup> The pronouncement in *Nevada v. Hicks*<sup>7</sup> that states have inherent jurisdiction on reservations is another unacknowledged, but intentional, judicial microbe that endangers the cultural and political life of American Indians. The existing stock of similarly generated pathogens includes, among others, the sub-rosa abandonment of longstanding presumptions in law that sustained tribal jurisdiction replaced by rootless new ones. Collaterally, there are the unstated reversals of precedent cases, established doctrines, and canons of construction that provided some guidance to offset the instability in Indian law. Perhaps most disturbing is the Court's construction of plenary judicial power that lacks constitutional origins and invades Congress' enumerated and exclusive power in relations with Indian tribes. While Congress has imperfectly used its power, nonetheless, it was the constitutionally designated heir to carry on the relations begun by the Europeans.

In all of the Americas, the initially outnumbered Europeans were able to reduce the military and political power of Native peoples through the advantages of weaponry and microbes.<sup>8</sup> Post-contact

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not have jurisdiction over suit alleging defamation, violation of the estate's right of publicity, negligent and intentional infliction of emotional distress, and violations of the Indian Arts and Crafts Act and the Lanham Act); *Witko v. Hornell Brewing Co.*, 156 F. Supp. 2d 1092 (D.S.D. 2001) (holding that the federal district court has personal jurisdiction over brewing company owners under the effects test, and inconvenience to the owners was outweighed by the extent of their purposeful conduct).

<sup>6</sup> See E. WAGNER STEARN & ALLEN E. STEARN, *THE EFFECT OF SMALLPOX ON THE DESTINY OF THE AMERINDIAN* 73-74 (1945). Smallpox is a punishing disease in its immediate and long-term effects, if the victim survives. The fevers and lesions are painful and enfeebling and the survivor faces disfiguring scars and loss of sight and hearing.

<sup>7</sup> 533 U.S. 353, 365 (2001) (finding the tribal court's jurisdiction did not extend to tort claims against state officials for execution of a search warrant on the reservation for an off-reservation crime or adjudication of section 1983 claims).

<sup>8</sup> See generally JARED DIAMOND, *GUNS, GERMS, AND STEEL* (1997) (examining how geography and environment shape the evolution of societies); ROY PORTER, *THE GREATEST BENEFIT TO MANKIND: A MEDICAL HISTORY OF HUMANITY* 165-66 (1998) (describing how smallpox accompanied Hernan Cortez (1485-1547) to Montezuma's Aztec Mexico in a pattern followed by other explorers and territories of the Americas); see also PORTER, *supra*, at 165:

Infections thus primed and sped conquest, rippling outwards to fell countless indigenes the Spanish troops did not have to butcher. The consequent epidemics did not merely exterminate vast numbers, they destroyed the will to resist—the psychological impact was as devastating as the physical. Between 1518 and 1531, perhaps one third of the total In-

epidemics decimated the indigenous people lacking resistance to measles, smallpox, influenza, and other diseases introduced to the Western hemisphere.<sup>9</sup> "The most lethal pathogen Europeans introduced to Native Americans, in terms of the total number of casualties, was smallpox. It was also the earliest Old World pathogen that we can be sure invaded the native peoples of North America."<sup>10</sup> More recently in the United States, the American Indian population has been decimated by their relationships with the English who took matters into their own hands and deliberately bestowed smallpox-infected blankets and clothing.

Military officers, traders, and settlers advocated the use of smallpox blankets when inconvenienced by tribes who insisted on possessing and exercising authority over their lands. Perhaps the most unashamed advocate was Baron Jeffrey Amherst, the military commander of British Colonial forces, who instructed his officer, "[y]ou will do well to try to inoculate the Indians by means of blankets as well as to try every other method that can serve to extirpate this exorable race."<sup>11</sup> Stearn and Stearn document a pattern of smallpox outbreaks when Europeans suspected that Indian opposition to white settlements or to traders would lead to violent resistance and attacks on settlers. These outbreaks or epidemics happened just in time to save the Europeans.<sup>12</sup> When Indians and traders met for

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dian population died of smallpox, while the Spanish hardly suffered. With allies like microbes, the Europeans did not require many soldiers or much military acumen.

<sup>9</sup> See STEARN & STEARN, *supra* note 6; see generally DANIEL T. REFF, *DISEASE, DEPOPULATION, AND CULTURE CHANGE IN NORTHWESTERN NEW SPAIN, 1518-1764* (1991) (exploring the cultural and demographic consequences of Spanish-induced disease in present day northern Mexico and the Southwest United States); see also 2 SHERBURNE F. COOK & WOODROW BORAH, *ESSAYS IN POPULATION HISTORY: MEXICO AND THE CARIBBEAN* 414-35 (1974) (studying mortality patterns in Mexico since 1860).

<sup>10</sup> HENRY F. DOBYNS, *THEIR NUMBER BECAME THINNED: NATIVE AMERICAN POPULATION DYNAMICS IN EASTERN NORTH AMERICA* 11 (1983) (providing a listing of epidemic episodes in North America and comparative charts with the incidence of other diseases). Extensive analysis of the North American experience is provided in the articles in *Part I: Disease Before and After Contact*, in *DISEASE AND DEMOGRAPHY IN THE AMERICAS* 1-166 (John W. Verano & Douglas H. Ubelaker eds., 1992).

<sup>11</sup> STEARN & STEARN, *supra* note 6, at 44-45. Amherst, for whom the town in Massachusetts was named, was the British commander in the French and Indian War of 1754-63. He delivered the first victory to the British against the French who had powerful Indian tribes as allies.

<sup>12</sup> See *id.* at 44-46. See also JONATHAN B. TUCKER, *SCOURGE: THE ONCE AND FUTURE THREAT OF SMALLPOX* 19-20 (2001). During the French and Indian War, Pontiac led the Ottawa, Delaware, Shawnee, and Mingo tribes in their attack against the British on Fort Pitt (Pittsburgh) in May 1763. Before Colonel Henry Bouquet could follow Amherst's orders, a tribal delegation visited the fort to advise the besieged British that they should surrender. Two blankets and handkerchiefs from the Smallpox Hospital were given to the delegation and an epidemic ensued among the tribes that had been besieging Fort Pitt. Tucker also describes the British use of smallpox against the rebellious American colonists. *Id.* at 19-22.

commercial transactions, these trade events, even when innocent of intent to harm, were followed by outbreaks among the Indians.<sup>13</sup>

The psychological impact of the fear of smallpox terrorized the indigenous populations and magnified the actual experiences in the world emerging after European contact.<sup>14</sup> Consider the events since September 11, 2001, the real attacks of anthrax, and the perceived threat of smallpox as a terrorist's tool. One can understand how indigenous people experienced a desperate fear. The distrust of Euro-Americans and the fear of intentional infection led some tribes to refuse the protection of inoculation against smallpox, among the earliest of successful immunizations.<sup>15</sup>

Relationships with the Euro-Americans, however, could not be evaded and would continue to change the lives of American Indians.

### *B. The Latest Blanket: Inherent State Jurisdiction on the Reservation*

*Hicks*, in its declaration of "[t]he States' inherent jurisdiction on reservations,"<sup>16</sup> presented the latest of the judicial toxic blankets. Today, the eviscerating potential of the Court's Indian law decisions provokes a real and palpable fear among tribal nations for their future existence. The decisions aggrandize state jurisdiction over Indian governments and their territory. Like smallpox blankets, the Court's judgments create an immediate debilitating impact, confusion in Indian Country for the tribal governments and their neighboring governments. The governmental neighbors who often work together on common concerns find that governance is now unnecessarily complex. For tribes especially, governmental planning and economic development have become more problematical. An ordinary exigency, such as an accident somewhere in Indian Country, with an immediate need for emergency medical services, fire services, and possibly the need to arrest an offender, raises questions about which government has the authority to respond. The cumulative de-

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<sup>13</sup> See Henry F. Dobyns, *Native American Trade Centers as Contagious Disease Foci*, in *DISEASE AND DEMOGRAPHY IN THE AMERICAS*, *supra* note 10, at 215-36.

<sup>14</sup> See TUCKER, *supra* note 12; see also DIAMOND, *supra* note 8.

<sup>15</sup> See STEARN & STEARN, *supra* note 6, at 64-65. Europeans, including royalty and Napoleon, who had his army vaccinated, had benefited since Edward Jenner successfully developed the vaccine in the late 1790s. Jenner began his experiments after observing that cowpox, a cattle disease, when contracted by humans conferred immunity against smallpox. His successful inoculation of a child in 1796 was followed by his scientific publication in 1798. Knowledge of Jenner and his vaccine spread worldwide, with publication of his research results in 1801 in the United States. See PORTER, *supra* note 8, at 274-77. Under President Andrew Jackson, in 1832 Congress passed an act and appropriated funds for vaccinating Native Americans. See STEARN & STEARN, *supra* note 6, at 62; see also Michael K. Trimble, *The 1832 Inoculation Program on the Missouri River*, in *DISEASE AND DEMOGRAPHY IN AMERICA*, *supra* note 10, at 257.

<sup>16</sup> *Nevada v. Hicks*, 533 U.S. 353, 365 (2001).

cisions of the Court do not engender optimism about the future of tribal jurisdiction when the cases eviscerate, albeit incrementally, the authority of the first sovereigns within the borders of the United States.<sup>17</sup> Like the toxic blankets, the cases contain unacknowledged elements that in their maximum force could destroy the tribes as culturally distinct nations governing their own lands.

*Hicks and Atkinson Trading Company v. Shirley*<sup>18</sup> culminate a purposeful digression in the Supreme Court's jurisprudence affecting Native Americans. That digression produces two outcomes: that state power should be restored to an appropriate magnitude that fits certain justices' views of federalism,<sup>19</sup> and that no non-Indian's person or property should be regulated by a tribal government. To achieve outcomes embracing this view of state and tribal authority, the Court has deviated from orderly and fair ways to analyze legal relationships. As David Getches has demonstrated, the Indian law cases are the crucible with which to reconstruct state power, while collaterally reinforcing two other Court objectives. One goal proscribes programs that benefit minorities because the Court's majority perceives them as violative of color-blind justice, and the other goal entrenches mainstream values as the controller of what non-majority interests shall be protected.<sup>20</sup>

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<sup>17</sup> See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1178 (2001) (providing an exhaustive review of the incrementalism in the current Supreme Court's approach to Indian law and providing an in-depth analysis of cases since 1991, twenty-eight involving Indian law questions, of which twenty-two were decided against the tribes or tribal litigants). Equally valuable is David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001). Getches analyzes the Indian law decisions of the Burger Court (sixty-seven cases in seventeen terms) and Rehnquist Court (forty cases in fifteen terms). *Id.* at 280. Moreover, he reviews the three trends of the Rehnquist era that concurrently affect Indian law cases: state interests prevail; attempts to protect specific rights of racial minorities fail; and mainstream values are protected. This analysis of Indian law in the context of constitutional jurisprudence, before and after Rehnquist became the Chief Justice, is helpful, thought-provoking, and affirms the concerns many have for the extent to which the court's vision of states' rights has distorting power in constitutional law.

<sup>18</sup> 532 U.S. 645 (2001) (finding Navajo Nation lacked authority to tax a nontribal owner of a hotel on the reservation but on non-Indian fee land).

<sup>19</sup> The author has benefited from the insights provided by other scholars, including, but not limited to: Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993) (discussing how Supreme Court opinions favor a vision of tribal sovereignty based on membership, rather than geography); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (discussing how Indian law embodies the tension between colonialism and constitutionalism and how Marshall's sensitive approach of balancing the two has since been abandoned, but a return is possible); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996) (discussing the potential among the newer members of the Supreme Court to recognize that the approach which curtails tribal sovereignty can be changed).

<sup>20</sup> Getches, *supra* note 17, at 317.

This paper responds to Justice Scalia's declaration in *Hicks* that "[t]he States' inherent jurisdiction on reservations can of course be stripped by Congress."<sup>21</sup> A search for the constitutional foundation, if any, for the "States' inherent jurisdiction" is the engine for the paper.<sup>22</sup> If such a concept existed and endured so that the Court's cases have a constitutional foundation, then it should be evident in the history of the formation of the organic instruments of the Republic. The constitutional dialogue involved at all times attempts to define state jurisdiction in the new republic.

The most critical issue of the continuous debate in the critical 1776-1787 period is the appropriate focus for the search: the Western lands and how the lands and peaceful relationships would be obtained from the American Indian sovereigns. Through the constitutional development triggered by the War for Independence, then the Articles of Confederation and Perpetual Union (Articles), and the Federal Constitution, the Western lands was the lodestone issue for establishing the authority of tribes, states, and the federal government. The conflicting claims for state and federal authority roiled, with "political consequences" then and now.<sup>23</sup> The western lands can generally be described as the country lying between the Appalachian divide and the Mississippi River.<sup>24</sup> Thomas Perkins Abernethy, in his definitive study of the western lands, points out that the claims of competing states based on their crown charters unleashed distrust and political alliances with land speculators' greed that undermined the national union: "This virus of sectional rivalry would have been hazardous even in a stable, vigorous government; it was almost fatal to the new union."<sup>25</sup>

This account of the constitutional union is from the perspectives in Euro-American sources. In all historical periods the American Indian nations have claimed title and sovereignty over their lands. That indigenous perspective continues to this day despite the intervening interferences. Euro-American history and law, as non-Indians recorded the narrative, is the substance of this paper. How indigenous

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<sup>21</sup> *Hicks*, 533 U.S. at 365.

<sup>22</sup> The terms in Justice Scalia's assertion, "States' inherent jurisdiction on reservations," do not show up in Westlaw and Lexis searches of the federal cases, statutes, code of federal regulations, or law reviews, except in *Hicks*. Prior existence of "inherent state jurisdiction" on reservations or tribal territory, as a legal concept, was not findable in the accessible databases of law.

<sup>23</sup> THOMAS PERKINS ABERNETHY, *WESTERN LANDS AND THE AMERICAN REVOLUTION* 362 (1937) ("The primary object of this study has been to investigate the political consequences of conflicting claims to the Western lands . . .").

<sup>24</sup> *Id.* at vii. The lands north of the Ohio River also figured in the contests for title and authority among the states themselves and the claims of the national government, but Congress, under the Articles of Confederation and Perpetual Union (Articles), took control of this area in 1784. *Id.*

<sup>25</sup> *Id.* at 366.

peoples viewed the events affecting their sovereignty is not within the historical scope of this paper.

The first section discusses sovereignty and the sources for foundational principles that pertain to the relationships among tribes, the states, and the federal government. The sources are the documented discourse and covenants of the constitutional evolution, the Articles of Confederation and Perpetual Union (Articles), and the Constitution of 1787 as they developed state jurisdiction related to Indian matters.

Second, the paper discusses the colonial period and reality versus the fictions or myths of discovery and conquest. Treaty making that recognized the tribes as nations and owners of their property was the actual practice of the Europeans and then the Euro-Americans. These nation-to-nation relations were essential to obtain tribal land and peaceful relations when trade, military, and political competition thrived among the European powers.

Third, the paper covers the conflict and unity in the pre-Revolutionary period. Besides the conflict with the Crown, pervasive competition existed between states over lands each claimed or coveted, the western lands. Competing national interests for the lands and for avoiding war with the Indians were entwined in this period.

Fourth, the paper considers the Articles as the first U.S. model to exclude the states from relations with the tribes. The drafting and ratification converged on the acrimonious issue: the western lands, which then delayed the ratification of the Articles. Ultimately, the Constitutional Convention was necessary to save the union. Disorder, violence, and anarchy exploded in the states. The Constitutional Convention delegates largely agreed that Indians and their land should be an exclusively federal matter after states' actions in this area had endangered the union.

Fifth is a review of how the federal government implemented the foundational principle to exclude the states. Federal power was exercised through the statutes, primarily the Trade and Non-Intercourse Acts, treaties, enabling acts for territories and states, and the disclaimers required of state constitutions.

Sixth is a discussion on the addition of "states' inherent jurisdiction on reservations" as the latest undisclosed and destructive judicial microbe in the Supreme Court's Indian law decisions.<sup>26</sup> It joins others, such as the shift from the enumerated power of Congress to judicial plenary power. Collaterally, the Court has reversed the presumption favoring tribal jurisdiction to one that presumes state power is primary. The historical review of the constitutional principles estab-

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<sup>26</sup> *Hicks*, 533 U.S. at 365.

lishes that state jurisdiction over tribal lands lacks a foundation. It is, in fact, contrary to the philosophy and framework of the U.S. to construct such state authority from the collection of rootless concepts in the Court's decisions. Stopping the damage from infectious decisions outside of constitutional foundations requires some form of inoculation. Acting from knowledge of the role of tribal nations within the Constitutional evolution and their status within the Constitution, as unique sovereigns, is requisite for principled decisions.

The conclusion advocates educating the Court and citizens about the role of the indigenous nations in the constitutional development. Educating also involves appreciating the life that actually occurs in Indian country. The tribal governments' retention of the authority does not rule out collaborative relationships with the States. In fact, there are many mutual interests, especially where the safety and welfare of neighboring political entities have spillover impact. The Supreme Court's construct of dominant state power and jurisdictional warfare deters making the twenty-first century of law conform to constitutional ideals that accomplish fairness and justice.

## II. SOVEREIGNTY AND FOUNDATIONAL PRINCIPLES OF THE CONSTITUTION

The heart of the discourse unleashed by recent Supreme Court decisions consists of sovereignty, political autonomy with actual authority, coexistent in tribes as well as States and the federal government. Justice Scalia's statement in *Hicks*, that the States have inherent jurisdiction on reservations,<sup>27</sup> is the latest rootless principle pronounced by the Court. This bold declaration immediately provoked the question: What inherent state jurisdiction?

What is the basis for this newly birthed claim of preexisting state sovereignty over Indian land that is undeniably in trust and with cognizable legal boundaries? Where are the history, practice, and doctrine that will enable those affected by the law, the American Indians and Indian law practitioners and scholars, to recognize an express principled justification for these recent decisions? This latest concept of inherent state jurisdiction is another jurisprudential microbe, perhaps spontaneously generated, fertile with potential for the Court to plunder more authority from the tribes and bestow it on the states.

The Court's proclamation of inherent state sovereignty on Indian lands provoked this inquiry into the foundational relationships between the tribes and the States, if any, and how it is affected by the scope of federal power. In Sarah Krakoff's study of the Supreme Court's decisions in Indian law, she categorizes the scholars' ap-

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<sup>27</sup> *Id.*

proaches to their analyses.<sup>28</sup> Among all scholars she notes that the enduring norm is that tribes are separate, self-governing entities; a norm that Indian law should affirm and strengthen.<sup>29</sup> However, in their approaches, Krakoff notes three camps: foundationalists, pragmatists, and critics.

The foundationalists posit a core of doctrinal principles supporting tribal sovereignty from which the Court has only recently strayed. The pragmatists are skeptical of any coherent account of the doctrine, and describe instead an interpretive approach that would uphold tribal sovereignty in most cases. The critics unearth the racist and colonist assumptions that under-gird the foundations of Indian law and argue that a decolonization of the federal-tribal relationship can occur only if the discriminatory aspects of those foundations are repudiated (footnotes omitted).<sup>30</sup>

Individual scholars move freely across the camps. This paper takes a foundationalist approach, but the writer has benefited from the pragmatists and critics who have enriched the analysis in Indian law.

There are fundamental principles in the political philosophy that shaped the United States as a revolutionary society. These core principles emerged from the Euro-American experience of the almost eight years (1775-1783) needed to secede from Great Britain. The colonists had engaged the British in military confrontations starting in 1775. After conciliation with the British did not happen, the Second Continental Congress on May 15, 1775 passed a resolution placing the colonies in a state of defense.<sup>31</sup> The Declaration of Independence certainly was not the start of the hostilities.<sup>32</sup> Concurrent with the Revolutionary War, the colonists framed and tested important political principles in the Articles of Confederation. The Continental Congress drafted the Articles in November 1777 and achieved unanimous ratification by the states in March of 1781. The breakaway colonists conducted the war until late 1782. Great Britain officially declared the end of hostilities on February 4, 1783 and the Congress did the same on April 11, 1783.<sup>33</sup>

In their military and civil experiences, the drafting of the Articles, the protracted ratification process, and the federal governance of Congress under the Articles, the colonists tested political ideas about how power should be distributed between the local and central gov-

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<sup>28</sup> Krakoff, *supra* note 17, at 1192.

<sup>29</sup> *Id.* at 1193.

<sup>30</sup> *Id.* at 1192.

<sup>31</sup> THE ALMANAC OF AMERICAN HISTORY 111-37 (Arthur M. Schlesinger, Jr. ed., 1983).

<sup>32</sup> In the prior decade, the colonists had objected to the Crown about taxes and other coercive acts. See generally DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774 (1974), EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION (1953) (detailing early American resistance and agitation).

<sup>33</sup> THE ALMANAC OF AMERICAN HISTORY, *supra* note 31, at 137.

ernments. The post-war period was peaceful in international terms for the United States, but not in the conduct of States with each other or with Indians. Additionally, debt-pressed citizens turned against their own state governments. Ultimately, the principles that would best protect the independence and political autonomy of the union—the national state—became the foundation articulated in binding terms in the Constitution of 1787.

All of the ideas considered, adopted, abandoned, and refined in the Articles and the Constitution developed into the constitutional substance. About 100 years before the American Revolution, the British had undergone their own constitutionally defining period with the Glorious Revolution of 1688. Gordon S. Wood has described the concept of a constitution as the basic ideas of rights and justice that restrain the power of legislatures and monarchs. By the time of the American breakaway, the British had moved away from their experience to an idea of a constitution in which “the English constitution could not be any sort of fundamental law.”<sup>34</sup> The constitution became articulated as a form of parliamentary supremacy. Blackstone and others saw no distinction between the constitution or frame of government and the system of law.<sup>35</sup> “All were one: every act of Parliament was in a sense a part of the constitution, and all law, customary and statutory, was thus constitutional.”<sup>36</sup> Thus, the Americans retained the seventeenth-century constitutional concepts, ideas from Whig philosophy, in the constitutional creativity of the United States.<sup>37</sup> The two forms could be made compatible.<sup>38</sup> The colonists rejected what they saw as the overreaching power of Parliament that had imposed the Stamp Act to tax the colonies. Legislative power in the American model had to be contained. The Americans deliberately moved away from the British constitutional views of the time.

For the Euro-Americans of the new republic there was a substantial difference between the unconstitutional and the illegal. The se-

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<sup>34</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 260 (1969).

<sup>35</sup> *Id.* at 261.

<sup>36</sup> *Id.*

<sup>37</sup> For the concept of the “two constitutions,” see JOHN PHILLIP REID, *IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION* (1981). See also DANIEL J. ELAZAR, *THE AMERICAN CONSTITUTIONAL TRADITION* 109-10 (1988); DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 63-64 (1988).

<sup>38</sup> REID, *supra* note 37, at 35-36:

To a degree, the two constitutional traditions were not incompatible. The assertion that the Stamp Act was unconstitutional did not have to mean it was illegal. It was possible to accept the new constitution of parliamentary supremacy while clinging to the old constitution of fixed restraints. What Parliament enacted was lawful because that body alone declared the law, but if it went beyond the limits of the constitution, then what it enacted was unconstitutional. The idea was less an anomaly than a consequence of contemporary jurisprudence.

curity of life, liberty, and property were the fundamental, explanatory, and controlling principles.<sup>39</sup> Samuel Adams captured the new American view that power could be limited only "by some certain terms of agreement."<sup>40</sup> While the British viewed expressly written documents with skepticism, for Adams and other colonial visionaries, such covenants or compacts were the best security against "the danger of an indefinite dependence upon an undetermined power."<sup>41</sup> The fundamentals of American constitutionalism required more than a contract; they required a covenant or compact that would bind the community of states.<sup>42</sup> According to Donald Lutz, in his study of American constitutionalism:

The Declaration of Independence and the Articles of Confederation together formed the Americans' first national compact. The Declaration of Independence and the United States Constitution together form the second national compact under which Americans live today. The first one was based on coherent political theory, American Whiggism. The second also had a coherent theory behind it, American federalism. The second theory, like the second compact, did not so much replace the first as evolve from it, a revision of the earlier experiment found to be flawed. As we will see, that was still subject to future revision. The United States was not founded in 1787; the nation was refounded upon a base that had been laid earlier.<sup>43</sup>

A moral force underlay the understanding of the public commitment in a constitution and the derived principles were constantly invoked in the ferment of the continuous debate.

The binding principles of the U.S. Constitution continue to be tested in the nation's societal changes. Yet, through all times, the core principles manifest the values that bind the society. This paper does not focus on originalism as it is often invoked in contemporary

<sup>39</sup> WOOD, *supra* note 34, at 261 (quoting Joseph Howley in 1775).

<sup>40</sup> *Id.* at 267.

<sup>41</sup> *Id.* (quoting WRITINGS OF SAMUEL ADAMS III 262 (Cushing ed., 1776)). Adams noted that to devout Whigs "vague and uncertain laws, and more especially constitutions, are the very instruments of slavery." *Id.*

<sup>42</sup> Scholars generally agree on the covenant and compact quality of U.S. constitutionalism. See ELAZAR, *supra* note 37, at 90-91 (stating that covenantal or compactual obligation is broadly reciprocal). See also *id.*:

Both *covenants* and their derivative, *compacts*, differ from *contracts* in that the first two are constitutional or public in character and the last is private. Those bound by one or the other are obligated to respond to one another beyond the letter of the law rather than limit their obligations to the narrowest contractual requirements. A covenant differs from a compact in that its morally binding dimension takes precedence over its legal dimension.

See also LUTZ, *supra* note 37, at 24-34 (discussing early compacts and covenants as the origins of the Constitution).

<sup>43</sup> LUTZ, *supra* note 37, at 135.

political debates.<sup>44</sup> Rather, it focuses on what is historically ascertainable from both the discourse of constitutional creativity and the law regimes that interpreted and applied the principles adopted. These underlying concepts do not change and are invaluable for norms in a society confronting new experiences.

Foundational principles must be functional and guide real people in everyday life.<sup>45</sup> Thus, for example, we struggle today with a new experience called "the Internet," its content, and the relations it creates. Can we appropriately invoke the norm against censorship in the First Amendment? Does intrusive spam violate the norm that respects privacy? Does employer monitoring of employees' e-mail and Internet use violate the norm against unlawful search and seizures of the Fourth Amendment? The alternatives, if any, to the constitutional principles are private and religious systems. These nonconstitutional alternatives cannot guide a national society defined by its diversity, and would destroy the foundational core, the constitutional covenant, meant to bind this society through all times.

The complexity of Indian law lies in the preconstitutional and extraconstitutional sovereignty of tribes.<sup>46</sup> This unique quality of Indian law does not nullify the development of constitutional principles in the cases, in the tools of jurisprudence like the canons of construction, and the policies enacted by Congress. David H. Getches counsels: "To be sure, these Rehnquist-era decisions departing from, but not overruling, venerable principles have created a veneer of confu-

<sup>44</sup> See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* xiii (1996):

The advocates of *originalism* argue that the meaning of the Constitution (or of its individual clauses) was fixed at the moment of its adoption, and that the task of interpretation is accordingly to ascertain the meaning and apply it to the issue at hand. The critics of originalism hold that is no easy task to discover the original meaning of a clause, and that even if it were, a rigid adherence to the ideas of framers and ratifiers would convert the Constitution into a brittle shell incapable of adaptation to all the changes that distinguish the present from the past.

<sup>45</sup> *Id.* at xv:

[B]ecause I firmly believe that the framers and many of the ratifiers were themselves decidedly empirical in their approach to politics, it seems rather beside the point to ask how they would act today. Whatever else we might say about their intentions and understandings, this at least seems clear: They would not have denied themselves the benefit of testing their original ideas and hopes against the intervening experiences that we have accrued since 1789.

<sup>46</sup> CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 112-13 (1987):

Our jurisprudence, then, has recognized tribal authority as being both preconstitutional and extraconstitutional. These principles are premises for the conclusions that American Indian governments can be, for example, theocratic, hereditary, and race-based in citizenship. Powerful moral and historical considerations support this special tribal status. European nations recognized similar notions half a millennium ago, and in the United States all three federal branches have acknowledge the special attributes of Indian tribal sovereignty from the beginning.

sion over a historically complex, but consistent body of law.”<sup>47</sup> In contrast, David E. Wilkins and K. Tsianina Lomawaima describe the field as historically the “uneven ground” of federal Indian policy.<sup>48</sup> They remind us that over time this jurisprudence has been marked by inconstancy, indeterminacy, and variability in judicial interpretation.<sup>49</sup>

However, Getches reminds us of the risks of categorical denunciation of the field:

Painting a picture of abject confusion rather than seeking to understand all of Indian law in its historical context has its risks. It may imply that it is up to the Court to wade in and “do justice.” Nice though this may

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<sup>47</sup> Getches, *supra* note 17, at 275 (documenting fully the perceptions of confusion among scholars who analyze Indian law).

<sup>48</sup> WILKINS & LOMAWAIMA, *supra* note 4, at 6 (describing the history of problems of Indian sovereignty in conflict with the United States).

<sup>49</sup> *Id.* at 143-75. Numerous scholars have questioned this shift from prior understandings and this writer acknowledges the debt to their insightful inquiry. See Getches, *supra* note 17, at 275 (capturing the confusion and incoherence discussed by scholars); see also Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 4-5 (1999) (“Given the lack of guidance in positive law, the complexity of the issues, and the tangled normative questions surrounding the colonial displacement of indigenous peoples to construct a constitutional democracy, it is also not surprising that the resulting decisional law is as incoherent as it is complicated.”); Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 275 (1997) (“Contemporary confusion in Indian law results from a failure to recognize Indian law’s close familial ties to constitutional doctrines that lie at the core of the Supreme Court’s concerns during the last century.”); Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 218 (1993) (“[N]o area of American law is more distinct, anomalous, or confused than that relating to Native Americans.”); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 439 (1999) (“[R]ecent developments in Indian law, particularly at the United States Supreme Court, threaten [a] well understood and precarious balance with a new, almost vicious, historical amnesia and doctrinal incoherence.”); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 38-39 (1996) (“One need only read a sampling of recent United States Supreme Court Indian [l]aw opinions . . . to realize that the nation’s high court has slipped into doctrinal incoherence.”); Laurie Reynolds, *“Jurisdiction” in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 360 (1997) (“[F]or lower courts trying to decipher the implications of these pronouncements on tribal jurisdiction, the Court’s conflicting signals have created confusion and uncertainty.”); Alex Tallchief Skibine, *The Court’s Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 267 (2000) (“[T]he Supreme Court’s current jurisprudence in the field of federal Indian law has mystified both academics and practitioners.”); Brad Jolly, Comment, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273, 278 (1997) (“Over the past century, the legal fiction of federal Indian law has matured into a grotesque creature capable of inflicting instant disorientation, bewilderment, and nausea.”); Ray Torgerson, Note, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law*, 2 TEX. F. ON C.L. & C.R. 165, 178 (1996) (“Most academics and courts agree that the area of Indian law is fraught with vacillation and incoherence.”). See generally Curtis G. Berkey, *Recent Supreme Court Decisions Bring New Confusion to the Law of Indian Sovereignty*, in RETHINKING INDIAN LAW 77 (National Lawyers Guild Committee on Native American Indian Struggles ed., 1982) (“The Supreme Court’s rulings on Indian sovereignty in the past four years demonstrate that perhaps the Court has abandoned any pretext of principled decision-making. Rather, the Court has embarked on a result-oriented approach.”).

sound, licensing courts to reinvent Indian law based on the judges' notions of justice and what is right for society could add legitimacy to an ethnocentric judicial foray into Indian policy. Indian law has always been based on the assumption that separate societies could exist exempt from the American melting pot, preserving customs, values, and governance of the vestiges of traditional tribal territory. Judges who are not steeped in the culture and values of Indian tribalism are ill-equipped to rework these complex and anomalous traditions case by case.<sup>50</sup>

The full constitutional experience included American Indians as full sovereigns governing over their lands. Constitutional principles, shaped by historical events, nonetheless provide an articulated core of law with which to evaluate the Supreme Court's Indian law cases.

The Supreme Court's vision of federalism extends state jurisdiction over Indian people and their lands *as if* such state authority were foundational in the law of the new republic. Yet the true foundation was generated from the political records and the organic instruments that established the republic as it struggled with the discord surrounding the western lands. The sources constitute authenticated guidance and reflect the debate and resolution that the States had to yield any claims to authority in relationships with Indians to a central, national government. This directive principle is explicit in the history and documents of the encounters between the European Americans and the tribal nations. These national entities pursued political relationships that produced treaties, the instrument for the constitutional objective.

The historical review, *infra*, evidences that in relationships with and authority in matters involving the American Indian nations, the exclusion of States was firmly established as a foundational principle. The Articles of Confederation and the Constitution were the products of a continuous internal debate and interim attempts to resolve the western lands and Indians problem. The question of who could have relationships with the tribal nations persistently undermined the creation of an enduring national union. Certainly time and circumstances have changed the tribes, the States, and the federal governments in ways unforeseeable to the constitutional framers. The complexity of how any government functions successfully in the twenty-

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<sup>50</sup> Getches, *supra* note 17, at 276 (pointing out the temptation to craft an easy and radical solution for incoherence in the field in Justice Souter's concurrence in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659-60 (2002)). Justice Souter embraced *Montana v. United States*, 450 U.S. 544 (1981), as the source for doctrinal coherence, further raising a "once marginal" case to primary status. In *Montana* the Court circuitously created exceptions to the long-standing assumption of tribal civil jurisdiction over non-Indians in *Williams v. Lee*, 358 U.S. 217 (1959), and non-Indian fee land in the Indian Country statute, 18 U.S.C. § 1151, passed in 1948. See *Montana v. United States*, 450 U.S. at 562.

first century makes invaluable the foundational principles for making justice real in the functional life of the three sovereigns.

### III. COLONIAL FICTIONS AND THE REALITY OF CONFLICT

#### A. *Counterfactual Stories*

Understanding the history of relations between the indigenous peoples and the European colonists requires putting aside the fictions of discovery and conquest that informed the social history and law affecting American Indians. If these fictions only assumed mythic status in popular history, perhaps their impact would be corrected through historical scholarship.<sup>51</sup> However, the stories of discovery and conquest informed the construction of Indian law in the critical period when the cases involving Indians reached the first Supreme Court.<sup>52</sup> Consequently, counterfactual legal constructs continue to coexist with Justice Marshall's ultimate recognition that the tribes were sovereigns that predated the arrival of Europeans. The holding

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<sup>51</sup> See AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS 6 (Alvin M. Josephy, Jr. ed., 1992) ("History still teaches falsely that pre-Columbian America was a wilderness, a virgin land, virtually untenanted, unknown, and unused, waiting for the white explorers and pioneers, with their superior brains, brawn, and courage to conquer and 'develop' it."). Josephy then quotes from RICHARD N. CURRENT, T. HARRY WILLIAMS & ALAN BRINKLEY, AMERICAN HISTORY: A SURVEY (1987), stating that while civilizations were being developed in Africa, Asia, and Europe, "the continents we know as the Americas stood empty of mankind and its works . . . [t]he story of the new world . . . is a story of the creation of a civilization where none existed." Josephy counters that besides overlooking the almost 75 million Indians demographers now estimate were living in the Americas (about six million within the present-day U.S.), the historians said:

nothing of the challenges met and overcome by the Indians as the *original* pioneers . . . of the many marvelous innovations, inventions, and adaptations of their societies and civilizations . . . developed without benefit of Western European advice and assistance . . . and of such Indian attainments and institutions as intricate calendrical systems, land and sea trade networks extending for hundreds and even thousands of miles, cities larger at the time than any in Europe, and political and social systems . . .

AMERICA IN 1492, *supra* at 6.

<sup>52</sup> See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that discovery and conquest by force terminated American Indians' absolute title, and they retained only title of occupancy); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (stating that the superior policy, arts, and arms of the Euro-Americans resulted in "peculiar" relations between the United States and the tribes, who are not a foreign state able to invoke the Court's jurisdiction). As *M'Intosh* and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) demonstrate, American Indians as governments or individuals are often not the parties in significant cases. It is still a pattern of our time that controversies in which non-Indians are the disputing parties result in decisions that affect, often detrimentally, the rights of American Indians. See, e.g., *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989) (upholding the state's severance tax on a non-Indian corporation engaged in an enterprise with the tribe on its trust land). There, the double burden of taxation (state and tribal) created a disincentive for non-Indians to enter into economic development ventures with tribes and interferes with the federal policy that tribes should exercise economic self-determination, but the Court disagreed. See *id.* at 186.

in *Worcester v. Georgia* that the tribes were nations in a unique political relationship only with the federal national government fits the relationships that actually occurred through the formalities of treaty making.<sup>53</sup>

The colonists chose treaty making to obtain what they needed from the Native Americans who had superiority over the Euro-Americans in population, military strength, possession of land, critical resources, and knowledge for surviving in the environment alien to newcomers.<sup>54</sup> From the moment of arrival the Europeans had interests that preoccupied them.<sup>55</sup> Then the new Americans had to continuously strategize on how the political, economic, and military interests of the tribes could be allied or, at minimum, neutralized so that the revolution and the emerging republic could succeed.<sup>56</sup> As the Americans entered their war,

[a]lready agreements had been negotiated that needed to be honored. The first treaty between the United States and an Indian nation, the Delawares, was signed in 1778. So concerned was the young Congress about the delicate diplomatic balance during the Revolution that the Delawares were offered the possible opportunity of statehood, but this offer was never renewed after the Revolution was over.<sup>57</sup>

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<sup>53</sup> *Worcester*, 31 U.S. at 542, 559-60:

America . . . was inhabited by distinct people, divided into separate nations, independent of each other and of the rest of world, having institutions of their own, and governing themselves by their own laws. The very words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Recalcitrant states still acted unilaterally, despite the Constitution and the statutory directives from Congress. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (holding the 1795 Treaty that the State of New York made with Oneidas was invalid and tribe had viable claim for damages).

<sup>54</sup> WILKINS & LOMAWAIMA, *supra* note 4 at 33. Between the British and Indian tribes, 175 treaties were made from 1607 (with the Powhatan Confederacy of Virginia) to 1775 (with the Iroquois of Ohio, the Shawnees and the Delawares).

<sup>55</sup> See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 47-58 (1982) (covering the pre-Revolutionary War period of relations).

<sup>56</sup> See ABERNETHY, *supra* note 23, at 175 ("At the beginning of the War, Congress had adopted a policy of encouraging the Western Indians to maintain a status of neutrality."). George Washington, commander of the federal forces, had urged this policy. Abernethy then describes the inconsistent or frustrated efforts to achieve the neutrality of Indians. This goal became entangled in private ambitions of persons who acted for the union and for their own interests in trade and land. See *id.* at 175-79; see also ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE 1600-1800*, at 114-15 (1997) (describing the League of the Iroquois (also called the League of the Haudenosaunee by the Iroquois themselves), who properly were respected by the colonial powers from all foreign states because the Leagues alone could muster up to 2000 warriors, and if allied tribes joined them the League's military strength became even more formidable for outnumbered colonists).

<sup>57</sup> JOHN R. WUNDER, "RETAINED BY THE PEOPLE:" A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 19 (1994).

The nation-builders, once they won their freedom from the Crown, knew that they had to obtain land from the tribal nations in a way that provided peaceful coexistence. All of these interests were pursued by the productive methods of treaties and negotiated contracts for obtaining land, economic exchanges, and stable political relationships.

Treaties, agreements requiring mutually respectful relations and consent of the governed, were the primary means for the indigenous nations to fit in the model of the new republic. Congress established a Northern Department and Southern Department to pursue treaties.<sup>58</sup> The Indian nations were not part of the dialogue when the States struggled through the "mutuality of concessions" that formed the Union.<sup>59</sup> Yet, as a political state within the boundaries of the United States, the Indian nations have ways in which they connect and do not connect to the principles articulated by the framers.

In the Americans' invention of their government, two critical principles were constraints on majoritarian power and protecting the equality of individuals. These principles do not comprehend the unique status of the tribes as political states. Restraining the abuse of majoritarian power resounds in the protection of disfavored minorities that *Carolene Products* articulated as a judicial duty.<sup>60</sup> However, anti-majoritarianism does not adequately address the rights that Indians claim as a political entity, rather than as a discrete and insular minority class. *Morton v. Mancari* affirmed the distinct political status and the unique tribal-federal relationship in the constitutional construct.<sup>61</sup> American Indians are not just an aggregate of distinctly identified individuals nor a private club.<sup>62</sup> Likewise, equality and fair

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<sup>58</sup> See ABERNETHY, *supra* note 23, at 316 (listing some of the treaties in the Confederate period: Six Nations of the Iroquois Confederacy at Fort Stanwix, October 22, 1784 (second treaty); Treaty of Fort MIntosh with the Wyandottes, Delawares, Chippewas and Ottawas, January 21, 1785; Treaty with the Shawnees at Fort Finney, January 31, 1785).

<sup>59</sup> See *Blatchford v. Native American Vill. of Noatak*, 501 U.S. 775, 782 (1991) (discussing how states mutually consented to be sued by each other, but not by the Indian tribes); see also Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Court*, 56 U. CHI. L. REV. 671, 701-02 (1989).

<sup>60</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (deferring for another time the question of "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"). American Indians, like other discretely identified populations, have been subjected to the prejudice and resulting discrimination of concern here in *Carolene Products*. That, however, is not the principle for the protection that Indians seek for tribal collective rights as a political entity.

<sup>61</sup> *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (explaining that Indian preference in the Bureau of Indian Affairs hiring and promotion is reasonable and related to a rational goal because it is political rather than merely racial in nature).

<sup>62</sup> *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (stating that "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations'").

treatment, the equal protection and due process principles, focused on individual rights. The only collective rights in the Constitution, in the Indian Commerce Clause, attest to the unique status of the tribal nations. Thus, the unique situation that holds today: only American Indian individuals are citizens of three discrete sovereigns within the borders of the United States.

The tribe's collective quality is more than a legal characteristic; it culturally shaped the tribes' view of the treaties they made with the Euro-Americans. Robert A. Williams reminds us how the indigenous nations viewed the treaties as more than contracts, but as enduring commitments to "brotherly" care.<sup>63</sup> Certainly the early treaties were understandings that only nations as peers can make; subsequent treaties still involved state-based relationships though the parties had disparate power. In the indigenous view, these covenants or compacts were an obligation of each party to protect the interests of the other, for mutual safety and security. Land transactions were to bind, not separate, the parties, and thus form multi-cultural unity.<sup>64</sup> The indigenous nations sought to generate something akin to the natural covenants that bound each tribal community.

Both contracts and covenants can build and maintain communities, but in the colonial context the indigenous peoples and the Euro-Americans had differing objectives.

Both contracts and covenants bring people together, by choice, into some kind of association or society. Contracts, however, assume a heterogeneity of interests among the associates . . . . The act of contracting makes certain kinds of relationships possible that would be impossible without the contractual guarantees and protections. The act of covenanting affirms and deepens intrinsic natural as well as accomplished historical relationships of common purpose and commitment. A covenanted community is one cemented by trust through its shared sense of meaning. If human life is authenticated and fulfilled in a community, then a covenant, or contract of homogeneous interests, strengthens the bonds of a community so that it can accomplish these shared purposes.<sup>65</sup>

While the Euro-Americans were realists in making treaties, the covenant that they pursued was among the States that lacked trust, sufficient common bonds, and shared identity as they pursued independence. To construct a nation, the visionaries had to overcome the internal nationalism of each State that defended a distinct sover-

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<sup>63</sup> WILLIAMS, *supra* note 56, at 98-123 ("Treaties told as stories sought to sustain a constitutional tradition of human solidarity between different peoples.").

<sup>64</sup> *Id.* at 115-23 (explaining how the Iroquois Covenant Chain "told a special kind of story, a way of imagining a world of human solidarity achieved through treaty making with different peoples").

<sup>65</sup> ROBERT W. HOFFERT, A POLITICS OF TENSIONS: THE ARTICLES OF CONFEDERATION AND AMERICAN POLITICAL IDEAS 13 (1992).

eighty.<sup>66</sup> To an outsider, especially one removed from the colonial period, the localized sense of nationalism was parochial.

The Indian nations enjoyed the benefit of covenanted communities in their discrete tribes and their confederacies; each context affirmed in stories the unique identity and purposes of each tribe.<sup>67</sup> Williams recounts the indigenous efforts to educate the States when the Europeans and then the Euro-Americans failed to perform their covenant obligations as a continuing constitutional obligation of treaty partners.<sup>68</sup>

### *B. Tribes and the American Revolution*

Conflicting States' views of political relationships contributed to the pervasive problem of the colonists to secure support from tribes in the struggle for independence and afterwards to keep at bay competitor nations still within the Americas. In the revolutionary and confederacy period, the British, French, and Spanish each pursued advantages in political, economic, and military alliances.<sup>69</sup> Each exploited a strategically stated willingness to respect the tribes as political powers who had full title to their lands,<sup>70</sup> in contrast to expansive states' claims to title in Indian lands. For instance, during the French and Indian War of 1754-63, the Cherokees remonstrated the British who failed in the covenant duty of mutual assistance. The Cherokees used this lack of performance to withhold going to war against the

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<sup>66</sup> WOOD, *supra* note 34, at 356-57 (discussing the sovereignty of each state; for example, as late as 1787 Marylanders called their state "the nation," and spokesmen for the small states, like Roger Sherman of Connecticut, argued that "every Colony is a distinct Person . . . they should have an equal vote").

<sup>67</sup> HOFFERT, *supra* note 65, at 13-14 (distinguishing covenanted communities from "mere orderliness and process"). American Indian confederacies such as the League of the Iroquois (Haudenosaunee) and the All Indian Pueblo Council in New Mexico functioned before European contact and are probably the oldest governmental confederations still operating in the United States. See Rebecca L. Robbins, *Self Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in NATIVE AMERICAN SOVEREIGNTY 287-289 (John R. Wunder, ed., 1999). Robbins describes the precontact confederacies, citing especially to Sharon O'Brien, *American Indian Tribal Governments* (1989) for both the Haudenosaunee (Iroquois) Confederacy and the All Indian Pueblo Council.

<sup>68</sup> WILLIAMS, *supra* note 56, at 103-05 (discussing the obligations of those involved in treaty agreements).

<sup>69</sup> See MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781*, at 218-21 (1963) (describing the intricacies of American relations with the French and Spanish during the Revolutionary War); see also THOMAS A. BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 19-65 (10th ed. 1980) (capturing the shifting alliances as the British, Spanish, and French tried to use the United States to secure their own power and territories within the United States and externally).

<sup>70</sup> WILKINS & LOMAWAIMA, *supra* note 4, at 26-40 (discussing the Spanish, French, British, and United States practices that recognized Indian title).

French.<sup>71</sup> This is only one instance where different conceptions of obligation contributed to an undesirable result for those seeking peaceful relationships.

Protecting tribes from the local ambition of colonies marked the national policies attempted before the Revolution as well as after.<sup>72</sup> The Royal Proclamation of 1763 was the Crown's attempt to impose a national government's preemptive power, the first such policy, over the machinations of the colonies.<sup>73</sup> The Proclamation intended to assure the tribes, who had favored the French in the French and Indian War, that Britain would prevent the illegal encroachment on Indian lands. The Proclamation aimed to protect Indians against abuses from unregulated traders.<sup>74</sup> Prohibiting settlers in the region west of the Appalachians was necessary for peace for the Crown. However, the colonists had long resented and disobeyed the royal rules that restricted land and trade transactions with the Indians.

Moreover, the "land rich" colonies claimed their royal charters included the frontier areas that the Crown, and subsequently, the States and Congress, would struggle to control. The States' claims contained the contradiction of claiming title from the Crown whose authority was renounced when the colonists "Absolved from all Allegiance to the British Crown" in the Declaration of Independence.<sup>75</sup> The success of the breakaway colonists became ensnared in interstate conflicts over the western lands. Concurrently, the States denied the

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<sup>71</sup> WILLIAMS, *supra* note 56, at 103-04 (discussing what happens when treaty obligations are not met).

<sup>72</sup> See Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995). Clinton's article provides an excellent account of the pre- and post-revolutionary period. Clinton's account of the pre-revolutionary dealings between American Indians and the colonists, the circumstances and events that resulted in the Royal Proclamation of 1763, and of the societal and formal debates during the drafting of Articles of Confederation is extensive. Clinton also captures in full detail the tensions of the states' rights versus central government approaches to relationships with Indians.

<sup>73</sup> DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 58-60 (4th ed. 1998) (noting the reaction of the colonial governments to the Royal Proclamation of 1763); WILKINS & LOMAWAIMA, *supra* note 4, at 176-78 (furthering the discussion on tribal-state relations during colonial times).

<sup>74</sup> WILKINS & LOMAWAIMA, *supra* note 4, at 177 (discussing the purpose of the Royal Proclamation of 1763).

<sup>75</sup> THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776), see DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 89-106 (1988). Among the "long train of abuses and usurpations" the colonists charged against the Crown: "He has refused to other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." *Id.* at 102. Eleazar offers this interpretation, "Royal action cut off the westward movement of the American people." *Id.*

national government, Congress, any entitlement or authority over the frontier lands.<sup>76</sup>

The colonists' claims to title of the Western lands incited enduring rancor and competition in the relations of the breakaway States,<sup>77</sup> prodded by the unceasing opportunism of private speculators. Virginia claimed its crown charter of 1609 entitled it to land extending to the Pacific Ocean as the border.<sup>78</sup> This meant that land titles in this area obtained by speculators and purchasers from Maryland and other states were not valid. Land speculators included all classes of persons and many of the constitutional framers.<sup>79</sup> For example, George Washington, a semi-deity in constitutional lore, like many others, disregarded the prohibitions in the Crown's proclamation. It was a "temporary expedient to quiet the minds of the Indians . . . . Any person, therefore, who neglects the present opportunity of hunting out good lands, and in some measure marking and distinguishing them for his own (in order to keep others from settling them), will never regain it."<sup>80</sup>

Underlying the greed of speculators and the States was the expectation that Indians would be removed from their lands. Abernathy concludes that

this study of land speculation would seem to point to the conclusion that a country cannot well afford to place its destinies in the hands of men who are engaged in the amassing of personal fortunes. When large profits are at stake neither their own consciences nor their country's distress often give pause, even to those who are loudest in the affirmation of their own righteousness. We have seen that this was not exclusively an Ameri-

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<sup>76</sup> Virginia was unrelenting in efforts to retain all title and control, based on its royal charter. See ABERNETHY, *supra* note 23, at 217-29, 242-73 (including three chapters on Virginia's Western land policy in the 1778-1783 period). See also the Marshall Court's interpretation in *Johnson v. McIntosh*, where the Court stated that "[t]he power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees." 21 U.S. 543, 587 (1823).

<sup>77</sup> In the Continental Congress of 1776, as it struggled to fight the war, the Western land claims had impact. See ABERNETHY, *supra* note 23, at 171 ("On September 16 Congress proposed to give a bounty of land to Continental troops who enlisted for the duration of the War."). When it was proposed to pay for these lands from the general national treasury, Maryland led the fight to object. To objecting States, Congress would be paying for lands that were a national resource. See *id.* at 171.

<sup>78</sup> GETCHES, *supra* note 73, at 61-62.

<sup>79</sup> See ABERNETHY, *supra* note 23, at 40-58 (describing Vandalia, a land speculating venture begun before the war in which Benjamin Franklin and his son, along with other prominent leaders, were involved; the victory and formation of the new government were entangled in the schemes for self-profit of these individuals).

<sup>80</sup> GETCHES, *supra* note 73, at 59 (instructing, in a 1767 letter, a business associate to survey and secure two thousand acres of "good rich land" in the prohibited area)(citing II THE WRITINGS OF GEORGE WASHINGTON 218-24 (Worthington C. Ford ed., 1972), quoted in THIS COUNTRY WAS OURS: A DOCUMENTARY HISTORY OF THE AMERICAN INDIANS 57 (Virgil J. Vogel ed., 1972)).

can failing; men of high place in England and in France were equally concerned with the rebel colonists in this peculiar form of pillage of war. The Revolution was no exception to the fact that in time of war great fortunes are built from the distress of the country, the excitement fostering laxness and making it difficult for the public to be aware of what goes on behind closed doors.<sup>81</sup>

The conflicting motives of states and individuals perpetuated difficulties in establishing the union dependent on peaceful relations with the Indians.<sup>82</sup>

During the wars to establish the new republic, most tribes supported the British, if not overtly, then by neutrality useful to protect tribal claims of the Western lands.<sup>83</sup> Powerful tribes who sided with the Crown during the Revolutionary War held large claims to territories between the Appalachians and the Mississippi River and contested any claims that the newly-born U.S. made to these ancestral lands.<sup>84</sup> Subsequently, in the War of 1812 with the Crown, most of the tribes again supported the British.<sup>85</sup> The United States tried different means to secure Indian allies. In the Treaty of Greenville of July 22, 1814, the United States made peace with the Delaware, Miami, Seneca, Shawnee and Wyandot, and required the tribes to declare war on the British.<sup>86</sup> The tribes who supported the British felt abandoned in the protection of their rights in the treaty ending the Revolutionary War and urged that this not happen with the treaty ending the War of 1812.

In the treaty negotiations to settle the War in 1814, the British insisted that the Indian Nations should be participants in the treaty.<sup>87</sup> The British demanded that their Indian allies be extended peace and that the boundary of their territory be definitively marked as a per-

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<sup>81</sup> ABERNETHY, *supra* note 23, at 368.

<sup>82</sup> GETCHES, *supra* note 73, at 60-63 (pointing out that Thomas Paine, the influential author of *Common Sense*, the Revolutionary War pamphlet, did not disclose that he had been given shares in a land speculating company in his spirited defense of the interest of the nation in defeating Virginia's unreasonable claims to control the entire western frontier).

<sup>83</sup> See COHEN, *supra* note 55, at 58 (discussing how "the Crown supported the sanctity of treaty obligations"); FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 26-28 (1962) ("The British had the better position and had in large measure retained the allegiance of the Indians."); WILKINS & LOMAWAIMA, *supra* note 4, at 37 ("[V]irtually all Indian nations allied with Great Britain against the upstart colonies . . .").

<sup>84</sup> See ABERNETHY, *supra* note 23, at 34-35 (describing the Cherokees balking at land cessions in Treaty of Fort Stanwix of 1768).

<sup>85</sup> See ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 89-95 (1970) (describing the efforts of the U.S. and Great Britain to recruit tribes as military allies and how Tecumseh used his superb leadership skills to unify tribes under his leadership).

<sup>86</sup> See *THE ALMANAC OF AMERICAN HISTORY*, *supra* note 31, at 199; WILKINS & LOMAWAIMA, *supra* note 4, at 45-46 (noting that the treaty acknowledged the tribes' land title).

<sup>87</sup> WILKINS & LOMAWAIMA, *supra* note 4, at 48-50 (showing the efforts of the British to include Indian Nations in treaty considerations).

manent barrier between the dominions of Britain and the United States. The British maintained that the Crown would sign a treaty only if "the Indian nations are included in it, and restored to all the rights, privileges, and territories which they enjoyed in the year 1811."<sup>88</sup> After conclusion of the war in 1814, the U.S. forced land cessions from tribes. Even the Lower Creeks who had remained neutral or sided with Andrew Jackson in battles had to cede twenty-two million acres in lower parts of western Georgia and much of Alabama.<sup>89</sup>

In the negotiations of 1814 the British delegation challenged the United States' "novel and alarming pretension" that the Indian nations were subjects of the United States and that the Indian territories were subject to the disposal of the federal government.<sup>90</sup> To foreclose adding tribes as direct parties to the agreement, the United States promised to recognize the rights and possession of tribes that existed prior to 1811, a provision that Britain accepted.<sup>91</sup> This treaty, in which the indigenous nations were affected by the dispute between non-Indians, perhaps made the tribes a third party beneficiary. The War of 1812 and its resolution captured the persisting tensions, from many sources, as the United States struggled to obtain both land and peaceful relations from the Indian tribes.

#### IV. THE NEW REPUBLIC'S MODEL: EXCLUDE THE STATES FROM RELATIONS WITH TRIBES

##### A. *Conflict and Unity in the Colonies*

Other than the shared goal of securing freedom from the Crown, the states lacked agreement on numerous subjects, most critically the

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<sup>88</sup> *Id.* at 49 (describing the tribes' increasing willingness to go to war to stop Anglo advancement and restore traditional Indian life). The Shawnee Prophet Tenskwatawa and his brother Tecumseh led in unifying the tribes to fight on the side of Great Britain in the War of 1812. Tecumseh fought in at least 150 engagements against the U.S. until his death, in battle, in October 1813 led to the collapse of his Indian confederacy and its support for the British.

<sup>89</sup> *Id.* at 48 ("The United States considered this enormous land cession to be 'an equivalent for all expenses incurred in prosecuting the war to its termination.'"); see also DEBO, *supra* note 85, at 96 (describing Andrew Jackson's leadership during the War of 1812 and subsequent work taking land from tribes, even those who allied with him during the war).

<sup>90</sup> WILKINS & LOMAWAIMA, *supra* note 4, at 49.

<sup>91</sup> *Id.* at 49-50 (quoting Treaty of Ghent, Article 9, 8 Stat. 747-48):

The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification, and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed, or been entitled to . . . provided always, that such tribes or nations shall agree to desist from all hostilities against the United States of America, their citizens and subjects, upon the ratification of the present treaty being notified to the such tribes or nations, and shall so desist accordingly.

western lands. Peter S. Onuf describes the intensity of the state disputes. "During the war years, state leaders claimed that they would not jeopardize the common cause by taking up arms against other Americans, whatever the provocation. But the States' "usual animosities and jealousies will return with elastic force' in the postwar period, according to a British prediction."<sup>92</sup> The mythic accounts of U.S. history hide the degree to which the States' aggressively pursued narrow interests that interfered with building mutuality and trust among themselves. The interstate disputes on the western lands formed a ubiquitous maelstrom at each stage of the project to construct a government that accommodated the powers of States and a national government. Constitutional creativity had to respond to the force of this whirlpool.

Studies on the constitutional formation reveal a panoply of events that informed how the conflicts affected the structure and powers assigned in the ultimate structure. A dual commitment to both forms of government, state and federal, led the colonists. Robert W. Hoftert reminds us that past studies projecting a history of struggles and conflicts of the American politics as well as those focusing on solidarity and harmony among the states presented incomplete accounts.<sup>93</sup> Choosing between stories of consensus and conflict ignores at least two important elements.

First, one cannot ignore that the consensus reached by the framers resulted from the confrontation of the conflicts over the respec-

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<sup>92</sup> PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC* 5 (1983). *See id.* at 8-9:

[I]n 1776 many observers could not foresee the possibility of the peaceful adjustment of conflicts . . . . The potential for intercolonial conflict was certainly great. The aggressive western policy of Virginia's governor, Lord Dunmore, had precipitated a struggle for jurisdiction and scattered violence in the Fort Pitt region . . . . Meanwhile, in the Wyoming Valley, settlers and speculators from Connecticut sought to defend their titles under the Susquehannah Company against Pennsylvania and its claimants. Both sides threatened to use force. Separatists in western Virginia and northeastern New York threatened to dismember two of the most important colonies even as they prepared to withdraw from the British Empire.

*See generally id.* at 3-20 (describing the conflicts between the states over territory in colonial America).

<sup>93</sup> HOFFERT, *supra* note 65, at 19-20 (discussing the approaches of the scholars who have authored the primary accounts of the formative period). *See also* Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period*, 60 TENN. L. REV. 783 (1993) (critiquing Jensen's thesis as one focusing on the critical confederation period with conflict and chaos, ended by the Constitution). Freedman's interpretation focuses on the debates and the differences among states as a process to build unity, moving from separate state interests to compromise and agreement on shared ideology. Freedman also treats the western lands as the complex problem that "plagued Congress repeatedly" and as the demonstration of the conflict resolution. *Id.* at 822-26. He statistically analyzed the voting patterns in the roll call voting in the Continental Congress on the Articles.

tive reach of state and federal power.<sup>94</sup> They rejected the idea of a single nation-state, but that still left how States that declared themselves as independent would be covenanted to coexist with a new central government. The 1887 Constitution reflects how the conflicts at that time were defined, but they were not resolved forever. Moreover, certain conflicts keep recurring as an alternative form of constitutional vision, e.g., the dominance of state power in the Articles. According to Hoffert, certain "defeated" impulses "retain their validity and, most importantly, saliency" despite the documented rejection.<sup>95</sup> Thus, the current Supreme Court's pursuit of restoring state power has revived the tension in the evolved constitutional models. However, the historical record shows that the dominant form of state power in the Articles was rejected.

Ronald Dworkin has urged that constitutional interpretation is not a matter of conventionalism or pragmatism.<sup>96</sup> The Declaration of Independence provides a direct philosophical statement, which the Constitution lacks. The Constitution is a practical document structuring how power over specific subject matter will be allocated. Thus, interpretation combines the backward-looking approach of conventionalism with the forward-looking bias of pragmatism. Hoffert, in response to the interpretative task, states that the initial difficulty is not a matter of textual interpretation or hermeneutics. "It is, instead a matter of sources. In what sources do we find the elements that constitute the fundamental principles of American politics?"<sup>97</sup> The Constitutional document alone is insufficient for the inquiry on the conflicts and how the concepts of localism and nationalism were worked out. The pre-Constitution documents and the interim Articles contain the values of a democratic vision. These core documents involve intensive advocacy, a form of ruminative thinking in which words of literate political architects recur so that one can identify the underlying principles with some degree of confidence.

After the Revolutionary War the United States faced debt and the western lands as immediate crises, with the lands seen as the means to pay national debt for the war and for future development.<sup>98</sup> Some states, not just the "land-poor" ones, argued that the western lands were obtained with the blood of all the colonies' citizens and these lands should pay the pressing war debt. These lands were needed for the union to fulfill its promise to the enlistees in the revolutionary

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<sup>94</sup> HOFFERT, *supra* note 65, at 21 ("[B]ecause American politics finds both deep consensus and significant conflict in the same sources, agreements are a primary generator of disagreements and, simultaneously, the basis for 'resolving' those disagreements.").

<sup>95</sup> *Id.* at 20.

<sup>96</sup> *Id.* at 22 (citing RONALD DWORKIN, *LAW'S EMPIRE* chs. 4 and 5 (1986)).

<sup>97</sup> *Id.* at 23.

<sup>98</sup> See RAKOVE, *supra* note 44, at 25-26.

army that they would be rewarded with land. Many worried that the financial and political advantage in the new states to emerge should not accrue to the eight states that claimed the western lands.<sup>99</sup> Additionally, the quality of people who were invading and settling in the frontier lands fed a northeastern fear of westerners. They were stereotypically depicted as squatters, ignorant and not likely to become productive citizens.<sup>100</sup> This view opposed Thomas Jefferson's that land should be given to actual settlers who would be productive and capable of self-government.<sup>101</sup> The Articles form the first formalized instrument to make practical the perspectives that became labeled as the Federalist and Antifederalist.

### *B. Articles of Confederation and Perpetual Union*

The Articles' vision of the democratic republic favored local or state power over the national, which was ultimately rejected in the Constitution. The Articles continue "to have a vital but unrecognized role in America's political foundations. A fuller and more satisfactory understanding of the perplexities of America's formative political principles requires that the implicit be made explicit."<sup>102</sup> Central in this analysis is the western lands and the authority in Indian affairs, though other issues were enmeshed. Other issues, such as small states versus large states and proportional or equal representation in Congress, coalesced with the hopes and fears about what would be done with the western lands. Yet, no matter how partisans argued about state size and representation (which are not the focus of this paper) and other issues, all advocates ultimately agreed on the lesson and principle after the Confederation experience. Namely, that the national government, not the states, would have authority over the

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<sup>99</sup> See MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, at 9 (1950):

The struggle continued without a break after the start of the Revolution. It affected the fighting of the war. It was a major issue in creating the Articles of Confederation and delayed their ratification for years. It warped the course of diplomacy. It shaped a good deal of the political and constitutional history of the Confederation.

<sup>100</sup> See *id.* at 358 ("The emigrants to the frontier lands are the least worthy subjects in the United States. They are little less savage than the Indians; and when possessed of the most fertile spots, for want of industry, live miserably.") (quoting Timothy Pickering in letter to Rufus King, 4 June 1785, *id.* at 358 n.15 ).

<sup>101</sup> See *id.* at 353-54 (noting that in 1784 the Congress of the Confederation appointed Thomas Jefferson as chairman of a committee to draft an ordinance for the government of the new public domain). Jefferson's vision of how responsible settlers given land could progress to statehood resulted in the Ordinance of 1784. However, it was repealed in the Ordinance of 1787 when land speculators and their supporters substituted congressional control, not local self-government, in the frontier. While both approaches used national power, rather than state power, the interests being served shifted to the private profit sector. *Id.*

<sup>102</sup> HOFFERT, *supra* note 65, at 27.

western lands and relationships, hopefully peaceful ones, with the Indian nations. The struggle to reach this resolution is story behind the formal Constitution.<sup>103</sup>

The Articles manifest connective strands that a simple state versus federal power dichotomy does not allow. The newly independent states, forced to rebel against the constrictive national power of the crown over local communities, were determined to prevent a federal power that would be similarly despotic. The states viewed local community as the source of governmental power. Anchored in local relationships and homogeneity, it is the small republic of Montesquieu's philosophy that the colonists embraced.<sup>104</sup> The terminology in the drafts and final product is of friendship, mutuality, and communal-<sup>105</sup>ity.

The concept of community guided the construction of the Articles, with individual rights as a lesser focus that emerged forcefully in the subsequent Constitution. In the states were the values and assumptions of covenanted communities; a national community was problematical. The state constitutions served as models to both the Articles and the Constitution; moreover, they offered alternative visions to federal constitutionalism.<sup>106</sup> Donald Lutz states that "[i]n late 1775 the Continental Congress instructed the states to draft constitutions that would 'establish some form of government' independent of the Crown."<sup>107</sup> State constitutions were products of "a time of ex-

<sup>103</sup> See generally JENSEN, *supra* note 99, at 350-59 (discussing the creation of the national domain).

<sup>104</sup> See WOOD, *supra* note 34, at 356 ("Americans were well aware of the prevailing maxim, made famous by Montesquieu—indeed it was basic to their thought in 1776—that only a small homogeneous society whose interests were essentially similar could properly sustain a republican government.").

<sup>105</sup> See ARTICLES OF CONFEDERATION, 1777, art. III, in U.S.C. at XLVII (2000):

The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

<sup>106</sup> See Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199 (2000) (arguing that six years before the formation of the federal Constitution, comprehensive compilations of existing state constitutions provided models for the framing of fundamental law in the new states and for the federal constitution); Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 289 (1997) (arguing that federal constitutionalism is a tradition distinct from the state constitutions that embraced a more expansive view of popular sovereignty as compared to the federal constrained view of the people's right to alter or abolish their government). But see LUTZ, *supra* note 37, at 97 ("One should not conclude that the state constitutions were the inevitable product of what came before or that the United States Constitution was simply a composite of state documents.").

<sup>107</sup> LUTZ, *supra* note 37, at 100. However, three of the states chose to continue their colonial charters. *Id.*

traordinary political experimentation and innovation"; in the 1776-1798 period, the first sixteen states wrote a total of twenty-nine constitutions.<sup>108</sup> The local level, according to Hoffert, afforded the maximum level of meaningful self-definition not possible in a national membership.<sup>109</sup>

The national frame should be a community of allies, constructed to protect the state communities' interest in friendship and mutuality in their intercourse. Here Vattel, read by many colonial Americans, proved influential with his view that "several sovereign and independent states may unite themselves together by a perpetual confederacy without each in particular ceasing to be a perfect state . . . . The deliberations in common will offer no violence to the sovereignty of each member."<sup>110</sup> In individual and joint actions as allies, the states claimed authority from their inherent sovereignty. How this authority would be delegated to the national Congress in the Articles energized long-standing disputes.

The first draft of the Articles apportioned the explicit powers and duties between the states and Congress, the embodiment of the national government, in a "model balanced much like that of the Constitution of 1787."<sup>111</sup> Less explicitly developed than the Constitution's balance of the two forms of power, the first Articles' draft was the work of John Dickinson of Delaware, which drew on an earlier effort by Benjamin Franklin.<sup>112</sup> In July 1754 commissioners of the northern colonies met in Albany where Franklin drafted the Albany Plan of Union to correct "our disunited state, and our weakness arising from such want of union."<sup>113</sup> Then the theoretical balance of power in the Dickinson model was reworked so that the states held the fundamental authority, limiting Congress to specific grants of power. Eighteen subject matter areas were reworked to shift strength to states, including Indian affairs and the Western lands.<sup>114</sup> Congress had a second

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<sup>108</sup> *Id.* at 97. See generally *id.* at 96-110 (categorizing the state constitutions by their chronology, e.g., the "first wave" and "second wave" produced fifteen new state constitutions after the 1775 order of the Continental Congress and before the end of the war actions in 1782).

<sup>109</sup> HOFFERT, *supra* note 65, at 35-36.

<sup>110</sup> WOOD, *supra* note 34, at 355 (quoting EMMERICH DE VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE* §§ 10, 67 (London 1759, 1760)).

<sup>111</sup> HOFFERT, *supra* note 65 at 85.

<sup>112</sup> Benjamin Franklin, *Reasons and Motives for the Albany Plan of Union* (July 1754), reprinted in 1 *THE FOUNDERS' CONSTITUTION* 210 (Philip B. Kurland & Ralph Lerner eds., 1987). The plan was to be submitted to Congress, and three pages of the plan were dedicated to the problems arising from the western land and relations with the Indians for land, trade, and peace.

<sup>113</sup> *Id.* See generally Clinton, *supra* note 72, at 1089-1104 (including a substantial discussion of the Albany plan and the supporters and resisters of centralizing policies that would limit state actions).

<sup>114</sup> HOFFERT, *supra* note 65, at 85. Some other major areas were reconstructed to keep state power as the control: the nature of the union, interstate comity, maritime jurisdictions, and

draft by August 20, 1776, where the contentious subject matter was reduced to four issues.<sup>115</sup>

Control of the western lands with the embedded Indian relationships proved the most acrimonious arena in this struggle where sovereignty was at stake. "Would it be plural—centered in each state—or singular—centered in Congress?"<sup>116</sup> As Onuf remarks, "Every state depended on the guarantees of state rights written into the Confederation. But landless and landed states alike resisted leaving the determination of western claims to future adjudication . . . . The western lands controversy thus became inextricably bound up with the terms of the union itself."<sup>117</sup> In the framework of Merrill Jensen's classifications, the "conservatives favored a single sovereign with 'superintending' power over states and citizens," while "radicals" transferred to this political struggle their animus against the Crown's "coercive centralized power" with its colonial governing class and economic elites.<sup>118</sup> The state-focused "radicals" enjoyed theoretical support in the Declaration of Independence and the experiences of all the colonists under the domination of the British form of centralized government.<sup>119</sup> The resulting framework structured the power to favor the states, yet provided for national subject matter and processes delegated to the centralized government. The final draft of the Articles, on November 15, 1777, did not resolve the western lands and Indians issues, which roiled in confrontations among the states and delayed ratification until March 1, 1781.

The final provisions manifest an architectural design that is paradoxical by structuring power in multi-layers that defy a simple state or federal categorization. In Article II, "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to

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military powers granted to a proposed Council of States, to function when the full Congress was not in session. *Id.*

<sup>115</sup> *Id.* at 85-86. The four included

the equal representation of all states in Congress, the basis for the apportionment of common expenses, the grant of powers to the central government over western lands, and the distribution of power between the states and Congress to define the precise location of sovereignty. This last issue was resolved quickly but pointedly. Formal coercive authority was to be located in each individual state.

*Id.* at 86.

<sup>116</sup> *Id.* at 87.

<sup>117</sup> ONUF, *supra* note 92, at 14.

<sup>118</sup> HOFFERT, *supra* note 65, at 87-88 (citing JENSEN, *supra* note 69, at 20). *Contra* Freedman, *supra* note 93, at 804-809 (challenging Jensen's thesis that the drafting of the Articles was focused on oppositional factions, labeled as radical and conservative).

<sup>119</sup> HOFFERT, *supra* note 65, at 87-88.

the United States, in Congress assembled.”<sup>120</sup> Then Article XIII provides that: “Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State and the Union shall be perpetual . . . .”<sup>121</sup> A truncated design then addressed the practicalities of how authority would be used in specific areas. The document articulates powers that are distinct for the states and the national entities and of powers that are integrated. However, the power of Congress was a dependent version of state power, for example, requiring super majority votes in Congress for presumably national subject matter, such as coining money and setting its value.<sup>122</sup>

State powers were described in the affirmative mandatory acts and then in prohibitions. The prohibited acts were both absolute (e.g., no imports or duties that interfere with United States treaties)<sup>123</sup> and conditional (e.g., prohibited from entering foreign treaties, though the full Congress can consent and authorize this for states).<sup>124</sup> The powers delegated to Congress—the only form of national government—included sole and exclusive rights or powers (e.g., to determine peace and war)<sup>125</sup> and those of last resort on appeals.<sup>126</sup> The Articles created a central legislative government, with an administrative mechanism (not an executive branch) and implied judicial-like forums. Each State was allocated one vote in Congress<sup>127</sup> and a Committee of the States would sit during the congressional recess.<sup>128</sup>

Quasi-judicial processes were invested in Congress, first in that a State could petition Congress when a controversy existed with opposing states. Boundary and jurisdiction disputes were exclusively reserved for this process.<sup>129</sup> Then a set of procedures would allow the states a voice in selecting the judges to hear the dispute; the decision would be sent to Congress. In response to contested land claims of states and the private parties who obtained title from a State, controversies concerning “the private right of soil” would also be decided by

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<sup>120</sup> ARTICLES OF CONFEDERATION, *supra* note 105, art. II, U.S.C. at XLVII. See also HOFFERT, *supra* note 65, at 199 (quoting the same text from the reproduction of the *Articles of Federation and Perpetual Union* found in JOURNALS, November 15, 1777, 9:907-25).

<sup>121</sup> ARTICLES OF CONFEDERATION, *supra* note 105, art. XIII, U.S.C. at L.

<sup>122</sup> *Id.* art. IX, at U.S.C. XLVIII-L. For purposes of this paper's focus on the Indian issues, the structure and powers in the Articles will be summarized.

<sup>123</sup> *Id.* art. VI, at U.S.C. XLVIII.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* art. IX, at U.S.C. XLVIII.

<sup>126</sup> *Id.* at U.S.C. XLVIII-XLIX.

<sup>127</sup> *Id.* art. V, at U.S.C. XLVIII.

<sup>128</sup> *Id.* art. IX, at U.S.C. XLIX.

<sup>129</sup> *Id.*

Congress.<sup>130</sup> The entire body served as the last resort of appeal in the land controversies involving states or individuals.<sup>131</sup>

The divisive force of the western lands and Indians shows in the truncated authority that was supposed to contain and discipline interstate controversies. Equally lacking was a rational form of central authority to which states consented. The decision pathway included diversions that created uncertainty in how some problems would be handled.<sup>132</sup> Congress had the sole and exclusive power to "regulat[e] the trade and manag[ement] all affairs with the Indians not members of any of the states, provided that the legislative right of any State within its own limits be not infringed or violated."<sup>133</sup> Congress had the sole and exclusive power of determining war and peace,<sup>134</sup> which included the relations with Indians. Again, the states wedged an exception to make conditional the state prohibition:

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such a State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled, can be consulted.<sup>135</sup>

This provision reflects the collateral fear for safety on land obtained from Indians and in trade with them, though it contains a counterfactual presumption. Non-Indians trespassing as squatters or with titles obtained from speculators and states were the reality in the frontier areas, the western lands. It was the invasive offenses of land-hungry non-Indians that political leaders feared would trigger wars that the confederation could not bear militarily or financially.

Ratification of the Articles was protracted as Virginia insisted on vast land over which it claimed sovereignty and other States resisted. New York, a State with land claims, ceded western land claims to congressional jurisdiction, while Virginia merely reduced its claim ini-

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> See Clinton, *supra* note 72, at 1104-47 (including an extended discussion of the struggles with states as Congress attempted to implement a national policy). Clinton notes that "[o]bviously the Indian affairs clause of Article IX originally was intended to have a more limited meaning than that advanced by some of the most vociferous state opponents of centralization of Indian affairs powers." *Id.* at 1103. Clinton provides details of the states' independent acts in Indian affairs, interference in treaty making, attempts to legally construct Indians as members of the states so that state jurisdiction could be extended in contrived compliance with Article IX, and ultimately, the Indian wars unilaterally initiated by the states of Virginia and Georgia, plus conflict with the Cherokees in North Carolina.

<sup>133</sup> ARTICLES OF CONFEDERATION, *supra* note 105, art. IX, at U.S.C. XLIX.

<sup>134</sup> *Id.* at U.S.C. XLVIII.

<sup>135</sup> *Id.* art. VI, at U.S.C. XLVIII.

tially.<sup>136</sup> However, the land-poor States of Maryland, Delaware, and New Jersey opposed the state jurisdiction over questions of the western lands in a matter affecting the entire union, a position that also served the interests of land speculators. The land speculators constantly trolled the political shoals of Congress where they believed they could obtain better deals than in state legislatures. Thus the ratification was held hostage.<sup>137</sup> Then Virginia voided the land claims of individuals from Maryland, Pennsylvania, and New Jersey whose titles originated with land companies. Virginia also voided all direct land purchases from Indians within the area of Virginia's charter claims.<sup>138</sup>

The States had to reach some solution so the union could start its "perpetual" life. International relations added complications as Spain and Britain were exploiting the union's disunity for their own goals that would undercut the United States' interests.<sup>139</sup> Virginia made its conditional land cession in January 1781; it would cede lands to congressional jurisdiction. However, on these lands, Virginia extracted the condition that individual purchases of land from Indians must be voided. Subsequently, Maryland, the last holdout to unanimity, ratified the Articles that went into formal effect on March 1, 1781.<sup>140</sup> "Virginia and her supporters had triumphed over Franklin, Dickinson, and their friends in withholding from Congress, under the Articles, the control of the Western lands. Under that instrument Congress could not interfere in the matter of state boundaries except through an elaborate system of arbitration . . ."<sup>141</sup> Governing under that instrument was the challenge awaiting the Confederation.

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<sup>136</sup> HOFFERT, *supra* note 65, at 94.

<sup>137</sup> *Id.* at 91 (explaining that ratification of the Articles was delayed by concern among some states over other states' western land claims).

<sup>138</sup> *See id.* at 92; *see also id.* at 90-94 (describing the sequence of events in which opposing states held to tough positions). Again, the participation of noteworthy founders is woven in these events. Thomas Jefferson, Richard Henry Lee, and George Mason of Virginia all took active roles in opposing the land schemes of the land-poor states. In this pre-ratification period when Virginia was being pressed to cede land to Congress, in 1780 James Wilson, George Morgan, Benjamin Franklin, and others petitioned Congress to exercise its sovereignty and ignore Virginia's offers of conditioned cessions. They wanted Congress to act and confirm the land claims of speculators in Pennsylvania and Maryland.

<sup>139</sup> *Id.* at 94-95. Some states, for their own gains, proposed that Spain be rewarded for its support during the revolution by assuring Spain that it, not the United States, would have an empire in some part of the Western lands. Hoffert notes that this reward for Spain would also have provided it full navigational rights on the Mississippi River. In this same environment Virginia was influenced by the British control in the South, whose interests were served by keeping the confederation from achieving an integrated union. *See* BAILEY, *supra* note 69.

<sup>140</sup> HOFFERT, *supra* note 65, at 94.

<sup>141</sup> ABERNETHY, *supra* note 23, at 365.

*C. Governance in the Confederation Period*

The Articles framed a practical structure as the response to exigencies of the Revolutionary War. Peter S. Onuf, in his historical analysis, places this experience in the developmental context that ultimately restrained state power:

The early constitutional history of the United States was shaped by jurisdictional struggles within and among the states. Territorial controversies continually threatened to undermine the war effort. Large states—and some small ones too—were beleaguered by separatists who jeopardized their contributions to the common cause. The Articles of Confederation were not adopted until 1781 because of seemingly intractable differences over control of the western lands. Despite these portents, the United States did not collapse. Indeed the territorial controversies illuminated the limits of state power in early American thought and practice.<sup>142</sup>

Making the structure of the Articles work in the everyday life of the new republic proved to be a daunting challenge.

Between 1776 and the ratification in 1781, the Continental Congress and the thirteen states had been governed, in a *de facto* manner, by the standards of the Articles. The ratification made *de jure* the conduct of the nation's military, economic, and political affairs.<sup>143</sup> Ratification, however, did not dissipate the struggle over the western lands. Always there were speculators pushing at political cleavages as congressional committees worked on the land issues. Efforts to restrict Virginia's land claims to end at the Alleghenies were caught in the delays in agreeing to the precise terms of the cession, while Virginia continued to sell land beyond the Alleghenies.

Many saw the control of the western land and its potential income as essential to a central government; they had to be firmly reserved for the national needs. George Washington, no longer commander of the army, warned that squatters and speculators created a constant risk of war with the Indians when unauthorized persons invaded the western lands. They prevented the officers and soldiers of the revolutionary army from obtaining the land promised to them if they signed up for the duration of the war. While Congress and Virginia debated, unauthorized settlers, often called "banditti," were unrestrained. According to Washington, unless measures were enacted immediately:

[O]ne of two capital evils, in my opinion, will inevitably result, and is near at hand; either that the settling . . . [of] the Western Country will take place, by a parcel of Banditti, who will bid defiance to all Authority while they are skimming and disposing of the Cream of the Country at the expence [sic] of many suffering Officers and Soldiers who have

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<sup>142</sup> ONUF, *supra* note 92, at 3.

<sup>143</sup> HOFFERT, *supra* note 65, at 92-95.

fought and bled to obtain it . . . or a renewal of Hostilities with the Indians, brought about more than probably, by this very means.<sup>144</sup>

The Virginia cession with its terms was accepted on March 1, 1784, and the design for administering the land and Indian issues could start.

Congress tried to establish some order in the administration of the western land and Indian issues. It issued a proclamation on September 22, 1783, similar in objectives to the Crown's in 1763, to prohibit unauthorized settlement or purchase of Indian lands. That non-Indian trespassers and squatters could provoke a war was central in the national government's statement. The prohibition was

essential to the welfare and interest of the United States as well as necessary for the maintenance of harmony and friendship with the Indians, not members of any of the states, that all cause or quarrel or complaint between them and United States, or any of them, should be removed and prevented . . .<sup>145</sup>

In describing the Indians as "not members of any of the states," Congress further constrained state authority over Indian lands and the Indians themselves.

The Committee on Indian Affairs was headed by James Duane, who had corresponded with George Washington about the critical need to prevent war with Indians in the activities on the western land. Duane's Committee issued reports in October of 1783 that outlined the procedures for dealing with the Indians in the North, West, and the South. Duane reminded that American Indians had also been aggressors and had not stayed neutral during the War. However, the Committee urged "clemency" so that the Confederation would not push the Indians into the political arms of the British who would benefit in the fur trade. Lines of property "should be ascertained and established" between the United States and the Indians. All trade with Indians be regulated by Congress so that "violence, fraud and injustice" toward Indians would be prevented. Indian anger about abuses in both areas, land and trade, could trigger a war.<sup>146</sup>

The advocates for state power and a central government assumed that the land would be obtained from the Indians, but now Congress had to focus on the means, making treaties. Surveying and the administrative structure could not begin until the Indians' land was

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<sup>144</sup> Letter from George Washington to James Duane (Sept. 7, 1783), *reprinted in* DOCUMENTS OF THE UNITED STATES INDIAN POLICY 2 (Francis Paul Prucha ed., 1989). As an officer, the Commander of the Revolutionary Army, Washington would benefit from land in the frontier area, and he went on to accrue great wealth. *See also* JENSEN, *supra* note 69, at 352.

<sup>145</sup> PROCLAMATION OF THE CONTINENTAL CONGRESS (Sept. 22, 1783), *reprinted in* PRUCHA, *supra* note 144, at 3.

<sup>146</sup> REPORT OF COMMITTEE ON INDIAN AFFAIRS (Oct. 15, 1783), *reprinted in* PRUCHA, *supra* note 144, at 3-4.

conveyed. Thus a series of treaties with Indians began as part of the Confederation's policy for the western lands.<sup>147</sup> Besides appointing commissioners to secure treaties, Congress established two departments for administering the legislative regulation of relationships with the Northern and Southern tribes.<sup>148</sup> "There was no alternative to treaty-making except to kill the Indians, an alternative which the westerners tried their best to carry out."<sup>149</sup>

The new union's leaders saw treaties as the critical tool to obtain land and peace with the Indians.<sup>150</sup> George Washington urged a practical public policy with two elements. First, the tribes who supported Great Britain in the war for independence must be treated with generosity, not retaliation, despite being a "deluded people" in their partisanship during the war.<sup>151</sup>

[W]hen I am called upon to give an opinion upon the terms of a Peace proper to be made with the Indians, that I should go into the formation of New States; *but the Settlement [sic] of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other . . .* I repeat it, again, and I am clear in my opinion, that policy and oeconomy [sic] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country . . . .<sup>152</sup>

Second, Congress enacted orders to restrain the lawless inhabitants, squatters, who defied both Congress and the Indians. Congress raised troops and sent them to the frontier area to remove the "banditti whose actions are a disgrace to human nature."<sup>153</sup> Congress had

<sup>147</sup> See COHEN, *supra* note 55, at 59-62 (discussing national Indian policy after the Revolutionary War and the treaties); ABERNETHY, *supra* note 23, at 316 (listing treaties in the 1784-1785 period).

<sup>148</sup> COHEN, *supra* note 55, at 62 (describing the jurisdiction of the two Indian departments).

<sup>149</sup> JENSEN, *supra* note 99, at 357 (referring to the options Westerners had in getting Indians to give up their land claims).

<sup>150</sup> COHEN, *supra* note 55, at 59-62 (describing the post-Revolutionary War policy of using commissioners to negotiate boundary lines and to conclude peace with the tribes).

<sup>151</sup> Letter from George Washington to James Duane (Sept. 7, 1783), *reprinted in* PRUCHA, *supra* note 144, at 1 (describing an American policy of generosity). See COHEN, *supra* note 55, at 59 (explaining that initially the Continental Congress instructed its commissioners that tribes aiding the British had forfeited their territory as a result of the American victory, but this policy was not fully carried out).

<sup>152</sup> Letter from George Washington to James Duane (Sept. 7, 1783), *in* PRUCHA, *supra* note 144, at 2 (emphasis added).

<sup>153</sup> JENSEN, *supra* note 99, at 357 (citing II WILLIAM H. SMITH, *THE ST. CLAIR PAPERS* 4 (1882) (quoting John Armstrong, an officer who removed the settlers)). In 1785, Congress ordered the settlers/squatters to stay south of the Ohio River. Resistant settlers returned and rebuilt their burned out cabins; they fought both the soldiers and the Indians. South of Ohio, the Kentuckians (unauthorized settlers/squatters) carried on a bloody struggle. Between 1783 and 1790 perhaps 1,500 Kentuckians were killed and no one knows how many Indians or squatters north of the river lost their lives. See *id.* at 357.

to create conditions favorable to successfully making and enforcing treaties.

Treaties demonstrated the union's policy that recognized the sovereignty of the tribes and their ownership of their lands. The relations and diplomacy of international law enabled these transactions, not presumptions of conquest and discovery. The Shawnee, the most important tribe in the area, boycotted a treaty signed at Fort M'Intosh in 1785. Consequently, a second treaty was negotiated at Fort Finney in 1786 where the Shawnee ceded some land claims.<sup>154</sup> Diplomatic courtship was necessary to achieve the relationships that Washington had advocated to establish peace and friendship and to obtain land cessions.

Congress enacted a series of ordinances to govern in the West. The Ordinance for the Regulation of Indian Affairs, passed by the Continental Congress in 1786, included elements such as licensing and regulating persons who would trade with Indians that also occur in the later Trade and Intercourse Acts.<sup>155</sup> Thomas Jefferson, who brought the Virginia cession to Congress, was made chairman of the committee to draft the ordinance for the administration of the new public domain.<sup>156</sup> With his belief in agrarian democracy, he wanted the land to be given to settlers, not sold to speculators. Productive settlers would eventually pay their share of the national debt. Jefferson then proposed a plan dividing the land into districts whose inhabitants would enjoy self-government, which would, by formulated steps, become states.<sup>157</sup> Jefferson's architectural views, with few changes, became the 1784 Northwest Ordinance. Continuing his design to survey and form townships for public and private purposes, which would generate some income from sales, Jefferson prepared the 1785 Northwest Ordinance. Then Jefferson left to replace Ben-

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<sup>154</sup> JENSEN, *supra* note 99, at 357. Treaty with the Wiandots, Delawares, Chippawas, and Ottawas, January 21, 1785, 7 Stat. 16 (reproducing the 1785 treaty). Treaty with the Shawanoes, January 31, 1786, 7 Stat. 26. Variance in spelling of names of Indian tribes is not unusual.

<sup>155</sup> JOURNALS OF THE CONTINENTAL CONGRESS, 31:490-93 (Aug. 7, 1786), *reprinted in* PRUCHA, *supra* note 83, at 8-9. Besides establishing an Indian Department with Southern and Northern districts of operation, the Ordinance required the Superintendents of the districts to warn targeted states "whenever they shall have reason to suspect any tribe or tribes of Indians, of hostile intentions." *Id.*

<sup>156</sup> JENSEN, *supra* note 99, at 353.

<sup>157</sup> *Id.* at 353-54 (describing the conditions under which the districts would become states). When the "territory had 20,000 people, they would hold a convention, adopt a constitution, and send a delegate to Congress. When the population equaled the free inhabitants of the smallest of the thirteen states, it could be admitted to the union as an equal partner.") Besides a commitment to the central government, a new state would have to pay its share of federal debt, maintain a republican form of government and exclude slavery after 1800. The prohibition of slavery was dropped from the Ordinance of 1784 when passed.

jamin Franklin as the United States minister to France before the 1785 Ordinance was enacted.<sup>158</sup>

The political pressure of land speculators and the need for national revenue prevailed in Congress and reversed Jefferson's democratic design in the 1784 ordinance and 1785 proposed act. In the terms of the Northwest Ordinance of 1787, the land would be sold, with certificates to discount the price to the army veterans, and Congress would appoint a governor and other officials.<sup>159</sup> Critical in relationships with the tribes, the Ordinance promised that the federal government would observe the "utmost good faith" towards the Indians and that Indian lands would never be taken without tribal consent.<sup>160</sup> Thus, with these moral and legal promises to the Indians, the Confederation's national government asserted it was in charge of Indian relationships and land issues.

Before considering the drafting of the Constitution, one must address the facile judgment that the Articles were a total failure, which caused their abandonment in the Constitution of 1787. The achievements of the Confederation do not fit such a narrow judgment. Some areas of success have been acknowledged in the earlier, long established analysis of Gordon S. Wood and more recent study by Robert Hoffert. In 1776 few would have envisioned and articulated how the thirteen fiercely independent colonies could become one republic. Wood comments that for the Confederation, the degree of union achieved was truly remarkable.<sup>161</sup> Among the achievements in state relations are the equality of the citizens of all states in privileges and immunities, the reciprocity of extradition and judicial proceedings, and the elimination of travel and some discriminatory trade restrictions.<sup>162</sup>

At the federal level, the substantial grant of powers to Congress in Article IX, setting out sole and exclusive powers, made the league of states cohesive and stronger than many citizens would have expected.<sup>163</sup> The unified strength was essential for a new nation simultaneously involved in the international relations necessary to win the war and building a union. Since 1776 the national governance, through the Continental Congress, had "contracted offensive and defensive alliances with France, established independence, financed the

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<sup>158</sup> *Id.* at 354.

<sup>159</sup> *Id.* at 356-58.

<sup>160</sup> Northwest Ordinance of 1787, art. 3, in 32 JOURNALS OF THE CONTINENTAL CONGRESS, 340-41 (July 13, 1787), reprinted in PRUCHA, *supra* note 83, at 9-10.

<sup>161</sup> WOOD, *supra* note 34, at 356-59 (commenting that the interests and qualities of the people in the states seemed so different that a Union was unlikely).

<sup>162</sup> *Id.* at 359.

<sup>163</sup> *Id.*

War of Independence, established and administered an army and navy," and succeeded in its war with England.<sup>164</sup>

In the Confederation period, the divisive issue of the western lands retained its virulence. In the changed political climate, appeals to citizens as the sovereign, the "people" as the source of power invoked since the Declaration of Independence, led to disorder as well as responses to restore social order. For those fearful for the future of the United States, the achievements of the Confederation proved insufficient in the face of problems that imperiled the union.

#### *D. Disorder as the Prelude to the Constitutional Convention*

The states' exercise of power under the Articles shifted political strength to favor the centralists or federalists as state legislatures created unstable business and political conditions while denying to the federal government the promised state responsibility to fund and administer the union. The congressional power that had been substantial and essential in the war years disintegrated. States' delegates failed to meet the necessary quorum so that "Congress had virtually ceased trying to govern."<sup>165</sup> With peace at hand, the states turned inward to their own sovereignty and jurisdictional powers. There were multiple areas of state malpractice, but the Western lands were the coalescing issue.

"The states had become increasingly jealous of their power and in fact through their handling of public lands and public debts were fast moving" to dominate the political and economic space and contain it within state sovereignty.<sup>166</sup> The states had drafted and ratified constitutions that emphasized accountability to people, practicing republicanism at its most local level. Yet these same legislatures extended their powers to eviscerate the executive branch, often the weakest in their state designs, and the judicial powers by closing or disempowering the courts. Vermont, for example, had seceded from New York during the war for independence and its breakaway conduct disrupted the states' unity during the war and in the Confederation.<sup>167</sup> Continuing in its fierce autonomy, the Vermont legislature became "the court of chancery in all cases over £4,000, interfering in causes between parties, reversing court judgments, staying executions after judgments, and even prohibiting court actions in matters pertaining

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<sup>164</sup> HOFFERT, *supra* note 65, at 97-98.

<sup>165</sup> WOOD, *supra* note 34, at 359 (noting that by the mid-1780s Congressional power had precipitously disintegrated).

<sup>166</sup> *Id.* at 361.

<sup>167</sup> RAKOVE, *supra* note 44, at 165. See *id.* at 245-46, 286 (pointing out persisting factional conflicts fed by the Vermont issue). Despite its behavioral autonomy, Vermont was not formally admitted as a state until 1791.

to land titles or private contracts involving bonds or debts, consequently stopping nine-tenths of all causes in the state."<sup>168</sup>

Debtor relief laws legitimized breaches of contract and undermined commerce and the credit of individuals and the states in a "chain of debt" that extended through the states. Proliferation of paper money that immediately lost its value led to laws outlawing creditors' refusal of its tender; creditors demanded gold or silver in these uncertain times. Every level of economic actor was caught in this cycle of unpredictable events: the subsistence farmers, small merchants, financiers, and banks in the United States and in London, so that ferment within the states created the pathway to abandon the Articles. Overseas creditors demanded payment from U.S. businessmen who then pressed their debtors; the Republic's financial relations and agreements with other nations were at risk. In the Confederation years when Jefferson was minister to France, a major creditor, he described his position as "an excellent school of humility."<sup>169</sup> Because of the American debt to France, Jefferson wrote "We are the lowest and most obscure of the whole diplomatic tribe."<sup>170</sup>

Probably the most significant of the chain reactions was Shays' Rebellion of debt-pressed farmers, led by former Revolutionary War Captain Daniel Shays in 1786.<sup>171</sup> To avoid losing their property or going to prison, the Shaysites took up arms and aggressively marched through Massachusetts. They shut down courts, beat lawyers, judges, and merchants as they staged raids that made "mob rule" more than a metaphor.<sup>172</sup> Congress, with no army and no money, could not quell the rebellion; neither could the State. Eventually the rebellion was put down by a militia financed by businessmen.<sup>173</sup>

<sup>168</sup> WOOD, *supra* note 34, at 407.

<sup>169</sup> BAILEY, *supra* note 69, at 63.

<sup>170</sup> *Id.* at 64 (commenting that France probably preferred a United States too weak to pay its debts to one that might break away from French influence). *See also id.* ("[T]he Paris regime was determined to cash in on these expenditures to by using the United States to promote French schemes in the New World.") However, U.S. debt was conspicuous and Bailey reports that rumors spread in the diplomatic circles that France might take a part of Rhode Island as payment. *Id.*

<sup>171</sup> *See* DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AMERICAN INSURRECTION 19 (1980); Curtis P. Nettles, *The Emergence of a National Economy, 1775-1815*, in 2 ECONOMIC HISTORY OF THE UNITED STATES (1962).

<sup>172</sup> THE ALMANAC OF AMERICAN HISTORY, *supra* note 31, at 141-42 (Shays began his armed challenge to the State when his band of insurgents confronted the Massachusetts militia sent to protect the State Supreme Court in September 1786. Shays' band forced the court to adjourn. Then, with another insurgent leader, Luke Day, in December of 1786 they assembled a rebel force of 1,200 men who outnumbered the state militia. The Governor had to call for a short-term mobilization to assemble 4,400 men to deal with the insurrection, which unsuccessfully attacked the federal arsenal in Springfield. It took until the end of February 1787 for the uprising to be suppressed.).

<sup>173</sup> FRED BARBASH, THE FOUNDING: A DRAMATIC ACCOUNT OF THE WRITING OF THE CONSTITUTION 38 (1987) (providing a journalist's succinct account of these events).

Shays'[] Rebellion, as seen through the eyes of frightened contemporaries, provided a powerful image of America after its fall from political grace. Shays himself became the exemplary antihero, the type for dissident leaders elsewhere [in the states] . . . . The conditions that had made Shays'[] ascendancy possible were present everywhere and would become progressively more acute.<sup>174</sup>

The rebellion became a national event because it offered a model for domestic dissidence in every State. Then, Shays' Rebellion spilled into neighboring states where Shaysites created disorder and undermined public confidence.<sup>175</sup> Wood terms this crisis as more than "licentiousness leading to anarchy—which was a comprehensible abuse of republican liberty, but also a serious shattering of older ways of examining politics and a fundamental questioning of majority rule."<sup>176</sup> The foundation of the new republic was insecure.

The Federalists opportunely used the disorder to compile the sins of the States in writings that were recycled in the Federalist Papers. In April 1787 James Madison compiled the "Vices of the Political System of the United States."<sup>177</sup> Leading his list was the failure of the states to comply with the "Constitutional requisitions" of the Articles, an "evil [that] has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States."<sup>178</sup> After concluding that the States' failures would be fatal to the confederation, Madison moved to the encroachment by the States on the federal authority. "Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians."<sup>179</sup>

In his recent history Paul Johnson has summarized the recurring problems and the inevitable conclusion:

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<sup>174</sup> ONUF, *supra* note 92, at 177. See also *id.* (reporting that James Wilson of Pennsylvania asserted that Shays' Rebellion revealed "on what a perilous tenure we hold our freedom and independence").

<sup>175</sup> See WOOD, *supra* note 34, at 325-26 (noting the discontentment of people throughout the states); ONUF, *supra* note 92, at 178-79 (explaining the gravity of the rebellion).

<sup>176</sup> WOOD, *supra* note 34, at 411-13. See also *id.* at 465:

Not only the fact of the rebellion itself but the eventual victory of the rebels at the polls brought the contradictions of American politics to a head, dramatically clarifying what was taking place in nearly all the states. Urging people to obey the laws of their state governments as a cure for anarchical excesses of the period seemed to be backfiring, resulting in evils even worse than licentiousness.

See also ONUF, *supra* note 92, at 177-81 (noting there was a "diaspora" of Shaysites into other states).

<sup>177</sup> James Madison, Vices of the Political System of the United States (Apr. 1787) in THE FOUNDERS' CONSTITUTION 166-69 (Philip B. Kurland & Ralph Lerner, eds., 1987).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

[I]ndividual states carried out all kinds of sovereign acts which logically belong to a central authority—they broke foreign treaties and federal law, made war on Indians, built their own navies, and sometimes did not trouble themselves to send representatives to Congress. They taxed each other's trade while failing to pay what they had promised to the Congressional coffers. That, of course, was at the root of the collapse of credit and the runaway inflation. All agreed: things could not go on this way.<sup>180</sup>

Onuf points out that domestic dissidence was not the only threat; foreign powers were eagerly awaiting the opportunity to exploit division among the Americans.<sup>181</sup> With these perilous conditions all political actors, previously opponents on the western lands and the framework of the Articles, at this time agreed that change was mandatory.

Whether to amend the Articles or make a total systemic change separated the Federalists and Antifederalists; experiences since the Articles injected disturbing, real-life content into philosophical disagreements. The Antifederalists, including Richard Henry Lee and George Mason, rejected the vicious state politics that their philosophical position, in some sense, bound them to defend. "Antifederalists failed to reconcile arguments drawn from theory with arguments drawn from experience."<sup>182</sup> "The Federalist victory . . . was actually more of an Antifederalist default."<sup>183</sup> According to Wood, the latter lacked coordination and unified leadership, a marked contrast to the energy and effectiveness of the Federalists, who also were relatively youthful.<sup>184</sup> "We had no principle of concert or union," lamented one South Carolina Antifederalist.<sup>185</sup> The Federalists marshaled formidable talent and influence. They had the speakers in the states' legislatures, large and small, with oration skills that surpassed many of the Antifederalists. Moreover, the Federalists enjoyed the

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<sup>180</sup> PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 183 (1997).

<sup>181</sup> ONUF, *supra* note 92, at 179 (noting the fear of counterrevolution orchestrated by Great Britain).

<sup>182</sup> *Id.* at 193.

<sup>183</sup> WOOD, *supra* note 34, at 486.

<sup>184</sup> *Id.* at 484-85.

<sup>185</sup> *Id.* at 486 (quoting Aedanus Burke). Madison's description of the Massachusetts Antifederalists fit across all the states: "There was not a single character capable of uniting their wills or directing their measures . . . . They had no plan whatever. They looked no farther than to put a negative on the Constitution and return home." *Id.* at 486, citing Letter from James Madison to Thomas Jefferson (Feb. 19, 1788) in 5 WRITINGS OF MADISON 101-102 (Gaillard Hunt ed., 1900). Wood also posits that the Antifederalists were not simply poorer politicians than the Federalists, "they were actually different kinds of politicians. Too many of them were state-centered men with local interests and loyalties only, politicians without influence and connections, and ultimately politicians without social and intellectual confidence." *Id.*

support of the newspapers, a critical source in an age where ordinary citizens were literate and politically engaged.<sup>186</sup>

In the construction of the new model of government, the Antifederalists should not be dismissed as “losers.” Their conceptual contributions, including the amended Bill of Rights, made the Constitution a covenant better fitted for the times and the experience of the “people,” the sovereign proclaimed since the Declaration of Independence.<sup>187</sup> The Antifederalists’ fear of excessive power of a remote government over the lives of individuals also resonated with the Confederation experiences. The Antifederalists raised questions that deserved serious consideration and forced the Federalists to justify the new ideas to be embodied in the Constitution.<sup>188</sup> The challenge of how to structure the changes in the power of the States and the central government remained.

#### *E. Constitutional Finale: Exclusive Federal Power in Indian Affairs*

Curing the domestic and international jeopardy of the republic, undeniable because of the anarchical experiences since the Articles, meant exclusive federal authority was the only viable principle for the Western lands and Indian affairs. The Federalists harped on the disorder—social, legal, and economic—to push for a systemic reformation, not just an amendment of the Articles:

More than anything else the Federalists’ obsession with disorder in American society and politics accounts for the revolutionary nature of the nationalist proposals offered by men like Madison in 1787 and for the resultant Federalist Constitution. Only an examination of the Federalists’ social perspective, their fears and anxieties about the disarray in American society, can fully explain how they conceived of the Constitution as a political device designed to control the social forces the Revolution had released.<sup>189</sup>

The Federalists feared uneducated, greedy lesser men who grasped at power in politics and business, now described as the “scum” who had plunged the States and the union into a depression aggravated by vio-

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<sup>186</sup> *Id.* at 486-87 (describing the Antifederalists who lacked speaking expertise, some were accused of using ghostwritten speeches because of their literate shortcomings). Of the hundred some newspapers printed in the late 1780s, only a dozen supported the Antifederalists because of fear of offending the merchants who could retaliate. Merchants had suffered losses in the laws suspending or burdening the collection of debts. The newspaper columns were closed to the opposition. *Id.* See RAKOVE, *supra* note 44, at 145-46 (discussing the difficulty in gaining access to the press for Antifederalists).

<sup>187</sup> RAKOVE, *supra* note 44, at 142-53 (describing the Pennsylvania Antifederalists as mounting an organized campaign to educate via public gatherings and newspapers about their vision for the Constitution). See *id.* at 153-60 (discussing the Federalists’ approach to the Constitution).

<sup>188</sup> *Id.* at 149.

<sup>189</sup> WOOD, *supra* note 34, at 476.

lence and anarchy.<sup>190</sup> Greedy land speculators, who had exploited the weaknesses of the Articles, became some of the enemies who would continue to plunder the union.

Financial need, aggravated by accelerating inflation, led Alexander Hamilton and his allies to propose what would become the "federalist solution."<sup>191</sup> Paul Johnson states that Hamilton's "Continentalist Letters," published in 1781-82, where he advanced his ideas, "was the beginning of the debate on the Constitution."<sup>192</sup> Money to operate a national government, with land to be obtained from Indians as a primary source, was a preoccupation of the new republic since the 1783 Peace of Paris ended the war with Britain. This treaty, by adding the Crown's western territories, doubled the geographical size of the United States. The Articles did not deal successfully with the land and the financing of the republic.

Robert Morris, Hamilton's ally, was the Superintendent of Finance for the national government and his push for reform sparked the constitutional drive. In 1781-82 he proposed a program of tax and finance that would provide funds and a stable currency.<sup>193</sup> The efforts of Hamilton and Morris did not result in reform. In 1783, James Madison entered this arena when he proposed a reform plan and made an opportunity out of a conflict between Virginia and Maryland.<sup>194</sup> The two states were fighting over control of navigation on the Potomac, allowing importers opportunity to evade customs dues. A conference at Mount Vernon, with George Washington as a conciliator, went beyond settling the disagreement to address customs, currencies, regulation of credit, and other topics.<sup>195</sup>

The Mount Vernon conciliation led to Madison's successful motion in Congress for a conference for all States in Annapolis in September 1786.<sup>196</sup> Only five States sent their commissioners. However, this event allowed Madison to work with Hamilton, who melded his

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<sup>190</sup> *Id.* ("When the pot boils, the scum will rise,' James Otis of Massachusetts had warned in 1776, but few Revolutionary leaders realized just how much it would rise."). See generally WOOD, *supra* note 34, at 471-518 (discussing the difficulty for the Federalists to persuade that their philosophy was not British elitism based on wealth, social rank, and titles of nobility). The Federalists urged that the elite of a republic could be anyone who acquired the attributes of social superiority: education, experience, wealth, and connection and thus became eligible for political leadership. *Id.* at 479-80.

<sup>191</sup> JOHNSON, *supra* note 180, at 180. Hamilton served as George Washington's executive officer during the Revolutionary War. *Id.* at 181. A federal government needed honest currency and a framework in which the economy could develop and expand with an advanced banking system, managed credit, and promotion of fiscal efficiency. *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 181-82.

<sup>194</sup> *Id.* at 184-85.

<sup>195</sup> *Id.* at 185.

<sup>196</sup> *Id.*

vision with Madison's to seek a more comprehensive plan of reform. On February 21, 1787, Congress endorsed the resolution of the Annapolis Conference to call all States to send delegates to Philadelphia in May 1787. The charge for Philadelphia: "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."<sup>197</sup> This call to Philadelphia set no limit on the subjects the Convention might address.

The Convention continued the interstate struggle in the proposals for the national legislature that would assure fair and appropriate power, and the "test" issue for the models was Indian affairs. The design of the national legislature would differ from the Confederation model of one chamber with equal representation for all States. At the Philadelphia Convention, on May 29, 1787 Edmund Randolph introduced Madison's Virginia plan, which advocated a bicameral legislature where States would be represented proportionately.<sup>198</sup> Subsequently, on June 15, the small States introduced the New Jersey Plan, that opposed proportional representation in both chambers of a bicameral legislature.<sup>199</sup> On the same day, the Convention debated "whether to amend the Articles of Confederation or draw up an entirely new framework for a national government."<sup>200</sup> On June 19, the Convention delegates voted to develop the type of constitutional government proposed in the Virginia Plan, with efforts to resolve the representation issue. On July 16, Roger Sherman presented the Connecticut Compromise, ultimately adopted, that had proportional representation in the House and equal representation in the Senate.<sup>201</sup> The legislative proposals were measured by their potential to handle a critical list of subject matter, including the matters involving Indians.

Indian matters were the touchstone because it was uncontested that exclusively federal power would apply to this subject matter. Thus, relations with Indians provided a recurring test for whether a proposed plan for the new government would cure the ills of the union. The questions were more about how to properly structure and express the matter. In Farrand's *Records of the Federal Convention of 1787*, there are recurring accounts using Indians as the test, affirming

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<sup>197</sup> *Id.*

<sup>198</sup> THE ALMANAC OF AMERICAN HISTORY, *supra* note 31, at 142 (summarizing the Virginia Plan).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 143.

the consensus to preserve relations with Indians for the federal government.<sup>202</sup>

In debate considering the New Jersey plan, Madison examined the plan and whether "it promises satisfaction" in eight concerns.<sup>203</sup> First, will the plan "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars?"<sup>204</sup> Second, "[w]ill it prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves . . . . By the federal articles, transactions with the Indians appertain to Congress [sic]. Yet in several instances, the States have entered into treaties & wars with them."<sup>205</sup> Madison questioned whether the New Jersey plan could preserve the union and provide a government that would remedy the "evils felt by the States."<sup>206</sup> His questioning and testing is picked up in the notes of Rufus King and Robert Yates, who point out that Georgia, in direct violation of the Articles of Confederation, made war and concluded treaties with the Indians.<sup>207</sup>

In the Record of the Convention and journals of observers, the relations with Indians became a matter of drafting and style rather than of substance. On August 18, the journal shows affirmative action on the proposition, vesting the federal legislature with power "[t]o regulate affairs with the Indians as well within as without the limits of the United States."<sup>208</sup>

Upon Madison's motion the item was sent to the Committee of Detail for final drafting. Madison's own notes for this period in August reflect a heated debate on slavery, whether to permit it and, if so, whether to tax the trade in slaves.<sup>209</sup> In contrast to the Indians, slavery remained the divisive issue it had been since the drafting of the Declaration of Independence. After the work of the Committee of Style, the final text enumerated for Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>210</sup> The Journal of the Convention shows only changes of style of capitalization and where to put commas.<sup>211</sup>

<sup>202</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 548 (Max Farrand ed., 1966) (commenting on the lack of debate about federal power in Indian relations).

<sup>203</sup> 1 *id.* at 313-25 (including entries for June 19, 1787).

<sup>204</sup> *Id.* at 316.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 315-16.

<sup>207</sup> *Id.* at 326, 330.

<sup>208</sup> 2 *id.* at 321, 324 (including journal for Saturday, August, 18, 1787).

<sup>209</sup> *Id.* at 220-23.

<sup>210</sup> *Id.* at 655.

<sup>211</sup> *Id.* at 367, 529, 595, 655 (comparing quoted text with the final text in Committee of Style).

By its very existence, the Indian Commerce Clause demonstrates the unique role that tribes as nations played in constructing the foundations of the Constitution. Reconstructing a new allocation of power between the States and the federal governments required that the Convention focus on what was absolutely required if the new union was to succeed. Relationships with the Indian nations were rescued from the Confederation morass that endangered the survival of the nation. The authority for Indian affairs appropriately became a touchstone for testing the proposals before the Convention. As Frank Pommersheim has noted,

The Indian Commerce Clause by its own terms acknowledges Indian tribes as sovereigns, sovereigns other than states for which the federal government needs delegated authority to regulate. Broad as the authority conferred in the Indian Commerce Clause might be, it cannot include the right to annul or otherwise unfairly limit the right of tribes to exist and to exercise reasonable authority within their borders.<sup>212</sup>

As the culmination of the national experiences, the new republic established a governmental model that clearly intended no role for States in Indian matters.

In *Worcester*, Chief Justice Marshall relied on the constitutional principles in Articles I and II, adding the power on treaties, war and peace, with the Indian commerce clause, to "comprehend all that is required for the regulation of our intercourse with the Indians."<sup>213</sup> In combination with the Supremacy Clause, these powers constitute a foundation preclusive of State jurisdiction. "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union."<sup>214</sup> A clearer statement of foundational principle would be hard to find. The subsequent statement by the Marshall Court that the Cherokee nation is a distinct community, occupying its own territory, with boundaries accurately described, expresses the political quality that made tribal nations the parties to treaties so essential to the formative U.S.<sup>215</sup> The practical consequences of such a unique political relationship only with the federal government were then captured as the Court completed its analysis. "[T]he laws of Georgia can have no force, and . . . the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress."<sup>216</sup> From founda-

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<sup>212</sup> FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 121 (1995).

<sup>213</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

<sup>214</sup> *Id.* at 557.

<sup>215</sup> *Id.* at 559.

<sup>216</sup> *Id.* at 561.

tional principle to immediate practical consequences, the Court understood and articulated the constitutional design of the Framers. To construe otherwise would have arrogantly ignored the entire constitutional experience and the substantive commitment to rescue the union.

The parts of the constitutional foundation each have a saliency. The Indian Commerce Clause reflects the original intent that Congress would regulate the relations *with* American Indians. However, the Supreme Court distended this concept to Congressional plenary power, a seemingly absolute authority *over* Indians that lacks a constitutional foundation.<sup>217</sup> "In a constitutional republic premised on the authority of limited sovereigns and the consent of the governed, federal doctrines of plenary power and unilateral abrogation of tribal authority are clearly extraconstitutional and ought to be considered beyond the scope of national authority."<sup>218</sup> As Robert Clinton reminds, the Indian Commerce Clause empowered Congress with authority to conduct bilateral relations, not to manage the affairs of Indians.<sup>219</sup> The war power and accords that resolved the Indian wars are not just historical artifacts, but are still part of modern-day relationships. Geronimo's Chiricahua Apaches surrendered to the United States and eventually were imprisoned at Fort Sill, Oklahoma, where they and their descendants remained as the last Indian prisoners of war until 1913.<sup>220</sup> Their descendants today rely on the understandings that formally ended the state of war between the United States and the Apaches, and the impact of that event is part of the life experiences of contemporary Fort Sill Apaches.<sup>221</sup> Today, treaties with tribes provide a legal foundation for vindicating the rights of the Indian nations. A treaty, under established constitutional law, "may endow Congress with a source of legislative authority independent of

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<sup>217</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (announcing the plenary authority of Congress over tribal relations).

<sup>218</sup> POMMERSHEIM, *supra* note 212, at 120.

<sup>219</sup> See Robert N. Clinton, *The Dormant Commerce Clause*, 27 CONN. L. REV. 1056, 1142-47 (1995).

<sup>220</sup> DEBO, *supra* note 85, at 232-35. War and its impact on modern life remained part of the life of the Fort Sill Apaches. Prohibited from returning to Arizona, they were given the choice of remaining in Oklahoma or joining the Mescaleros in New Mexico. Contemporary life includes an awareness of war because of relationships with elders, as all children born at Fort Sill were born as prisoners of war until 1913. The last child born as a prisoner of war was the clan mother, Mildred Cleghorn (1910-1997). The first free-born child was the late artist, Alan Houser (1914-1994). These two individuals marked the historical boundaries of war and peace and enriched the lives of many with their knowledge, talents, and generosity of spirit.

<sup>221</sup> See ANGIE DEBO, *GERONIMO: THE MAN, HIS TIME, HIS PLACE* (1976).

the powers enumerated in Article I (although, of course, still limited by the Constitution's explicit constraints on federal action)."<sup>222</sup>

In the absence of constitutional amendments that significantly alter the powers vested in the federal government, the foundational provisions continue as the sources for retained federal power that excludes state jurisdiction. Whatever the claims that States made for jurisdiction, inherent or from another source, they were terminated in the constitutional construction needed to save the union. Moreover, in the shared authority of the executive and legislative branch there is no role for the Court to make policy or regulate intercourse with American Indians.

## V. IMPLEMENTING THE FOUNDATIONAL PRINCIPLE TO EXCLUDE THE STATES

### A. *Treaties and the Trade and Intercourse Acts*

In the immediate period after the Constitution was ratified on July 2, 1788,<sup>223</sup> the federal government used its exclusive power to constrain the States via statutes and preemption. Advocates for ratification had focused on the overreach or invalid use of state power and the need to control it.<sup>224</sup> With the Constitutional framers in the first set of administrations, Congress acted immediately to strengthen the foundation laid out in the Constitution. The preoccupation with the western lands and the need to make peaceful relationships with the Indians were paramount.<sup>225</sup>

President George Washington, in his annual addresses, returned again and again to the matter of the western lands, commerce, and peace with the Indians.<sup>226</sup> However, some States continued to provoke violent confrontations with them. In his address in 1795, Wash-

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<sup>222</sup> See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1127 (2d ed. 1988); see also *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>223</sup> Congress adjourned under the Articles of Confederation on November 1, 1788; the first Congress under the new Constitution did not convene until March 4, 1789 in New York City.

<sup>224</sup> THE FEDERALIST NO. 7 (Alexander Hamilton), reprinted in 1 THE FOUNDERS' CONSTITUTION *supra* note 177, at 224-26, (arguing for ratification by focusing on four sources of disunity that caused states to "make war upon each other;" the four sources are: the territorial disputes of the western lands, commerce competition, the national debt, and violation of the private contract laws).

<sup>225</sup> DEBO, *supra* note 85, at 74-79 (discussing federal policy after the Constitution was ratified as a time of peace and war, with treaty making as well as violations of the treaties by the U.S.).

<sup>226</sup> George Washington, Third Annual Address, Oct. 25, 1791, in 2 THE FOUNDER'S CONSTITUTION, *supra* note 177, at 531-32. On matters tended to during the Congressional recess, "[a]mong the most important of these is the defense and security of the Western frontiers . . . . [as well as] uniting their [the Indians] immediate interests with the preservation of peace . . . . would be as honorable to the national character as conformable to the dictates of sound policy." *Id.*

ington noted, "[t]he termination of the long, expensive, and distressing war in which we have been engaged with certain Indians north-west of the Ohio is placed in the option of the United States by a treaty . . . ."<sup>227</sup> The performance of treaties, by Indians and the U.S., was at stake. Washington further noted that the Creek and Cherokee Indians had confirmed their preexisting treaties with the U.S. and were giving evidence of a

sincere disposition to carry them into effect . . . . But we have to lament that the fair prospect in this quarter has been once more clouded by wanton murders, which some citizens of Georgia are represented to have recently perpetrated on hunting parties of the Creeks, which have again subjected that frontier to disquietude and danger . . . .<sup>228</sup>

The Trade and Intercourse Acts, according to Francis Paul Prucha, are the basic Indian policies formulated in the first decades of the Constitutional republic.<sup>229</sup> While there was policy in the treaties, the shaping of the policy in terms of implementation structure and rules is in the Acts. These statutes, the first passed in 1790 and the last in 1834,<sup>230</sup> were intended to regulate trade and intercourse with the Indian tribes and "to preserve peace on the frontier."<sup>231</sup> Prucha states that "[t]he first consideration was peace."<sup>232</sup> The outrageous acts committed by non-Indians on the frontier were continuously reported to Congress by Washington and Henry Knox, the Secretary of War in both the Confederation period and the first Department of War under the Constitution.

The Acts affirmed the treaties, enabled compliance with the treaties, and enforced the Congressional authority to prevent the violations of federal power that had doomed the Confederation. The use of Congressional power was important as a message to the tribes with treaties and those with whom Congress hoped to achieve treaties. But the laws were not "Indian" laws that regulated Indians broadly, despite limiting trade and sale of land through the federal monopoly. The Acts were notice to the States and the lawless non-Indians on the frontier, and sought to make them behave to prevent violations of Indian treaties. The enduring power of the Acts to preserve treaties as binding law has been demonstrated by the twentieth century suc-

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<sup>227</sup> George Washington, Seventh Annual Address, Dec. 8, 1795, in THE FOUNDERS' CONSTITUTION, *supra* note 177, at vol. 2, art. 1, sec. 8, cl. 3 (Indians), doc. 7.

<sup>228</sup> *Id.* See also George Washington, Eighth Annual Address, Dec. 7, 1796, *id.* at doc. 8; PRUCHA, *supra* note 83, at 44 (noting that the Union had only two choices: wars with Indians or treaties).

<sup>229</sup> PRUCHA, *supra* note 83, at 1-3, 43-50.

<sup>230</sup> 1 Stat. 137 (1790); 2 Stat. 139 (1802); 4 Stat. 729 (1834).

<sup>231</sup> PRUCHA, *supra* note 83, at 2.

<sup>232</sup> *Id.* at 44.

cess of tribes with land claims, where the land transactions were made in violation of the Acts.<sup>233</sup>

The new republic's pursuit of treaties solidified the federal power to regulate how non-Indians could function on Indian lands. Treaties remained the main instrument with which the Indian nations could give consent to the relationships with the national government and when, if at all, non-Indian activities would be permitted by the tribes. The substance of the treaties certainly respected the tribes' sovereignty with regards to maintaining a separation between tribes and States. Equally important was the tribes' authority over all persons within the tribal territory, including non-Indians.

The first major Indian land cession treaty was the Treaty with six tribes (Wyandots, Delawares, Ottawas, Chippewas, Patawatimas, and the Sac Nations) at Fort Harmar on January 9, 1789.<sup>234</sup> The Sachems and warriors of the assembled nations negotiated with Arthur St. Clair, governor of the Northwest Territory, for the United States. The treaty established a permanent boundary between the tribes and the U.S.; land was ceded for federal protection and goods. The tribes released, quit-claimed, relinquished, and ceded lands the Indians formerly claimed and the U.S. was "to have and to hold the same in true and absolute propriety forever."<sup>235</sup> The U.S. then relinquished and quit-claimed all the lands the tribes reserved and retained for themselves.<sup>236</sup> If the discovery doctrine generated or reserved authority for the U.S., it was not ownership. Rather, it was a preemptive right of first purchase, as the tribes agreed that

said nations, or either of them, shall not be at liberty to sell or dispose of the same, or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States.<sup>237</sup>

The authority over non-Indians was certainly informed by the continuing concern of the political leadership in the first administrations over "banditti," "lawless whites," and "wanton murders" on the Western frontier. In *Oliphant v. Suquamish Indian Tribe*, then Justice

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<sup>233</sup> See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (holding Oneida County liable for wrongful possession of land, in violation of the Nonintercourse Act of 1793); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (holding that the Nonintercourse Act created a trust relationship with the federal government that was ordered to file suit to recover land improperly ceded to Maine).

<sup>234</sup> Treaty for removing all Causes of Controversy, regulating Trade, and settling Boundaries, with the Indian Nations in the Northern Department, of the one Part; and the Sachems and Warriors of the Wiandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac Nations, on the other Part, Jan. 9, 1789, 7 Stat. 28 (1789).

<sup>235</sup> *Id.* at art. II.

<sup>236</sup> *Id.* at art. III. See also WILKINS & LOMAWAIMA, *supra* note 4, at 41-42 (interpreting this treaty).

<sup>237</sup> 7 Stat. 28, at art. III.

Rehnquist treated the tribes' authority under treaties as simply a means to discourage illegal settlement on Indian lands, not as criminal jurisdiction by tribes over non-Indians.<sup>238</sup> The 1778 treaty with the Delawares provided for joint prosecution by the Delawares and the federal government, in a trial mode "fixed by the wise men of the United States in Congress" with the deputies of the Delaware nation.<sup>239</sup> Treaties in the time of the first Trade and Intercourse Act are described in Felix S. Cohen's *Handbook of Federal Indian Law*. "Punishment of non-Indian offenders under federal laws as a substitute for direct redress by Indian tribes was promised in most treaties in force when the first Indian Trade and Intercourse Act was adopted."<sup>240</sup>

These specific treaty provisions fail to establish that tribes did not have preexisting or inherent jurisdiction over all actors, Indian and non-Indian, on their lands. Forbearing to use a right in specific situations does not destroy its preexistence. Also, the fact that tribes agreed to substitute or defer to the federal government for the prosecution of non-Indians does not construct a case that states thereby have default jurisdiction.

In the Confederation period, a series of treaties including the treaty at Fort M'Intosh in 1785 and the treaty with the Shawnees in 1786, had provisions that any U.S. citizen attempting to settle on Indian territory would forfeit the protection of the federal government.<sup>241</sup> In the Treaty of Fort M'Intosh, January 21, 1785 (Wyandotte, Delaware, Chippewa, Ottawa Nations), the provision stated:

If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands allotted to the Wiandot [original spelling] and Delaware nations in this treaty, except on the lands reserved to the United States in the preceding article, such person shall forfeit the protection of the United States, and the Indians may punish him as they please.<sup>242</sup>

The critical relationship with the Indians was affirmed after the Constitution was ratified with the Treaty of Fort Harmar, signed by the governor of the Northwest Territory, General Arthur St. Clair. It renewed the Treaty of Fort M'Intosh on January 2, 1789. Thus peace with the Ohio Indians, located in the contested frontier area, was

<sup>238</sup> 435 U.S. 191, 202 n.13 (1978).

<sup>239</sup> *Id.* at 199 n.8 (citing Treaty with the Delawares, art. IV, 7 Stat. 14).

<sup>240</sup> COHEN, *supra* note 55, at 111. See generally *id.* at 109-17 (discussing the Trade and Intercourse Acts).

<sup>241</sup> *Id.* at 60 (citing Treaty of Fort M'Intosh, Jan. 21, 1785, art. 5, 7 Stat. 17; Treaty with Shawanoes, Jan. 31, 1786, art. 7, 7 Stat. 27). Similar provisions are found in the treaties at Hopewell, including the Treaty with the Chickasaws, Jan. 10, 1786, art. 6, 7 Stat. 24, 25; Treaty with the Choctaws, Jan. 3, 1786, art. 6, 7 Stat. 21, 22; and Treaty with Cherokees, Nov. 28, 1785, art. 7, 7 Stat. 18, 19.

<sup>242</sup> PRUCHA, *supra* note 144, at 6.

pursued by the federal political branches. Other treaties with a similar provision include the Hopewell treaties with the Cherokees, the Chickasaws, and the Choctaws.<sup>243</sup>

These treaties do not support the assumption stated in *Oliphant* that Indians generally had no authority over non-Indians on tribal territory. Tribes also expressly agreed in treaties to deliver Indian and non-Indians who committed "capital" crimes to the United States, to be tried under federal law.<sup>244</sup> However, this pragmatic choice did not expressly remove the tribes' jurisdiction over lesser or misdemeanor crimes, such as those in *Oliphant*. Subsequently, in a parallel model, the Major Crimes Act of 1885, deprived both tribes and States of criminal jurisdiction over felonies in Indian country.<sup>245</sup>

The American Indian nations in their treaty agreements used the conserving and innovating abilities that enabled their historical continuity in the face of changing environments. The tribes were resisting the political and military aggressiveness of States that defied the constitutional rule that relations with Indians would be exclusively federal. Given the many fronts and forms of assaults on the tribes, it is understandable that tribes would agree to substitute federal power. If the federal government would rein in the recalcitrant States, this would reduce contentious interactions with non-Indian governments.

Political alliances and their necessity were part of the tribes' approaches in relations with other tribes as well as the Europeans.<sup>246</sup> "Indians did not, as historians too frequently have written, have 'ancient' or 'traditional' enemies. Each group surely had its allies and enemies, but such relationships were neither permanent nor necessarily long-lived. Alliances changed and animosities withered or flared, both before and after European contact."<sup>247</sup> The tribal world had changed; American Indians were being outnumbered by the growing Euro-American population<sup>248</sup> and were being overwhelmed

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<sup>243</sup> See *id.* at 7; COHEN, *supra* note 55, at 60, n.86; see also Clinton, *supra* note 72, at 1113-35 (describing the state objections to treaty-making with these provisions and interference with the federal treaty commissioners). Resisting states, especially in the South, pursued their own policy on Indian relations, trade, and war. For example, Virginia raised a force to make war on neighboring tribes in 1786 and Georgia unilaterally went to war with Creeks in 1787.

<sup>244</sup> Treaty with Cherokees, arts. 6, 7; Treaty with Choctaw, arts. 5, 6; Treaty with Shawnee, art. 3; Treaty with Chickasaw, *supra* note 241, arts. 5, 6.

<sup>245</sup> 18 U.S.C. § 1153 (2000).

<sup>246</sup> See ANGIE DEBO, *THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS* 3-36 (1984) (discussing political and military alliances, and describing the government and formidable military power of the Creek Confederation before arrival of the Europeans); Peter Iverson, *Native Peoples and Native Histories*, in *THE OXFORD HISTORY OF THE AMERICAN WEST* 13, 15 (Clyde Milner et al. eds., 1994).

<sup>247</sup> Iverson, *supra* note 246, at 15.

<sup>248</sup> Estimations of the population of the American Colonies between 1630 and 1780 show the total population within U.S. borders (not counting Indians) as increasing from 4,600 in 1630 to

by the proximity of Euro-American communities to the tribes' pre-contact territories. In dealing with change, tribes resorted to their pattern of learning from others and then constructing ways to live productively.

In the popular imagination American Indians are peoples at some set point in time despite their historical flexibility in keeping customary values while learning from new experiences. Peter Iverson<sup>249</sup> and Clara Sue Kidwell<sup>250</sup> are among the scholars who have described the adaptive abilities of indigenous peoples to assess their contemporaneous condition and use new ideas, as well as animal and plant forms. Iverson mentions the ability to transfer old ways to new places while at the same time picking up improved methods to build houses, grow crops, etc. "Their flexibility carried over into the post-contact period, when many groups incorporated European technology into their culture."<sup>251</sup> Absorbing new influences does not necessarily mean decay or diminution of a culture. Ultimately, indigenous peoples have maintained continuity through change. "By adaptation, experimentation, and trial and error, they discovered what worked and what did not."<sup>252</sup> The process of adoption, adaptation, and then appropriation into tribal culture is evident in ideas of government, as demonstrated in the experiences of the Cherokees and other tribes.<sup>253</sup> Thus, the lessons of past unsuccessful experiences with the States made the treaties mutually beneficial for the two nations, the tribe and the federal government.

When the Constitution was first implemented and the federal government prosecuted the non-Indian offenders of capital crimes or felonies and withdrew its protection from unlawful settlers, treaty-specific tribes benefited. In return the federal government obtained peaceful relations, land cessions, and diminished the strength of competitor foreign nations in land and commercial trade. All of

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2,780,400 in 1780. WORLD ALMANAC EDUCATION GROUP, THE WORLD ALMANAC AND BOOKS OF FACTS 376 (2002) (citing source as the Bureau of the Census, U.S. Department of Commerce).

<sup>249</sup> Peter Iverson, *Taking Care of the Earth and Sky*, in AMERICA IN 1492, *supra* note 51, at 85.

<sup>250</sup> Clara Sue Kidwell, *Systems of Knowledge*, in AMERICA IN 1492, *supra* note 51, at 369.

<sup>251</sup> Iverson, *supra* note 246, at 16 ("[B]efore the introduction of European technology, the American Indian West was a place of progress and innovation. The challenges faced by the people living there—the altitude, the wind, and the aridity—highlight the economic and cultural success enjoyed by many native societies.").

<sup>252</sup> *Id.* See also Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 256-61 (1994) (discussing customary belief systems and innovative approaches that incorporated ideas and life forms through adoption, adaptation, and ultimate appropriation into the tribal culture).

<sup>253</sup> See *id.* at 256-61 (discussing conservational and innovative practices, including the Cherokee and Creek development of tribal governments after contact with Euro-Americans); see also Arrell M. Gibson, *Constitutional Experiences of the Five Civilized Tribes*, 2 AM. INDIAN L. REV. Winter 1974, at 17, 17-45. See generally ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1940).

these interests were centered on controlling what would happen in the western lands. In the twentieth century in *Oliphant v. Ququamish Indian Tribe*, American Indian governments were at another point in how they exercised jurisdiction, not formally ceded or extinguished, over non-Indians.<sup>254</sup>

*B. Enabling Acts for Territories and States, and Disclaimers in State Constitutions*

The disclaimer clauses of enabling acts for new territories and States and in State constitutions are an under-appreciated body of law manifesting exclusive federal power. Again, the western lands are the context out of which this law regime arises. The disclaimers define the jurisdictional lines between tribes and non-Indians as well as States and the federal preemptive power. Affirmative law strengthened the boundary reserving Indian affairs for the national government. Unambiguously, the States were prohibited from engaging in the unrestrained unlawful power of the Confederation period. In Indian law cases, this body of acts has been under-utilized, though the Tenth Circuit has issued a decision reminding States of the intended preclusive effect.<sup>255</sup> Yet, if one looks at the continuing and consistent congressional pattern, the intent and the provisions make clear the preclusion of States in matters reserved for tribes and the federal government. The equal footing doctrine was tailored in these new States to fit the express regime of Congress to preclude State jurisdiction.

The disclaimers used a similar approach that specifies in terms of assurance to the tribes that territories or States will not, without federal consent, interfere with tribal nations' internal affairs. An act precedent, such as treaty modification, anchors the federal consent. Wilkins and Lomawaima provide a helpful historical analysis of the pattern and substance of these disclaimers.<sup>256</sup> The disclaimers were intended to keep the territories and resulting States from interfering with the property rights of American Indians and Alaskan Natives and from regulating and taxing tribal lands and trust lands within Indian

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<sup>254</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978) ("Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians.").

<sup>255</sup> In *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) the Tenth Circuit Court of Appeals rejected the Oklahoma argument that its enabling act, because of variance with the enabling acts for North Dakota, South Dakota, Montana, and Washington, authorized jurisdiction over Indians, their lands, and property. *Id.* at 979. Moreover, Oklahoma's early statehood claim of jurisdiction lacks authorization from Congress and has been rejected by federal and state courts. *Id.* at 980.

<sup>256</sup> WILKINS & LOMAWAIMA, *supra* note 4, at 176-215.

country. Essentially, the States had to disclaim title to and jurisdiction over tribal territory as the requisite for entering the union created on that constitutional principle.

The territorial enabling acts, with Indian disclaimer clauses, reflect the historical struggle over who had title to and authority over Indian lands in the western lands. Wilkins and Lomawaima chart twelve specific acts.<sup>257</sup> The Wisconsin act of 1836 and the subsequent acts, ending with Oklahoma's territorial act of 1890, are consistent in a number of ways. First, all state that Indian rights will not be impaired until extinguished by a treaty.<sup>258</sup> Then, the Kansas Act of 1854, Nebraska Act of 1854, Colorado Act of 1861, and Montana Act of 1864 state that Indian lands will not be included in the territory without tribal consent.<sup>259</sup> The territorial statutes that arose in the western lands (except Alaska) were the touchstone in the creation of constitutional principles. The statutes were another foundational notice to the States from the central government. "Federal lawmakers were warning territorial residents and leaders not to interfere with the treaty-based political relationship between the tribes and the federal government."<sup>260</sup> The central government was also affirming that treaties were the main tool for obtaining tribal consent in the federalist scheme. Unlike the territories that became States, the tribal governments would not have representatives in Congress as the means for consent.

Congress seemed less amenable to creating new States as rapidly as it created new territories in the western lands. The lingering concerns about the civil qualities of the western settlers remained; moving these residents from federal governance to self-governance required consideration. Ten of the eighteen western States had disclaimer clauses in their enabling acts.<sup>261</sup> Some minor variability existed; for example, Wyoming and Idaho were admitted to statehood without enabling acts as their territorial governments eagerly launched statehood campaigns and constructed constitutions that

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<sup>257</sup> *Id.* at 181 tbl. 1. The territories with Indian disclaimer clauses in their enabling acts were: Wisconsin (1836); Iowa (1838); Oregon (1848); Washington (1853); Kansas (1854); Nebraska (1854); Colorado (1861); North Dakota (1861); Idaho (1863); Montana (1864); Wyoming (1868); Oklahoma (1890).

<sup>258</sup> *Id.* at 180.

<sup>259</sup> *Id.* at 181 tbl. 1.

<sup>260</sup> *Id.* at 189. Wilkins and Lomawaima note that five territorial acts in areas with many indigenous peoples did not have express disclaimers: New Mexico (1850), Arizona (1863), Michigan (1805), Alaska (1854), and Minnesota (1844). *Id.* at 190.

<sup>261</sup> *Id.* at 182 tbl. 2, 191. The ten states were: Kansas (1861), North Dakota (1889), South Dakota (1889), Montana (1889), Washington (1889), Utah (1894), Oklahoma (1906), New Mexico (1910), Arizona (1910), and Alaska (1958).

complied with federal policy.<sup>262</sup> Their State constitutions included disclaimers. In general principle, the enabling acts repeated the boundary setting to restrict the States from interfering with how tribes and the federal governments handled matters within the indigenous territories.

The State constitutions are the frameworks for state and local government and do the "fill-in" of subject matter and authority not covered in the federal constitution. The state and local authority are express in each State's organic instruments. The authority of the federal government is by inference, except in the express disclaimers that were required in matters affecting American Indians and their lands. "Congress insisted that disclaimer clauses be inserted in eleven of the eighteen western States' constitutions."<sup>263</sup> There is a common thread in these disclaimers, which repeat much of the substance and terms of earlier territorial and state enabling acts. Especially noteworthy, however, is the express statement that all right and title to Indian-held land is subject to absolute federal jurisdiction.<sup>264</sup> Montana's disclaimer, for instance, included the language, "absolute jurisdiction and control of the Congress," while others mentioned the congressional authority needed to impose taxes on Indian territory.<sup>265</sup>

Yet States did not lose interest in asserting authority over the western lands and their campaigns to achieve statehood included advocacy to obtain exclusive jurisdiction over all land, including Indian lands, within the new state's boundaries. Opportunities for State advocacy arose once Congress stopped formal treaty-making in 1871 and the *Cherokee Tobacco* decision of 1871 held that Indian treaties could be implicitly abrogated by later federal laws.<sup>266</sup> In that instance, a Cherokee treaty provision exempting sales on tribal land from federal taxes was pierced by a subsequent federal statute taxing tobacco produced anywhere within the United States. Colorado, admitted to the union in 1876, tested the reach of state power in *United States v. McBratney*<sup>267</sup> in 1881. Although Colorado's territorial act contained a

<sup>262</sup> *Id.* at 191. Wilkins and Lomawaima also point out that three states admitted between 1861 and 1889, Nevada, Nebraska, and Colorado were not required to have disclaimers in their enabling acts and that the reason why is not clear from the legislative record. *Id.*

<sup>263</sup> *Id.* at 194. The eleven states are: North Dakota (1889), South Dakota (1889), Montana (1889), Washington (1889), Wyoming (1890), Idaho (1890), Utah (1896), Oklahoma (1907), New Mexico (1912), Arizona (1912), and Alaska (1959). *Id.* at 183 tbl. 3.

<sup>264</sup> *Id.* at 183 tbl. 3 (providing key language from eleven state constitutions all of which vest jurisdiction of Indian lands in Congress).

<sup>265</sup> *Id.* at 183 tbl. 3.

<sup>266</sup> *Id.* at 192 (citing *Cherokee Tobacco*, 78 U.S. 616 (1871)).

<sup>267</sup> 104 U.S. 621, 624 (1881). For a non-Indian against a non-Indian crime on the reservation, prosecuted in federal court, the equal footing doctrine meant that Colorado acquired criminal jurisdiction over the whole of its territory, including the Ute Reservation, which deprived the federal court of jurisdiction. See also *Draper v. United States*, 164 U.S. 240, 243-47

disclaimer, its state enabling act and constitution did not. Since Colorado had not expressly disclaimed jurisdiction over the Ute Indian reservation, its state law applied for criminal prosecution. Some scholars cite this Colorado victory as the provocation for Congress' subsequent enabling acts in 1889 that introduced the language of "absolute jurisdiction and control of the Congress of the United States."<sup>268</sup> The statutory concern of Congress for its Article I power over Indian affairs was evident in this response to loss of criminal jurisdiction in *McBratney*.

Congress has insisted on express statutory and State constitution disclaimers, through the entry of the last State, Alaska, in 1959. At this time, the indigenous nations' historical experiences had changed their status and territory because of intervening policies since the Constitutional period. The tribes persisted despite the devastating effects from policies of forced assimilation via the civilizing programs,<sup>269</sup> loss of land because of allotment,<sup>270</sup> retribalizing in a Euro-American model of government in the Indian Reorganization Act,<sup>271</sup> and termination which was in effect at the time of Alaska's statehood.<sup>272</sup> Self-determination policy would not start until the early 1960s. Yet Congress insisted on the continuation of the constitutional principle, especially noteworthy in the instance of Alaska where the Alaskan Natives had long-standing land claims that the Alaska Native Claims Settlement Act addressed.<sup>273</sup> In the Congressional hearings on Alaska statehood, the disclaimer was explained:

The requirement of a disclaimer clause is a customary feature of acts providing for the admission of new States into the Union. They are designed primarily to protect the rights of the native inhabitants of the area being

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(1896) (upholding criminal jurisdiction of Montana for murder of a non-Indian on the Crow reservation, where Montana had a disclaimer clause in its state enabling act and constitution). Both decisions have been criticized). See, e.g., WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 128-32 (3d ed. 1998) ("Despite the dubious statutory and judicial underpinnings for the *McBratney* and *Draper* decisions, they have become firmly entrenched in existing law.").

<sup>268</sup> WILKINS & LOMAWAIMA, *supra* note 4, at 192-93 (discussing the respective positions of Glen E. Davies and Michael Lieder regarding the language of the disclaimers).

<sup>269</sup> See *THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S* (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984); ROBERT H. KELLER, JR., *AMERICAN PROTESTANTISM AND THE UNITED STATES INDIAN POLICY, 1869-82* (1983) (introducing various discussions of the United States' policies towards the Indians).

<sup>270</sup> DEBO, *supra* note 85, at 331 (stating that, because of allotment, the Indian holdings declined from 138,000,000 acres to 47,000,000 in 1934 when the Indian Reorganization Act became the new policy to restore and protect communal land).

<sup>271</sup> Indian Reorganization (Wheeler-Howard) Act of 1934, 25 U.S.C. §§ 461-479 (1994).

<sup>272</sup> See generally ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 137-65 (1991) (describing the uneven history of Federal Indian policy).

<sup>273</sup> 43 U.S.C. §§ 1601-1628 (Supp. V 1999).

admitted to statehood, as well as those of the Federal Government in the public lands which are not disposed of in the act of admission.<sup>274</sup>

The hearings included testimonial concern about creating or recognizing Native American rights that federal courts had not recognized<sup>275</sup> as well as Alaskan Natives' concern that their existing rights, in this instance, would be jeopardized.<sup>276</sup> The Alaska legislative process and resulting disclaimer should be viewed as Congress telling the newly admitted State that it must recognize the limits of its powers as well as the overriding authority of the federal government, in Congress, in Indian affairs.

Despite the language and lineage from territorial acts to State constitutions, the purpose of the federal regime has been ignored by the States, the courts, and scholars.<sup>277</sup> Federal law expressly constructed for enforcing the constitutional principle in Indian matters should be revitalized for its foundational guidance when the Court constructs expansive State jurisdiction:

We argue that a long line of federal and state case law and statutory law supports the ongoing vitality of state, enabling, and constitutional disclaimer clauses as the most "persuasive considerations as to the lack of state power" in areas such as hunting and fishing rights, taxation, and civil jurisdiction in Indian Country.<sup>278</sup>

An intact body of law that persistently excludes the States from jurisdiction over Indian held territory, the Indian Country, does not argue for inherent state jurisdiction over the reservation or its members. These disclaimers remain largely as passed by Congress and the States in their constitutions. In *Williams v. Lee*,<sup>279</sup> the Court construed the Navajo treaty and Public Law 280 (hereinafter PL 280)<sup>280</sup> as a

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<sup>274</sup> See *Alaska Statehood: Hearings on S.50 Before the Senate Comm. on Interior and Insular Affairs*, 83rd Cong. 227 (1954) (statement of Sen. Jackson) (noting the Department of Justice's concern about "giving and receiving a right," and asserting that the Committee wanted only to "maintain[] the status quo").

<sup>275</sup> *Id.* (Department of Justice concern about "giving or recognizing a right"). Senator Jackson asserted that the Committee wanted only to "maintain[] the status quo." *Id.*

<sup>276</sup> Miles Brandon, President of the Anchorage Camp of the Alaska Native Brotherhood testified on perceived danger to Native land claims in the disclaimer language. Senator Jackson responded: "The committee has no desire to jeopardize your rights whatever they may be." *Alaska-Hawaii Statehood, Elective Governor, and Commonwealth Status, Hearings on S.49, S.399, and S.402 Before Senate Comm. on Interior and Insular Affairs*, 84th Cong. 98 (1955).

<sup>277</sup> See WILKINS & LOMAWAIMA, *supra* note 4, at 195-96 (describing silence in scholarly works, and noting omissions in publications of the National Conference of State Legislatures, specifically in JAMES B. REED & JUDY A. ZELIO, *STATES AND TRIBES: BUILDING NEW TRADITIONS* (1995), and disagreeing with Frank Pommersheim, who in his book *Braid of Feathers*, argues that disclaimers are vague, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND TRIBAL LIFE 142 (1995)).

<sup>278</sup> WILKINS & LOMAWAIMA, *supra* note 4, at 197 (citing COHEN, *supra* note 55, at 116). See also *id.* at 282 n.15 (listing examples of such case law).

<sup>279</sup> 358 U.S. 217, 217-23 (1959).

<sup>280</sup> Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1360 (1994)).

statutory path for a State to obtain jurisdiction denied in a State disclaimer. The Court denied State jurisdiction when a non-Indian creditor sued a Navajo creditor for an on-reservation transaction. Arizona had not met the requirements of PL 280 to change the prohibition in the State's enabling act.<sup>281</sup> Nor could the State pass the "infringement" test, that is, whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.<sup>282</sup>

Subsequently in the 1973 case of *McClanahan v. Arizona State Tax Commission*,<sup>283</sup> the Court again construed the State's enabling act and the State's failure to meet PL 280 requirements, including tribal consent for State jurisdiction.<sup>284</sup> The Court described a jurisdictional enigma as the State had conceded that in the absence of PL 280 authority, "the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. But the appellee [Arizona] nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected . . . . [T]he admitted absence of either civil or criminal jurisdiction would seem to dispose of the case."<sup>285</sup> According to the Court, in making its concession Arizona had "no choice" because of the precedent in *Kennerly v. District Court* and *United States v. Kagama*.<sup>286</sup> The Court denied the State the authority to tax Indians on the reservation, stating "[S]ince the signing of the Navajo treaty, Congress has consistently acted upon the assumption that States lacked jurisdiction over Navajos living on the reservation."<sup>287</sup> In *McClanahan* the Court drew only on the treaty, the enabling act and PL 280 statutory framework, and not infringement.<sup>288</sup> Thus, the Court fully applied the foundational principle in the regime of enabling acts with PL 280 to exclude State jurisdiction on the reservation and its members.

The federal enabling regime has not been repealed and a pattern is not visible of States' energy focused on formally removing the preclusive substance of the disclaimers.<sup>289</sup> The substantive preclusion of

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<sup>281</sup> *Williams*, 358 U.S. at 222-23.

<sup>282</sup> *Id.* at 220.

<sup>283</sup> 411 U.S. 164, 177-79 (1973).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 178-79.

<sup>286</sup> *Id.* at 178 n.19 (citing *Kennerly v. Dist. Court*, 400 U.S. 423 (1971); *United States v. Kagama*, 118 U.S. 375 (1886)).

<sup>287</sup> *Id.* at 175.

<sup>288</sup> *Id.* at 179 ("[W]e reject the suggestion that the *Williams* test [for infringement] was meant to apply in this situation. It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians.").

<sup>289</sup> In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Court held that amending the state's constitution was not the only way to obtain PL 280 jurisdiction for "option" states not included in the first PL 280 delegation. The "permis-

State jurisdiction has been applied to lands formerly in the western lands of the revolutionary period and other lands, e.g., Alaska. This unrepealed express law needs to be weighed in the process of correcting the Supreme Court's misinterpretation of the foundational law that clearly prescribes a national relationship with American Indian sovereigns and prohibits State interference. This law could also help restore the norm that consent of tribes as governments is required before treaties and prior law are in-effect abrogated by States asserting jurisdiction that is created by the Court.

## VI. THE COURT ADDS A NEW LEGAL MICROBE: INHERENT STATE JURISDICTION

### A. *Rootless Jurisdiction Outside the Foundational Principle*

The contentious historical and legal experiences with the western lands establishes that inherent State jurisdiction over Indian territory as a constitutional concept is rootless. The crucible of the western lands led to the *only* foundational principle that would secure the survival of the newly independent United States: relations with Indians and their lands had to be exclusively federal. Any proffered claim of inherent State jurisdiction over the Indian lands was continuously in dispute. States disputed the jurisdiction of other States in the western lands and there was a conflict between the states and a central government in claims to authority in matters involving Indian lands. Whatever the jurisdiction that some States claimed ended in the construction of the constitutional republic. Any construct derived outside the resulting constitutional principle is fictional.

The Indians and their lands were simply too critical an issue to leave to risky idiosyncrasies of the states with their virulent rivalry in claims to land and jurisdiction extending to the shores of the Pacific. The interstate disputes put the union in jeopardy in state-declared wars on Indians, unilateral treaty-making with Indians, and the collusive relations with land speculators greedy for sales in western lands. During the Confederation the states proved themselves incapable of resolving their land disputes and of administering in an orderly way the land issues and other subject matter. Their incompetence thrust the nation into a crisis. The pre-Constitutional crisis triggered by the

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sive" terms of PL 280 only requires positive action, which can be a legislative act in accord with a state law method if it meets the requisites of the federal statute. *Id.* at 493. *See also id.*: "If as a matter of state law a constitutional amendment is required, that procedure must—as a matter of state law—be followed." The Court's finding about method does not undercut the exclusion of states from jurisdiction over the reservation and members unless Congress has specifically authorized.

western lands involved matters beyond ordinary state jurisdiction. At stake were the foreign relations needed for stable financial arrangements as well as to prevent foreign states from encroaching into the territorial interests of the United States.

After the Constitution became operative, the Congress pursued treaties and statutes to enforce the foundational principle to keep states out of the subject matter of Indians and their lands. Congress is the primary enumerated actor for how the federal government arranged its relationships with Indians. Congress' policies have included objectives and means that displeased Indians and states, but that does not change that the legislative arm, in conjunction with the executive, is where the Constitution placed this subject area. The Court simply lacks the authority to discretionarily create Indian policy that is reserved for the political branches.

Arguing for this foundational principle on Indian matters does not necessarily force a choice between competing constitutional values. The framers made the choice in the structure of the Constitution as to which institutions would be responsible. The *Worcester* Court correctly interpreted the principle, respecting the political relationships in the treaties the Court analyzed so that the federal and tribal relationship was determinative. Thus, the states' laws and jurisdictional claims could not reach into tribal territory. In this interpretation, the Court exercised the institutional role it proclaimed in *Marbury v. Madison*<sup>290</sup> to make decisions in accord with the foundational principles. It is not the Court's charge to ignore a constitutional principle because it is inconvenient for the states. States may intensely pursue subject matter that is, nonetheless, foreclosed to states by the Constitution, treaties, and the laws made pursuant to these sources, and the Court must decide accordingly.

*Hicks* and other cases exhibit the devices of the Court that are undisclosed and have destructive potency for the future of American Indian nations as culturally distinct governments. *Worcester v. Georgia*,<sup>291</sup> despite its flaws, established the unique status for tribes under the international law of that time. In international law today, the tribal sovereigns still function as respected states in the law of indigenous peoples.<sup>292</sup> International law reflects the respect that the American Indian nations obtain abroad, which inspires indigenous peoples throughout the world. Ironically, the U.S. law that acknowledged

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<sup>290</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>291</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 515 (1832).

<sup>292</sup> See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996) (contending that international law continues to develop to support indigenous peoples' rights). See also GETCHES ET AL., *supra* note 73, at 975-1055 (discussing the relationship between international law and indigenous peoples' rights).

and sustained the status of tribes as self-governing political bodies is what the Supreme Court is dismantling. While the international approach increasingly recognizes and strengthens the autonomy of indigenous people as self-governing entities,<sup>293</sup> the Court cannibalizes its own integrity. In *Hicks* the Court moved further away from foundational principles and emanating doctrines that, despite repetition, deficiencies sustained the sovereignty of the tribes.

Even if one agrees with Justice Scalia that "long ago" the Court departed from the *Worcester* holding that state law has "no force within reservation boundaries,"<sup>294</sup> the search for principled law remains. His statement that "an Indian reservation is considered part of the territory of the State" asserts a geographical fact, but that does not answer the question of where jurisdictional boundaries should be.<sup>295</sup> With state governments, for instance, jurisdictional boundaries among local governments and regulatory power do not always match the obvious visual facts of geography. Because constitutional foundations should guide for the long-term, infesting decisions with unprincipled opportunistic ideas make suspect the judicial product.

### *B. Joining the Collection of the Smallpox Blankets*

In *Hicks*, when the Court again implanted unacknowledged elements that injure the legitimacy of the Court and of the tribes, it increased the stock of judicial microbes. Inherent state jurisdiction over Indian territory joins a disturbing list that includes but is not limited to the following examples.

#### *1. Shift From Enumerated Power of Congress to Judicial Plenary Power*

With the enumerated powers in the Constitution, it is possible to understand a defined form of the plenary power for Congress as full authority over the matter of relations with the Indian nations. This would fit the historical and legal experience:

[T]he treatment of the Indian tribes by the national government during this period strongly suggests that Congress conceived its constitutional power of "managing all affairs with the Indians" as a power to manage bilateral relations with the tribes rather than a power to manage the affairs

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<sup>293</sup> See, e.g., CAN. CONST. (Constitution Act, 1982) pt. II (§ 35, Rights of the Aboriginal Peoples of Canada), § 35 (affirming the rights of the aboriginal peoples of Canada); Treaty of Waitangi Tribunal in New Zealand (providing a forum for recognition of Maori rights and adjudication of claims for violation of rights under the Treaty of February 6, 1840); Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc E/CN.4/1995/2, E/CN.4/Sub.2/1994/56.

<sup>294</sup> *Nevada v. Hicks*, 533 U.S. 353, 361-63 (2001).

<sup>295</sup> *Id.*

of the Indians. Consistently, the Continental Congress dealt with the tribes as autonomous political units; the treaty format, requiring tribal assent, constituted the most dramatic manifestation of this assumption.<sup>296</sup>

Congressional power over bona fide content of the Indian commerce clause, to the exclusion of other federal branches and states, is substantially different from unlimited power over Indians and any subject matter.

In a world where the congressional plenary power created in *Lone Wolf v. Hitchcock*<sup>297</sup> lacks constitutional sources,<sup>298</sup> the Court's construction of its own plenary power over Indians introduces another contagion into the constitutional framework. The Court has seized subject matter and authority from Congress. This trend includes more than Indian law subject matter when one considers the trail of cases where the Court has determined that Congress had exceeded its constitutional authority. *Seminole Tribe of Florida v. Florida*<sup>299</sup> was the "miner's canary" that Felix Cohen warned was the signal of toxic political climates.

In *Seminole*, the Court ignored the unique purpose of the Indian commerce clause.<sup>300</sup> Thus the Court never addressed whether Con-

<sup>296</sup> See CLINTON, *supra* note 72, at 1142 (describing how Congress viewed its role in relation to Indian tribes).

<sup>297</sup> 187 U.S. 553 (1903) (illustrating how Congress has plenary power and can unilaterally abrogate a treaty, despite the requirement in the treaty for the tribe's consent for a land cession).

<sup>298</sup> The vast federal authority and "plenary power" over Indian nations lacks universal acceptance. See, e.g., RUSSEL L. BARSH & JAMES Y. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 257-69 (1980) (arguing that the Constitution supports the notion that tribes should be guaranteed the same rights as states); INDIAN LAW RESOURCE CENTER, *UNITED STATES DENIAL OF INDIAN PROPERTY RIGHTS*, reprinted in NATIONAL LAWYERS GUILD, *RETHINKING INDIAN LAW* 15 (1982) (setting forth the idea that the "unrestrained power over Indians" in the United States is not "soundly based in law"); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 46-59; Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government*, 33 STAN. L. REV. 979, 996-1001 (1981) (discussing the limits of "congressional authority over Indian affairs"); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (theorizing that American Indian people have not fully consented to the government, and noting that many scholars have "attacked the doctrine of plenary federal power" and its use to control tribal life); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 197-98, 207-28, 236 (1984) (discussing the "genesis of plenary power" over American Indians and its limitations); Robert A. Williams, Jr., *Learning Not to Live With Eurocentric Myopia*, 30 ARIZ. L. REV. 439 (1988) (responding in opposition to Professor Lawrence's idea that American Indians need to learn to live with the plenary power of Congress).

<sup>299</sup> 517 U.S. 44 (1996) (holding the Indian Gaming Regulatory Act constitutionally invalid because the Eleventh Amendment prohibits tribes from suing states in federal court without their consent). See Justice Stevens' and Justice Souter's dissenting opinions, warning of what eventually happened in subsequent cases involving congressional acts. *Id.* at 77 (Stevens, J., dissenting) ("The majority's opinion . . . prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.")

<sup>300</sup> See Getches, *supra* note 17, at 337-39.

gress had authority under the Indian Commerce Clause for the Indian Gaming Regulatory Act (IGRA) provision that allowed tribes to sue the state. IGRA is the most direct form of constitutional power, under the Indian commerce clause, that demonstrates the foundational principle at work. Previously, in *Cotton Petroleum Corporation v. New Mexico*, the Court held:

It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the states even in the absence of implementing federal legislation . . . the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.<sup>301</sup>

*Seminole* is only one instance in which the Court has ignored constitutional principles, including its own charge under *Marbury*, and used judicial power to bulk up state power.<sup>302</sup>

Before and after the Court began confiscating political power, Congress passed numerous acts that strengthened the authority of tribal governments in directional action opposite that of the Courts. The governmental autonomy of American Indian governments was strengthened in the self-determination statutes such as the Indian Self-Determination and Education Assistance Act of 1988,<sup>303</sup> Tribal Self-Governance Act of 1994,<sup>304</sup> Indian Health Care Amendments of 1990,<sup>305</sup> and the Indian Land Consolidation Act of 1991.<sup>306</sup> These acts presume the tribes' ability as governments to design and administer the necessary programs.<sup>307</sup>

In matters of jurisdiction, Congress expressly excluded state power and corrected the Court's construction in *Duro v. Reina* that

<sup>301</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

<sup>302</sup> Before *Seminole*, the Court had found constitutional authority lacking for Congress to pass the Gun-Free School Zones Act of 1990 in *United States v. Lopez*, 514 U.S. 549 (1995). Then came the string of cases in which the Court found Congress acted outside its power under the non-Indian commerce clause and section 5 of the Fourteenth Amendment. *Fed. Mar. Comm'n v. South Carolina Port Auth.*, 122 S. Ct. 1864 (2002) (holding that the Federal Maritime Commission cannot adjudicate private party complaints against the state because of the Eleventh Amendment); *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that the Americans With Disabilities Act exceeded Congress' authority under section 5 of Fourteenth Amendment, and Congress cannot abrogate states' immunity); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act cannot abrogate states' immunity); *United States v. Morrison* 529 U.S. 598 (2000) (holding that provisions in the Violence Against Women Act violated the Commerce Clause and Fourteenth Amendment).

<sup>303</sup> 25 U.S.C. §§ 450-457 (2000).

<sup>304</sup> 25 U.S.C. §§ 450n, 450a(a) note, 450a(a)-450g (2000).

<sup>305</sup> 25 U.S.C. §§ 1613-1682 (2000).

<sup>306</sup> 25 U.S.C. §§ 2201-2211 (2000).

<sup>307</sup> For general discussion of Congress passing acts to increase tribal autonomy and governance, see GETCHES ET AL., *supra* note 73, at 230-33.

denied tribal jurisdiction over non-member Indians charged with misdemeanor crimes.<sup>308</sup> Congress amended the Indian Civil Rights Act in 1991 and affirmed the inherent jurisdiction of tribes to exercise criminal jurisdiction within their reservations over “all” Indians, using the generic definition used in the Major Crimes Act in the exercise of federal jurisdiction.<sup>309</sup> In the Indian Child Welfare Act of 1978 Congress prescribed how state courts must conduct child custody proceedings where an Indian child is involved.<sup>310</sup> Moreover, in the traditional state area of family law, Congress preempted state jurisdiction to expressly require exclusive tribal jurisdiction in certain situations.<sup>311</sup> Inherent state jurisdiction over Indian lands is counter to this congressional regime. More disturbing, as a primary concept it enables the creation of other ideas that are not tethered to constitutional principles.

## 2. *Shift Presumption for Tribal Jurisdiction to a Presumption Favoring the State*

The Court has shifted prior presumption for a tribe’s jurisdiction over its own territory, if not expressly precluded, to a presumption against such jurisdiction. In *Williams v. Lee*, the Court unambiguously stated, “Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied.”<sup>312</sup> In the Court’s reversal of presumption an express congressional provision for state jurisdiction is not required.

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<sup>308</sup> 495 U.S. 676 (1990) (holding that an Indian tribe may not assert criminal jurisdiction over a nonmember Indian).

<sup>309</sup> 25 U.S.C. § 1301(4) (2000) (“‘Indian’ means any person who would be subject to the jurisdiction of the United States as an Indian under [section] 1153, title 18 . . .”).

<sup>310</sup> 25 U.S.C. §§ 1901-1963 (2000). The requisite trigger for the act to apply is the whether the child can meet the definition of an “Indian child” in section 1903(4): “[A]ny unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of any Indian tribe.”

<sup>311</sup> 25 U.S.C. § 1911(a) (2000). Exclusive tribal jurisdiction exists when (1) the Indian child “resides or is domiciled within the reservation” of the tribe, except if jurisdiction has been vested in the state by existing Federal law, or (2) if the Indian child is a ward of the tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence of domicile of the child. *Id.* See also *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 (1989) (holding that the tribe has exclusive jurisdiction; under federal law a child takes the domicile of the member parent, domiciled on the reservation, who arranged the child’s birth and adoption off the reservation).

<sup>312</sup> *Williams v. Lee*, 358 U.S. 217, 220 (1959). See discussion *supra* notes 254-288 and accompanying text on enabling acts and disclaimer clauses.

Thus, in *Oliphant v. Suquamish Indian Tribe*, there is no substantiated inquiry into how tribes lose criminal jurisdiction absent an express provision in a treaty that the tribe agrees to or abrogation of such a right is recognized in a treaty. Even with the one treaty with the Delawares where Justice Rehnquist acknowledged that tribal jurisdiction in criminal matters existed, how the Delawares eventually lost that jurisdictional power is not clear.<sup>313</sup>

In reversing the presumption, the Court has relied on non-existent law sources so that one cannot discern a devolution process that caused the loss of tribal jurisdiction. In *Oliphant* the Court harkened the 1878 voice of Judge Isaac C. Parker who reigned in the Indian territory where tribes had been removed pursuant to treaties. The tribes' territories were invaded by non-Indians who ignored the federal statutes and treaties that prohibited unauthorized presence. The Court assumed that some form of universal law had continued as in Judge Parker's time, so the Court overlooked the Oklahoma Territorial Act (1890), State Enabling Act (1906), and State Constitution (1907) with disclaimers.<sup>314</sup> In these laws and their treaties the tribes were promised federal protection of their treaty and land rights and exclusion of state power.

Judge Parker's 1878 decision that denied tribal jurisdiction over a non-Indian was shored up by a short-lived Opinion of the Solicitor General of the Department of Interior.<sup>315</sup> The Solicitor's opinion was in effect from 1970-1974 and then withdrawn. As if Judge Parker and the Solicitor's Opinion are not puzzling enough for those in search of principle, the Court brought forth other hollow law sources. The Court offered the proposed Western Territory bill of 1834 that was rejected by Congress, a nineteenth century "unspoken assumption" against tribal jurisdiction over non-Indians, and a 1960 Senate Report that reflects the "unspoken assumption."<sup>316</sup> It is hard to imagine any subject matter that the Court would cobble together in such an unsubstantiated way that could be regarded as transparent law, yet reasoned from a foundational principle. Using "figments" of law cannot invoke respect for the Court when it uses conjectural construction to replace foundational principles from the Constitution.

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<sup>313</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199 (1978) (discussing the "one treaty signed by the U.S. [that] has ever provided for any form of tribal criminal jurisdiction over non-Indians").

<sup>314</sup> See discussion *supra* notes 254-288 and accompanying text on enabling acts and on acts that recognized and revitalized the jurisdiction of tribal governments.

<sup>315</sup> *Oliphant*, 435 U.S. at 199 (holding that "to give an Indian tribal court jurisdiction of the person of an offender, such offender must be an Indian," which was reaffirmed in 1970 by an opinion of the Solicitor General of the Department of the Interior).

<sup>316</sup> *Id.* at 201-06 (noting Congress' "unspoken assumption" that "Indian tribal courts were without jurisdiction to try non-Indians").

Ultimately, the search for a foundational principle and its articulation is futile. There is simply an unacknowledged reversal of the presumption of tribal jurisdiction in treaties, statutes, enabling acts, and disclaimers clauses, and the concurrent tribal criminal jurisdiction for misdemeanors in the Major Crimes Act. Given the silence on how the state obtained criminal jurisdiction, in *Oliphant* the state acquired criminal jurisdiction by default.

Any sovereign—Canada, another state in the union, a distinct municipality—would have recognized interest and authority to protect the safety and security of all persons within its boundaries. The *Oliphant* defendants were non-Indian residents of the reservation charged with offenses that are injurious to people and property. Assault and high speed racing on a highway on the reservation, ending in a collision with a tribal vehicle, are not harmless.<sup>317</sup> All persons within the geographical community were at risk and were entitled to be protected. This regulatory and possibly criminal prosecution is not a matter of race, citizenship, political membership, or consent in the political entity within whose boundaries a non-member acts in prohibited ways. The Court has deviated from long-established principles that apply to any other sovereigns so that they can exercise public policy that protects everyone.

### 3. Remove Tribal Jurisdiction Without Tribal Consent or Congressional Act

Counter to the Court's general rule against repeal of express law by implication,<sup>318</sup> the Court has both repealed law and created divestiture by implication. In *United States v. Wheeler*, the Court found that the tribe had pre-Constitutional jurisdiction over its own members and that its exercise of criminal jurisdiction along with a federal prosecution did not constitute double jeopardy.<sup>319</sup> Implanted in this decision upholding tribal jurisdiction over members was the micro-

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<sup>317</sup> *Id.* at 210-11. Justice Rehnquist edited text from *Ex parte Crow Dog*, 109 U.S. 556 (1883) to explain the race and cultural disparity between the defendants and the tribe that sought to use "authority and power which seeks to impose upon them the restraints of an external and unknown code . . . which judges them by a standard made by others and not for them . . ." Justice Rehnquist altered both the text and context of *Ex parte Crow Dog*, to apply "[t]hese considerations" to the non-Indians in *Oliphant*. A side-b-side comparison of the *Crow Dog* text with the *Oliphant* version demonstrates substantive dissimilarity, e.g., *Crow Dog* was a decision based on the tribe's jurisdiction rather than lack of it. What were the culturally unknown code and standards that the *Oliphant* defendants could not know about assault and reckless driving and speeding? While questions rebound about the wisdom of the tribe to pursue an appeal when the majority of the reservation's residents and lands were non-Indian, this strategic concern does not deflect from the requisite for guiding principles for this decision.

<sup>318</sup> Discussed in *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom.* *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

<sup>319</sup> 435 U.S. 313 (1978).

bial trap that appeared in *Oliphant*. Tribes possess the sovereignty not withdrawn by treaty or statute, or "by implication as a necessary result of their dependent status."<sup>320</sup> Moreover, the "areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."<sup>321</sup> The Court ignored the precedence and reasoning in *Williams* and *McClanahan* that expressly used the foundational principle to exclude state jurisdiction unless Congress authorized.<sup>322</sup> Thus the *Wheeler* decision was infested with toxic elements that blossomed in *Montana v. United States*<sup>323</sup> and *Strate v. A-1 Contractors*.<sup>324</sup>

In *Montana* and *Strate*, tribal jurisdiction became the exception, silently erasing the prior presumption for tribal jurisdiction in *Williams* and *McClanahan* and the Indian Country statute.<sup>325</sup> The presumption of state jurisdiction created in *Montana* has become the Court's rule, ignoring its own precedence. Lost in the discourse is the Indian Country statute,<sup>326</sup> passed in 1948 to solidify tribal jurisdiction in the checkerboard created by Allotment and other policies. The statute places in tribal jurisdiction "all land within the limits of any Indian reservation" notwithstanding any patent and "rights-of-way running through the reservation."<sup>327</sup> The statute also includes within tribal jurisdiction all dependent Indian communities and all Indian allotments. Thus, the statute attempted to match the on-the-ground incoherence in tribal lands today.

The Indian country statute makes sense as the policies that created noncontiguous tribal lands and the consequent jurisdictional questions were imposed on tribes, generally without their consent. A statute affirming that tribes have jurisdiction beyond what remains of the formal trust land borders acknowledges Indian country as it is experienced in the daily life of many Indians and non-Indians. Interactions between Indians and non-Indians are not an abstract canvas for the law, but the common and ordinary. The everyday life of peo-

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<sup>320</sup> *Id.* at 323.

<sup>321</sup> *Id.* at 326.

<sup>322</sup> See discussion *supra* notes 254-88 and accompanying text.

<sup>323</sup> *Montana v. United States*, 450 U.S. 544, 557-67 (1981) (holding that a tribe has no power to regulate non-Indian fishing and hunting on reservation land owned in fee by non-members of the tribe).

<sup>324</sup> *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that "tribal courts may not exercise jurisdiction governing the conduct on non-members driving on the state's highway," even when the highway crosses over Indian reservation land).

<sup>325</sup> See Krakoff, *supra* note 17, at 1210-23 (noting the refusal of the Court to grant tribes self-governing rights); Getches, *supra* note 17, at 327-36 (discussing the *Montana* decision's derived and related cases).

<sup>326</sup> 18 U.S.C. § 1151 (2000) (defining "Indian country" as used in the Act).

<sup>327</sup> 18 U.S.C. § 1151.

ple in Indian country includes multi-governmental boundaries with varied forms of land tenure and rights-of-ways, all experienced as one engages in personal and public behavior. The Court affirmed the Indian sovereign's authority in each tribe's Indian country in *Oklahoma Tax Commission v. Sac and Fox Nation*<sup>328</sup> and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*<sup>329</sup> where the state stretched its jurisdictional arm to regulate and tax. The Indian country statute is an express policy of Congress on jurisdiction over the different types of land within Indian Country. Congress has not amended it since 1948. The Court has not stated a constitutionally principled basis why it has to judicially amend a policy made by the enumerated political branch.<sup>330</sup>

#### 4. *Weaken Tribal Jurisdiction with Ad Hoc Terminology and New Confusing Rules*

The Court has removed tribal jurisdiction by introducing ad hoc terminology and new rules. Both confuse rather than clarify and add more uncertainty to Indian law. These new rules arise most easily when the Court ignores express statutes, treaty terms, prior cases, and long-standing doctrines.

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,<sup>331</sup> the Court adopted the use of "open" and "closed" to distinguish areas in which a tribe would be denied or affirmed the authority to zone non-Indian property within the boundaries of the reservation. What distinguished the open area, where the tribe had no regulatory power, was seemingly tied to how much non-Indian settlement had destroyed the contiguity of the reservation. Much of Indian Country today has such a checkerboard configuration to which Congress responded with the Indian Country statute. The *Brendale* distinction, without any discernible standard, bodes poorly for future cases. In the situation of the closed area, where the tribe obtained

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<sup>328</sup> 508 U.S. 114, 123-28 (1993) (holding that a state does not have jurisdiction to tax tribal members who live and work in Indian country absent explicit congressional direction to the contrary).

<sup>329</sup> 498 U.S. 505, 509-14 (1991) (holding under the doctrine of tribal sovereign immunity, a state that has not asserted jurisdiction over Indian lands cannot tax goods sold to tribesmen on land held in trust for a tribe).

<sup>330</sup> *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001). In *Atkinson*, Chief Justice Rehnquist, for the majority, disposed of any reliance on the Indian Country statute because "we do not deal here with a claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers or non-Indian fee land." *Id.* Then the Court invoked *Duro v. Reina*, 495 U.S. 676 (1990) to establish that tribes are not "full territorial sovereigns" with the power to enforce laws against all who come within the sovereign's territory. *Atkinson*, 532 U.S. at 653.

<sup>331</sup> 492 U.S. 408 (1989).

zoning jurisdiction, the non-Indian property was surrounded by tribal trust land, pristine and undeveloped. This virginal quality was described as the Indian "essential character" of the land.<sup>332</sup> The content of Indian character is mysterious and could doom any efforts of the tribe for economic development that would alter the land. Justice Scalia in *Atkinson* stated that "it [is] plain that the judgment in *Brendale* turned on both the closed nature of the non-Indian fee land and the fact that its development would place the entire area 'in jeopardy.'"<sup>333</sup> Any standards for Indian "character" and "closed" land are open to challenge. Why should they be invented by the Court when cases like *Williams*,<sup>334</sup> *Sac and Fox*,<sup>335</sup> and *Potawatomie*,<sup>336</sup> and the Indian country statute exist? Even if one accepts that these terms are functionally needed, the standards are unlikely to achieve legal content one can respect. The elusiveness of these ad hoc distinctions was evident in *Atkinson* where the non-Indian property surrounded by Navajo trust land was placed in the state's jurisdiction.

##### 5. Demand Ahistorical Specificity of Terms in Treaties and Statutes

The Court has implanted in Indian law a requirement that assumes that treaty and statute drafters in the eighteenth and nineteenth centuries were omniscient. Somehow they would know the concerns and regulatory issues of future relationships with tribes and the states yet unborn. Consequently, there is perverse interpretation of treaty terms or of silence in treaties, e.g., the removal treaties used to induce resistant tribes to remove to the Indian Territory in present day Oklahoma. These treaties made promises to tribes that, if they removed, no state would impose its laws or jurisdiction over the tribe or its members.<sup>337</sup>

In *Oklahoma Tax Commission v. Chickasaw Nation* the Chickasaws invoked the treaty that promised "no Territory or State shall ever have a

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<sup>332</sup> *Id.* at 44, 464-65.

<sup>333</sup> *Atkinson*, 532 U.S. at 658-59 ("Irrespective of the percentage of non-Indian fee land within a reservation, *Montana's* second exception grants Indian tribes nothing 'beyond what is necessary to protect tribal self-government or to control internal relations.'"). The isolated non-Indian property in *Atkinson* was within the Navajo Nation reservation where the tribe owns 96.3 percent of the land. *Id.* at 657 n.11.

<sup>334</sup> *Williams v. Lee*, 358 U.S. 217 (1959).

<sup>335</sup> *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993).

<sup>336</sup> *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

<sup>337</sup> See generally *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (describing the removal treaties with Cherokees and Choctaws, which included a patent to lands and the bed of the Arkansas River); DEBO, *supra* note 253 (explaining that the Chickasaws held similar rights under their removal treaties). The Supreme Court later provided an account of the Cherokee and Choctaw treaties in *Montana v. U.S.*, 450 U.S. 544, 555 n.5 (1981), to distinguish the Crow treaties.

right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws . . . ."<sup>338</sup> Despite the explicit terms of the Treaty of Dancing Rabbit Creek in 1830 that provided immunity from the state's regulation for the tribe and its descendants, Justice Ginsberg overlooked the preemptive power of the treaty. In the history of this period, the Chickasaw Government and its members feared the states and their uncontrolled, land-hungry citizens who repeatedly invaded their tribal lands.<sup>339</sup>

Forced to accept removal, the Chickasaws had a future perspective about what they feared and had to negotiate around: state power in any form. Justice Ginsberg stated it is not likely that the treaty's signatories gave any thought to state authority to tax the income of members.<sup>340</sup> However, instead of understanding the context of the treaty, part of the Court's especially developed canons of construction in Indian law, Justice Ginsberg applied general tax law.<sup>341</sup> The treaties of the Chickasaws and similar treaties still have force today in relationships with the federal and state governments. The ahistorical dismissal of the tribe's claim to a treaty right demonstrated the Court's failure to appreciate the constitutional status of tribes as nations who made treaties in which jurisdictional substance mattered. Moreover, decisions such as these reflect poorly on the Court's understanding that tribal treaties are part of the supreme law of the land.

#### 6. *Change Without Acknowledgement of the Burden of Proof and Concepts Like Privity*

From the pro-state presumptions in *Oliphant*, *Montana* and *Strate*, that deny tribes jurisdiction over non-Indians in their person or over their property, other unstated ideas have permeated Indian law. One effect is a shift in the burden of proof. *Montana* introduced the two exceptions that somehow became the Court's rule without an explanation of what foundational principles would allow state jurisdiction. A tribe can have civil jurisdiction over non-Indians present within a tribe's jurisdictional territory if either non-Indians consent or the

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<sup>338</sup> 515 U.S. 450, 465 (1995) (citing the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, art. IV, 7 Stat. 333-34).

<sup>339</sup> See DEBO, *supra* note 253.

<sup>340</sup> *Chickasaw Nation*, 515 U.S. at 466-67 (suggesting signatories did not expect tribal members to be present in state territory rather than on tribal land).

<sup>341</sup> See Krakoff, *supra* note 17, at 1242-44 (stating that Justice Ginsberg in *Chickasaw* used Indian law as "gap-filler" for the Court's preference to primarily use general law when Indian laws should have applied).

non-Indians' conduct on fee lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>342</sup> The *Montana* exceptions collaterally created an unstated shift of the evidence demanded from tribes to sustain the claimed interest.

The in-effect shift of the burden of proof began in *Montana*: "[N]othing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe."<sup>343</sup> Then in *Brendale*, the threat to a tribal interest was ratcheted up in the plurality opinion: "The impact must be demonstrably serious and must imperil" the four interests specified in *Montana*.<sup>344</sup> "This standard will sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners."<sup>345</sup> It is undue interference with the state's sovereignty that guides, the reverse of the infringement test in *Williams*.

Recently in *Atkinson*, the Court cited *Montana* and specified that "unless the drain of the nonmember's [non-Indian's] conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands."<sup>346</sup> These statements captured the change in presumption that favors the state with the accompanying shift in the burden of proof. Must the tribe show that members are on the verge of death because of the non-Indian's adverse impact on its health resources, for instance, and that the tribal government faces administrative collapse unless it has the authority over the non-Indian? What is clear is that the tribe must prove, at some demanding level of evidence, the imperiling harm that it is experiencing or will certainly experience.

This cumulative burden on the tribes is a reversal of the burden of proof required in *Williams*, *Central Machinery Company v. Arizona State Tax Commission*,<sup>347</sup> *White Mountain Apache Tribe v. Bracker*,<sup>348</sup> *McClana-*

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<sup>342</sup> *Montana*, 450 U.S. at 565-66. The Court has used the term "nonmember" inconsistently, but the cases since *Olipphant* have focused on non-Indians. The Congressional correction of the *Duro* decision has restored tribal jurisdiction over nonmember Indians.

<sup>343</sup> *Id.* at 566.

<sup>344</sup> *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989) (plurality opinion of White, J.).

<sup>345</sup> *Id.*

<sup>346</sup> *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n.12 (2001) (citing *Montana*, 450 U.S. at 566).

<sup>347</sup> 448 U.S. 160 (1980).

<sup>348</sup> 448 U.S. 136 (1980).

han, and *New Mexico v. Mescalero Apache Tribe*<sup>349</sup> where the state had to demonstrate its bona fide interest. In these cases the Court considered whether the evidence supported the state's proclaimed interest and whether it was substantial enough to justify invading the tribe's jurisdiction.

In *Strate*, a typical tort accident on a highway, the Court collaterally subverted long standing tort liability without acknowledging its work. Sufficient minimum contacts analysis would allow any state, within the U.S. or an international context, to apply its laws and adjudicate for a non-citizen defendant with the case's facts.<sup>350</sup> In *Strate* the plaintiff was a resident and domiciliary of the tribe's reservation and Indian Country. She was a non-Indian widow whose husband had been a member and her children were all members.<sup>351</sup> The defendant was a non-Indian employee of a contractor performing services under a contract with the tribe for a tribal construction project.

The Court described the parties as "strangers" whose lack of a relationship with the Tribe affected jurisdiction.<sup>352</sup> Most auto accidents involve strangers, which does not prevent non-Indian jurisdictions from applying their own tort laws. It is a mystery why this stranger-quality should matter in removing the accident from the tribe's regulatory and adjudicatory jurisdiction. The Court stated that the plaintiff widow was not in a contract with the defendant. Is this a sub-rosa revival of an anachronistic notion of privity? Unfair denials of standing and causes of action, derived from outdated ideas of privity, were removed from law in the U.S. some time ago.<sup>353</sup> Anyone who is injured in an auto accident arguably caused by the negligence of another can sue for her injuries and losses. The law regime of vehicular-caused torts and liability arising from lawn mower accidents would fall apart on outdated reasoning requiring a contract between the injured party and the tort defendant. It is unimaginable that the Court would apply such vacuous reasoning to states, municipalities, or counties where individuals or citizens had the misfortune to suffer injuries from the acts of a stranger who is not a member or citizen of the political entity where the accident occurred.

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<sup>349</sup> 462 U.S. 324 (1983).

<sup>350</sup> Cf. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (holding that due process depends on the quality and nature of the party's activities in the state seeking to exercise jurisdiction; systematic and continuous activity provide sufficient contacts for personal jurisdiction).

<sup>351</sup> See Krakoff, *supra* note 17, at 1256-62 (thoroughly analyzing this case).

<sup>352</sup> *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997).

<sup>353</sup> See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 696-97 (1971) (describing the decline of privity of contract); see also *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916); *Derflinger v. Ford Motor Co.*, 866 F.2d 107 (1989) (detailing the elimination of privity in product liability cases).

C. *The Need for and the Requisites for Inoculation*

When rampant disease endangers the existence of a people or of important resources, inoculation is an important counterforce. The Supreme Court's Indian law cases create exigencies that mandate immunization. At stake is the future of American Indian peoples as well as the integrity of the federal jurisprudence in Indian law. The Court itself has noted the current disorder that it labels incoherence. In *Atkinson*, Justices Souter, Kennedy, and Thomas articulated that, "If we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians . . ."<sup>354</sup> then a concerted approach was necessary. However, they then treated *Montana* as the source for doctrine, not the Court's own precedent cases and doctrines, such as infringement. Curing the destructive disorder or incoherence requires more than the easy arbitrary solution of making *Montana* the judicial oracle.

Before inoculation can work as a preventive remedy, it is necessary to delineate the destructive force at work. Acknowledging what causes the harm, the incoherence and deviation from the constitutional principles regarding the American Indian tribes, requires a return to the national foundations. The Court, as the primary cause has circumvented the basic idea that tribes affected how the constitutional framework was designed because they are distinct sovereigns. This unique political status and relationship is designated in the text of the nation's covenant, the Constitution. The first sovereigns within the borders of the U.S., tribes have never ceased to exist.

The larger issue at stake in nearly all Indian law cases is the relationship of tribes to the United States—a matter rooted in centuries-old policy created as part of the nation's constitutional framework. The Justices, however, do not appear to comprehend Indian law cases as implicating a set of ancient policies that define the nation's relationships with tribes.<sup>355</sup>

Treating American Indian nations as an inconvenient racial or ethnic minority disregards the historical and legal relationship between the tribes and the federal government constructed since the first European contact. As the twenty-first century starts, the Court's cases defy the cumulative policy from Congress and the Court's own jurisprudence that conserved the unique relationship, albeit unevenly at times, by excluding state power.

The foundational relationship continues today in the operative treaties, statutes, and collaborative intergovernmental agreements, and it should guide Indian law decisions. This enduring relationship conforms to the constitutional principles invoked in *Worcester* and

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<sup>354</sup> *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (Souter, J., concurring).

<sup>355</sup> Getches, *supra* note 17, at 329.

consequent cases and statutes. When Justices ignore the foundational principle, they subject tribes to a three-part trap created by the Court's decisional trends, as noted by Getches.<sup>356</sup> First, the Justices have arbitrarily expanded state power over tribes and their territory, disregarding congressional authority and the policy of self-determination. Second, the Court has treated Indians as another racial minority, "racializing" the political status as it did in *Oliphant*. Title 25 of the U.S. Code is devoted solely to Indians, the only discrete group with an exclusive area in federal law, so the Court's demands for race-neutrality in law are unlikely to be met. Finally, the Court has denied constitutional protection to minority rights because they are outside of mainstream values, as occurred in *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>357</sup> for the use of peyote (a hallucinogenic drug) in the Native American Church. As long as the Court follows this three-part trap and defies the constitutional foundations, it produces Indian law without the substance and doctrinal authority due from Constitutional law.

Inoculation requires that the Court "rediscover Indian law,"<sup>358</sup> the *sui generis* tradition that began before the nation and guided the ultimate design of this constitutional democracy. Rediscovery with substantive knowledge will guide the Court to the constitutional foundation setting the relationships with the tribes outside of states' power. The framers' essential idea to construct only tribal-federal relationships should inform decision-making by the Court. Judicial conduct in compliance with constitutional principles requires respecting that Congress is the enumerated political branch and it develops how the relationship will be pursued. Judicial restraint, a long respected method of the federal courts, is warranted for the future of American Indian peoples and the Court's own jurisprudence. The integrity of both the Indian nations and the Court deserve this conscientious commitment.

## VII. CONCLUSION: HOW CAN INDIAN LAW FIT THE FOUNDATIONAL PRINCIPLES

Besides inoculation, how can one prevent the spread of a destructive infective force? Certainly, quarantine strategies are a common topic in the Indian law world. Advice to stay away from the Supreme Court, *if* a tribe is able, makes sense. Focusing on Congress and the

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<sup>356</sup> See *id.* at 316-27 (describing the three trends that explain the outcomes in Indian law decisions).

<sup>357</sup> 494 U.S. 872 (1990).

<sup>358</sup> Getches, *supra* note 17, at 352-60 (describing a discovery process that takes into account the congressional policies and other elements necessary for appreciation of Indian law, a field as specialized as international law).

Executive fit into this strategy. Increasing tribal negotiations and agreements with states and working with state legislatures is another approach to prevent damage. In past outbreaks of microbial disease, there were fatalities and survivors. The latter often endured lifelong disabilities. The tribes have proved that they are surviving and continuing cultural governments despite historical wrongs such as the United States' violations of treaties. The task now is to prevent further disabling as tribal sovereigns strive to function as twenty-first century governments who responsibly serve all who reside within the borders of their territory.

Containing deviational law first requires eliminating ignorance about how tribes fit in with constitutional principles, including the framers' specific solution to make relations with tribes a federal responsibility. The education needed here is for people beyond the Supreme Court, who has a special duty to protect and enforce foundational principles. In addition, the general public must be educated to understand that American Indian nations were the first sovereigns within the present day United States. They had a significant role in the formation of the republic and were structured into the constitutional framework that remains unchanged. The tribes' willingness to make treaties assured the survival of the union. Tribal lands generated the income to pay the national debt for the Revolutionary War and enabled the growth of the United States.<sup>359</sup> Indigenous people have a special relationship to their lands; it is not real estate, but their source of culture and identity. The sacrifice of indigenous lands would be hard for any other group to match as a contribution to the building of the new republic in the eighteenth century.

The tribal nations have not disappeared and do not intend to do so. Rather, they aim, as do other responsible governments, to provide for the needs of members and residents of their territory, while conserving the cultural framework that has long distinguished indigenous peoples. Appreciation and respect for different cultures is the continuing test of whether the United States can live in accord with its proclaimed commitment to fairly and justly treat all members of the national community. Whether acceptance can be made real, in everyday life, is particularly tested by American Indians who form a unique sovereign with the nation's borders.

A second ingredient for a better future is education on daily life in Indian Country and the practical relationships that frequently exist between tribes and their governmental neighbors. Again, people beyond the Court must realize that tribes and local governments are not

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<sup>359</sup> JOHNSON, *supra* note 180, at 211-15 (describing the war debt of \$27 million that escalated to almost \$54 million because states refused to pay the debt, proliferation and decline in value of paper money, inflation, and citizens' resistance to taxes and tariffs to raise revenue).

always adversaries with irreconcilable goals. In a time of limited public funds, Indian and non-Indian governments have entered a massive number of agreements that meet the common needs of health, safety, welfare, and an enhanced quality of life. In the wake of the Court's recent decisions, tribes will increase their efforts to cooperate, rather than fight, with their neighboring governments. Because of marriages, personal relations, and business ventures, Indian and non-Indian people cross jurisdictional boundaries in their ordinary activities.

Certainly, there is animus in some situations, but that is not universal in contemporary life. Financially stressed governments, pressed to provide services, do not enter collaborative partnerships because of animus towards tribal governments, but out of mutual responsibility. Compacts and agreements insure that someone can respond to the injured on the highway, the neglected child at risk, and the fires that require immediate and sometimes massive response. Cross-deputizing law enforcement officers and prosecutors will increase the safety for everyone in a geographical community comprised of more than one jurisdiction. Non-tribal governments also cooperate so that tribal enterprises thrive and create jobs for both Indians and non-Indians. There are situations where status as a member of a federally recognized Indian tribe matters for the retained treaty and law-based rights. However, much of the life in Indian Country does not require combat in the hard-set lines of the jurisdictional warfare in the Court opinions. The Court should enable cooperative relationships, not impair them.

A guide from the cultural framework of tribal people can be helpful for those working on making Indian law responsive to the foundational principles arising from the relationships with American Indian nations in the formation of this constitutional nation. In the creation story of the Hopi and others, humans emerged from the earth, having failed in the previous world to behave in accord with ethical principles.<sup>360</sup> The people faced the daunting task of learning to survive in a new world where their humanity would be tested. Spider Grandmother provided guidance in two rules: do not hurt each other, and try to understand things. These rules fit the twenty-first century struggle to make Indian law embody the highest ethical standards of constitutional fairness and justice. In this critical endeavor, the Court should not just respond to bona fide demands, rather it should lead.

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<sup>360</sup> Numerous indigenous cultures in the United States have a Spider Grandmother or Spider Woman, a creator of thought who weaves the fabric of life. See PAULA GUNN ALLEN, *THE SACRED HOOP: REDISCOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS* 11-29 (1986); see also *SPIDER WOMAN'S GRANDDAUGHTERS: TRADITIONAL TALES AND CONTEMPORARY WRITINGS BY NATIVE AMERICAN WOMEN* (Paula Gunn Allen ed., 1989).