

INDIAN COUNTRY AND THE TERRITORY CLAUSE: WASHINGTON’S PROMISE AT THE FRAMING

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This Article explores the Territory Clause, Article IV, Section 3, as a source of power for federal laws in “Indian country,” as defined at 18 U.S.C § 1151. In contrast to plenary power doctrine, the Territory Clause offers a textual source of authority to regulate matters unrelated to commerce, such as criminal jurisdiction, in Indian country. Intended to constitutionalize the Northwest Ordinance of 1787, the Territory Clause provides a principled rather than plenary basis for congressional initiatives in Indian policy and a constitutional source of authority tempered by the duty of “utmost good faith.” This renewed understanding of the Territory Clause makes certain the source of federal authority in Indian country, and provides a stronger interpretive lens for matters of tribal sovereignty, land rights, taxation, and criminal justice.

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I would only observe; . . . that the Tribes of Indians within our Territory are numerous, soured and jealous; that Communications must be established with the exterior Posts; And, that it may be policy and economy, to appear respectable in the Eyes of the Indians, at the Commencement of our National Intercourse and Traffic with them.

—George Washington¹

INTRODUCTION

A. *The Problem of Plenary Power in Federal Indian Law*

The federal government comprehensively regulates indigenous peoples in the United States, as well as fifty-seven million acres of tribal lands, an area larger than Idaho.² In this area defined as the “Indian country,” the Department of Justice enforces a unique federal criminal code found at Chapter 53 of Title 18 of the United States Code. The Department of the Interior’s expansive authority is evident in Title 25 of the United States Code, covering subjects as varied as tribal government organization, tribal courts, civil rights, law enforcement, Indian health care, education, housing, cultural resources, land titles and records, probate, agriculture, forestry, and mining.³ In recent decades, federal policy has become less paternalistic, supporting tribal self-determination and empowering tribal governments to take greater control and responsibility within their homelands.⁴

Tribal self-government has many benefits, but also raises new legal questions that seemed long settled. If the federal government has limited powers under the Constitution, where does it derive its authority to enact such comprehensive laws related to Indian tribes and native peoples? The Supreme Court has historically deferred to Congress on this question, devising a theory of plenary authority that resulted in great loss of tribal lands and rights during the nineteenth

1. George Washington’s Sentiments on a Peace Establishment, 1 May 1783, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-11202>.

2. See DEPARTMENT OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 16 (2013) (“On trust lands . . . [the Department of the Interior (DOI)] is responsible for managing [fifty-six] million surface acres and [fifty-seven] million acres of subsurface mineral estates . . .”).

3. See 25 U.S.C. §§ 1–5636 (2012).

4. The Indian Self-Determination and Education Assistance Act, *id.* §§ 5301–5423, is the primary example but there are many others, including the Indian Health Care Improvement Act, *id.* §§ 1601–1683, the HEARTH Act, *id.* § 415(h), and the Tribal Law and Order Act of 2010, Pub. L. No. 111-211 (2010).

and early twentieth centuries.⁵ More recently, seemingly in reaction to federal laws that restore tribal rights, some members of the Court and Congress are inclined to limit federal power to its enumerated sources and have questioned whether Congress has any power in Indian affairs other than the regulation of commerce.⁶ Questions regarding the sources of federal authority in Indian affairs pose a new challenge within the field. The purpose of this Article is to begin a reexamination of textual sources.

Federal authority in Indian affairs is customarily traced to two sources in the Constitution. First, Article I's Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁷ This clause recognizes the inherent sovereignty of Indian tribes similar to that of states and foreign nations. Congress's three powers—over foreign commerce, interstate commerce, and Indian commerce—have different applications, but were all "given in the same words, and in the same breath, as it were."⁸ Although federal power over commerce and trade with Indian tribes is very broad, it is doubtful that it extends to subjects such as criminal jurisdiction or civil rights.

Second, Article II, Section 2 of the Constitution, commonly known as the Treaty Clause, gives the President the power "to make Treaties, provided two thirds of the Senators present concur."⁹ The Supreme Court has said that a treaty is "primarily a compact between independent

5. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (maintaining that Congress continuously exercised plenary authority over tribal relations); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."); *Stephens v. Cherokee Nation*, 174 U.S. 445, 488 (1899) (reaffirming the constitutionality of congressional authority to determine citizenship within Indian tribes because tribal lands are public and not held by individuals).

6. Compare *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring) (reflecting upon the inadequacy of relying on congressional authority under the Indian Commerce Clause when the claim involved neither Indian tribes nor commerce, but instead included "noneconomic activity such as adoption of children"), with *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause . . .").

7. U.S. CONST. art. I, § 8, cl. 3.

8. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824) (Johnson, J., concurring) (remarking upon the breadth of the Commerce Clause, which simultaneously provides Congress with the power to regulate commerce with foreign nations, among the states, and with Indian tribes).

9. U.S. CONST. art. II, § 2, cl. 2.

nations.”¹⁰ Although the Treaty Clause does not specifically reference Indian tribes, hundreds of Indian treaties were established between the United States and Tribal Nations,¹¹ and President Washington insisted that the Senate ratify Indian treaties in the same manner as foreign treaties.¹² In 1871, Congress signaled it would no longer ratify Indian treaties, ending the nearly 100-year-old practice, and would instead unilaterally regulate Indian affairs by statute.¹³

Neither the Commerce Clause nor the Treaty Clause provides federal authority for the types of intrusive legislation that followed the end of the treaty-making period. In that era, the Supreme Court developed a new federal authority in Indian affairs: a “plenary” power drawn from sources outside the text of the Constitution.¹⁴ Beginning in 1886 with *United States v. Kagama*¹⁵ and running to *United States v. Lara*¹⁶ in 2004, a long series of Supreme Court decisions synthesized congressional authority over Indian affairs into a nearly unlimited authority. Such authority was based on a guardian-ward relationship between the federal government and the Indian tribes, as well as the “preconstitutional powers necessarily inherent in any Federal Government.”¹⁷

Professor Nell Newton traced the history of federal authority in Indian affairs in her seminal work, focusing on the development of the plenary power doctrine.¹⁸ Plenary power developed as a form of deference to Congress and as justification for nineteenth century laws taking tribal lands and interfering with tribal rights of self-government. Newton concluded that the original reasons for the doctrine are no longer applicable, as the country has been settled and notions of racial inferiority have been repudiated.¹⁹ Nevertheless, federal courts continue

10. *Edye v. Robertson*, 112 U.S. 580, 598 (1884).

11. *See generally* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904).

12. Letter from George Washington to the United States Senate, 17 September 1789, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-04-02-0032> (last visited Oct. 17, 2018).

13. Indian Appropriation Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (2012)) (stating that “[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty”).

14. FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 5.01, at 383–91 (Nell Newton Jessup ed., 2012).

15. 118 U.S. 375 (1886).

16. 541 U.S. 193 (2004).

17. *Id.* at 201.

18. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

19. *Id.* at 236.

to rely on plenary power or invocations of similarly broad authorities not enumerated in the text of the Constitution.²⁰ Professor Phil Frickey captured both the legal and ethical concerns with plenary power:

Its apparent inconsistency with the most fundamental of constitutional principles—the *McCulloch* understanding that Congress ordinarily possesses only that authority delegated to it in the Constitution—is an embarrassment of constitutional theory. . . .

Its holding, which intimates that congressional power over Indian affairs is limitless, is an embarrassment of humanity.²¹

Now that Congress is enacting laws that support tribal self-government, some members of the Supreme Court question Congress's authority to do so. Justice Thomas has led these efforts, raising sharp concerns with plenary power in a series of concurrences and dissents to Indian law decisions. Justice Thomas' efforts began in 2004, with a concurrence in *Lara*, which was the Court's third decision to grapple with determining the scope of tribal criminal jurisdiction.²²

First, in *Oliphant v. Suquamish Indian Tribe*,²³ the Court found tribal governments implicitly divested of criminal jurisdiction over non-Indians.²⁴ A decade later in *Duro v. Reina*,²⁵ the Court found tribes divested of criminal jurisdiction over members of another Indian tribe.²⁶ After tribal leaders raised significant public safety concerns, Congress promptly overturned *Duro*, amending the Indian Civil Rights Act.²⁷ The Act restored "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all

20. *Id.* at 240.

21. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996) (footnote omitted); see also Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 163 (2002).

22. 541 U.S. 193, 214 (2004) (Thomas, J., concurring).

23. 435 U.S. 191 (1978).

24. *Id.* at 210 (saying the United States' sovereignty meant Indians relinquished the power to try non-Indian citizens except in a manner Congress would have approved).

25. 495 U.S. 676 (1990).

26. *Id.* at 685–86 (determining that the sovereignty to exercise criminal jurisdiction over members of other Indian tribes was inconsistent with the retained sovereignty of Indian tribes because Indian sovereignty had become internal, focused on managing and maintaining their respective customs and order).

27. Pub. L. No. 90-284, tit. II–VII, §§ 201–701, 82 Stat. 77 (1968). See generally Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLAL. REV. 1564, 1581–89 (2016) (discussing the prevalent issue of violent crime within Indian tribes due to the absence of consistent criminal jurisdiction and the resulting momentum towards the 2010 Tribal Law and Order Act).

Indians.”²⁸ Fourteen years later, in *Lara*, the Court upheld this “*Duro* fix” in the face of a double jeopardy challenge where Lara faced both tribal and federal prosecution.²⁹ Justice Breyer’s majority opinion found no double jeopardy because Tribal Nations are separate sovereigns from the federal government.³⁰ He relied on Congress’s plenary power, including “the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe’s inherent legal authority.”³¹

In his concurring opinion, Justice Thomas disagreed with the majority’s conclusion in *Lara* that such authority could be found in the plenary power doctrine.³² He argued that the Treaty Clause is not a power to legislate, and that the Commerce Clause does not provide Congress with power over criminal matters.³³ Notably, Justice Thomas would extend the *United States v. Lopez*³⁴ and *United States v. Morrison*³⁵ Commerce Clause limitations to the Indian Commerce Clause:³⁶ “I cannot agree that the Indian Commerce Clause ‘provide[s] Congress with plenary power to legislate in the field of Indian affairs.’”³⁷

Since 2004, Justice Thomas has raised questions with plenary power in four subsequent decisions: *Adoptive Couple v. Baby Girl*,³⁸ *Puerto Rico*

28. Pub. L. No. 101-511, tit. VIII, § 8077(b), (c), 104 Stat. 1892 (1990) (codified at 25 U.S.C. § 1301(2) (2012)).

29. *United States v. Lara*, 541 U.S. 193, 210 (2004) (determining that the Double Jeopardy Clause did not preclude federal prosecution for a discrete federal offense given that, after *Duro*, Indian tribes retained the inherent sovereign authority of tribal prosecutions).

30. *See id.* (holding that Congress has the constitutional authority to allow tribes to prosecute nonmember Indians).

31. *Id.* at 196.

32. *Id.* at 215 (Thomas, J., concurring).

33. *Id.* at 222–23.

34. 514 U.S. 549 (1995).

35. 529 U.S. 598 (2000).

36. *Morrison*, 529 U.S. at 617 (rejecting “the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”); *Lopez*, 514 U.S. at 567–68 (invalidating a federal law that criminalized possession of a firearm within one thousand feet of a school, as an overreach of Commerce Clause authority).

37. *Lara*, 541 U.S. at 224 (alteration in original) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

38. 570 U.S. 637 (2013). Thomas’s concurrence questions the source of federal authority for the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963, governing the removal of Indian children from their families. *Id.* at 658–59. Although not addressed here, the Constitution grants Congress the power to define and punish “Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. Emer de Vattel recognized the citizenship of children as a subject of the Law of Nations, stating that

v. Sanchez Valle,³⁹ *United States v. Bryant*,⁴⁰ and, most recently, *Town of Vernon v. United States*.⁴¹ Two of these cases are most relevant. In *Bryant*, he questioned Congress's authority for the Major Crimes Act, under which the federal government has imposed felony sentences on Indian defendants since 1885.⁴² In his *Town of Vernon* dissent from the denial of certiorari, he questioned the authority of the federal government to acquire and hold title to tribal lands, an authority that the United States has exercised since the Continental Congress, and that the Secretary of the Interior implements regularly under the Indian Reorganization Act of 1934.⁴³

Justice Kennedy also raised concerns with plenary power. Justice Kennedy authored the majority opinion in *Duro*, discounting any tribal authority over territory and finding that tribal jurisdiction exists only because of the "voluntary character of tribal membership and the concomitant right of participation in a tribal government."⁴⁴ Furthermore, Justice Kennedy concurred separately in *Lara* to reemphasize his view that voluntary tribal membership provides the only basis for tribal criminal jurisdiction.⁴⁵ He found it troubling that Congress could "relax the restrictions on inherent tribal sovereignty in a way that extends that sovereignty beyond those historical limits."⁴⁶

Questions on plenary authority are also arising within Congress, creating a new obstacle to legislation that would address problems in Indian country and strengthen tribal self-government. For example, in

"it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it." EMER DE Vattel, *THE LAW OF NATIONS* § 212, at 101 (1849); see also John Hayden Dossett, *Tribal Nations and Congress's Power to Define Offences against the Law of Nations*, 80 MONT. L. REV. (forthcoming 2018).

39. 136 S. Ct. 1863 (2016).

40. 136 S. Ct. 1954 (2016).

41. Nos. 16-1320, 17-8 (U.S. Nov. 27, 2017) (Thomas, J., dissenting from denials of certiorari).

42. See *Bryant*, 136 S. Ct. at 1968 (Thomas, J., concurring) (questioning the breadth of congressional authority to enact the Major Crimes Act, 18 U.S.C. § 1153 (2012)).

43. See *Vernon*, Nos. 16-1320, 17-8, at *2 (U.S. Nov. 27, 2017) (Thomas, J., dissenting from denials of certiorari) (arguing that the Supreme Court should have granted certiorari to reconsider the constitutionality of the Indian Reorganization Act of 1935, 25 U.S.C. § 5108 (2012)).

44. *Duro v. Reina*, 495 U.S. 676, 694 (1990).

45. See *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) (declining to find a violation of double jeopardy because Lara did not object to the tribe's authority to try him, and the federal government already had jurisdiction over Lara because of inherent sovereign authority).

46. *Id.*

2013, Congress addressed problems created by the *Oliphant* decision,⁴⁷ and recognized tribal authority to prosecute domestic violence crimes committed by non-Indians.⁴⁸ This legislation faced opposition from some members of Congress who questioned the source of congressional authority to recognize and restore tribal criminal jurisdiction.⁴⁹

In this context, it is worthwhile to reexamine the constitutional sources of federal authority in Indian affairs. Although plenary power remains an important legal doctrine, members of Congress and the Court are seeking to limit federal action to enumerated sources and narrowly construe the Commerce Clause.⁵⁰ When tribal leaders ask Congress to address problems in Indian country, legislation is vulnerable to questions about the source of federal authority. Even if Congress can be convinced, new laws are frequently challenged, and federal courts are searching for sources of enumerated constitutional authority rather than inferred powers.

Fortunately, strict construction and original meaning are home turf for Indian tribes, who were at the forefront of the Framers' concerns during and after the Revolutionary War.⁵¹ Federal power and responsibility are deeply embedded in federal title to Indian lands, providing ample authority for modernizing Federal Indian law while respecting tribal sovereignty and encouraging tribal self-government.

47. Post-*Oliphant*, tribal authorities lacked jurisdiction over non-Indians, which precluded any ability to prosecute "non-Indian" crimes occurring on tribal lands. In particular, tribal authorities could not prosecute non-Indian perpetrators of domestic violence against Indian women. See Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1581–83 (2016) (detailing the domestic violence-related issues in prosecuting, especially when a white man would abuse a Native American woman).

48. 25 U.S.C. § 1304 (Supp. IV 2017) (amending the Indian Civil Rights Act to extend tribal jurisdiction to crimes of domestic violence).

49. The opposition arose from members of Congress who follow the writings of the Heritage Foundation. See Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 BYU J. PUB. L. 1, 5–10 (2012). Tribal leaders might be forgiven for suspicion of this new mode of thought. For generations, Congress has been content to rely on an atextual plenary power when *restricting* the rights of Indian tribes. Now, in an era where it is possible to contemplate *expanding* tribal authority, Congress's power is sharply questioned. However, this is not unique to Indian affairs. There is generally an increased focus on strict adherence to enumerated constitutional authorities. Currently, the Rules of the House of Representatives require that every bill include a Constitutional Authority Statement citing the constitutional power granted to Congress. Rules of the House of Representatives, Rule XII(7)(c)(1), H.R. Doc. No. 113-181, at 629 (2015).

50. See *supra* notes 14–21 and accompanying text.

51. See *supra* Section I.B.

B. Solution: The Original Meaning of the Territory Clause

The Territory Clause is a primary source of federal authority in Indian affairs. There are three bases for this contention. The first is structural. The United States holds land in trust, or restricted fee, for Indian tribes and their individual members.⁵² Because the United States holds an interest in title, the Indian tribes and their members possess and use these trust lands, but cannot alienate or encumber them without federal approval.⁵³ The Supreme Court has described Indian title as “the right of occupancy with all its beneficial incidents; . . . the right of occupancy being the primary one and as sacred as the fee.”⁵⁴

The authority for the United States to hold title in land flows from Article IV, Section 3, Clause 2 of the Constitution, which provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁵⁵ The Territory Clause is a fundamental source of federal authority within the territory defined as “Indian country.”⁵⁶ This constitutional authority is derived from the federal and tribal relationship with land, rather than commerce.⁵⁷

The second basis is precedent. Supreme Court decisions rely on the Territory Clause as the source of authority for federal criminal laws in “Indian country.”⁵⁸ Prior to 1948, “Indian country” was an undefined term that caused confusion and conflicting decisions. This debate concluded with three decisions, *United States v. Celestine*,⁵⁹ *United States v. Sandoval*,⁶⁰ and *United States v. Pelican*,⁶¹ which all relied on the

52. See, e.g., *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (“But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose.”).

53. See *Oklahoma v. Texas*, 258 U.S. 574, 597 (1922). This Article uses the abbreviated term “Indian land” when referring to “trust or restricted land.”

54. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115 (1938).

55. U.S. CONST. art. IV, § 3, cl. 2.

56. See Newton, *supra* note 18, at 210 n.73.

57. See *infra* Section III.A.

58. See, e.g., *United States v. Celestine*, 215 U.S. 278 (1909); see also 18 U.S.C. § 1151 (2012) (defining “Indian country” as all the land within Indian reservations, all dependent Indian communities, and all Indian allotments).

59. 215 U.S. 278 (1909).

60. 231 U.S. 28 (1913).

61. 232 U.S. 442 (1914).

Territory Clause. The statutory definition reflects the holdings of these cases, and nearly verbatim adopts their language.⁶²

While the Supreme Court upheld the statutory definition in 1962 in *Seymour v. Superintendent of Washington State Penitentiary*,⁶³ the role of the Territory Clause in Indian country has gone unnoticed since that time. Federal territory principles are deeply embedded in federal Indian law,⁶⁴ yet, the role of the Territory Clause is rarely recognized.

The role of the Territory Clause lacks attention for several reasons. The 1948 statutory definition brought consistency of interpretation to the term “Indian country,” but obscured the role of the Territory Clause.⁶⁵ Congress created the definition during codification of the entirety of Title 18, so its legislative history is limited to a few notes in a much larger congressional report.⁶⁶ Additionally, until recently, plenary power doctrine and broad constructions of the Commerce Clause largely eliminated the need for courts to consider other sources of federal authority.⁶⁷ The renewed focus on strictly construing enumerated powers requires a fresh look.

Finally, an area of the law may become settled and its history forgotten. Justice Holmes observed that the law is “eternally weaving into her web dim figures of the ever-lengthening past.”⁶⁸ The goal of this Article is to shine new light on the role of the Territory Clause in federal Indian law.

62. Compare *Celestine* 215 U.S. at 285, with § 1151(a) (“All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation”). Compare *Sandoval*, 231 U.S. at 46, with § 1151(b) (“[A]ll dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state”). Compare *Pelican*, 232 U.S. at 449, with § 1151(c) (“all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same”).

63. 368 U.S. 351 (1962) (referring to § 1151 as the prevailing definition of “Indian country”).

64. See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959) (understanding that state action may not infringe on the purposes of an Indian reservation without congressional acquiescence).

65. See Pub. L. No. 80-772, 62 Stat. 757, 757 (1948) (codifying Title 18 and defining “Indian country”).

66. 18 U.S.C. § 1151 (2012) (citing the legislative history that accompanies § 1151); H.R. Rep. No. 308 (1947).

67. See *supra* notes 18–46 and accompanying text.

68. MAX LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS* 30 (1943).

As a result, U.S. history is the third basis for contending that the Territory Clause is a primary source of authority in Indian affairs. Today, we think of the Territory Clause for managing the public lands or for governance of the territorial islands. But none of those existed in 1787 and the Framers could scarcely have imagined they would.⁶⁹ The original purpose of the Territory Clause was to govern the vast area claimed by the United States under the Treaty of Paris of 1783, most of it held by Indian tribes and known to George Washington and his military commanders as the “Indian country.”⁷⁰ A fundamental purpose of the Constitutional Convention, and the drafting of Article IV, Section 3 was to create a federal government empowered to establish new states to the west, to manage relations with the Indian Nations, and to limit violent conflict in the Indian country.⁷¹

The Framers did not believe they owned absolute title to land in Indian country. Instead, they claimed it as U.S. territory, meaning the United States had the exclusive right to purchase land from the Indian tribes and a general power to govern.⁷² This Article uses the term “Territory Clause” rather than “Property Clause,” because the concept of territory guided the Framers and better describes the federal interest in tribal lands.

As settlement stretched westward, the Territory Clause and the Treaty Clause were the constitutional authorities used for negotiating the boundaries of lands ceded and reserved by Indian Nations.⁷³

69. See generally Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1131 (2005) (presenting a broad history of eras of public land policy post-1787).

70. See *infra* Section I.B (detailing the history of the Territory Clause).

71. See *infra* Section I.C (describing the debate among the Framers during the Constitutional Convention that resulted in the drafting of the current Territory Clause).

72. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 35, 52 (1947) (explaining that tribes held absolute title to Indian country “subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain” and describing the federal interest acquired in tribal lands as “simply the power to govern and to tax, the same sort of power that [the federal government] gained with the acquisition of Puerto Rico or the Virgin Islands a century later”). European claims to tribal lands were based on the Doctrine of Discovery. See generally ROBERT MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY* (2008); LINDSAY ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2007); Michael Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 718 (2004); Robert Lee, *Accounting for Conquest: The Price of the Louisiana Purchase of Indian Country*, 103 J. OF AM. HIST. 921, 922 (2017).

73. See *infra* Section I.D.

“From the organization of the National Government, it has been the rule of the Nation to purchase the occupancy right from the Indians The Government has never attempted to survey and dispose of lands prior to their cession by the Indians.”⁷⁴ In other words, the United States could purchase the right of occupancy from Tribal Nations, but where it did not, those lands remain federal Indian territory, with the right of occupancy vested in the tribe. Since the federal government’s founding, it has continually asserted and assiduously recorded its interest in tribal lands, maintaining millions of records in the Department of the Interior evidencing both the federal and tribal interests.⁷⁵

The limitation on federal title is also a limitation on federal power, unlike federal public lands. In *Kleppe v. New Mexico*,⁷⁶ the Supreme Court said that “[t]he power over the *public land* thus entrusted to Congress is without limitations.”⁷⁷ Is this another source of absolute power in Indian country, a more grounded version of plenary power? No. In contrast, Indian lands are not public lands. The United States holds tribal lands as a trustee.⁷⁸

Because of this, the Territory Clause is a deep well of authority attended by principled limitations as evidenced by its historical development and adoption in the Constitution. The Territory Clause can only be understood in the historical context of the Northwest Ordinance. During the Constitutional Convention, the Framers needed to resolve the process for the admission of new states and the governance of the western territory. With the Constitutional Convention ongoing, the original states agreed to transfer western land claims to

74. THOMAS DONALDSON, *THE PUBLIC DOMAIN: ITS HISTORY, WITH STATISTICS* 240 (1884).

75. See *infra* notes 409–414.

76. 426 U.S. 529 (1976).

77. *Id.* at 539 (alteration in original) (emphasis added) (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

78. See *Minnesota v. United States*, 305 U.S. 382, 386 n.1 (1939) (“The fee of the United States is not a dry legal title divorced from substantial powers and responsibilities with relation to the land.”); *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935) (“The Creek Tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.”).

the new federal government under the principles in the Northwest Ordinance.⁷⁹

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.⁸⁰

The principles of the Northwest Ordinance⁸¹ and cession of western lands were a compact among the original states and all that followed. This served as the basis for the federal power to govern territory and create new states in Article IV, Section 3. The First Congress immediately reenacted the Ordinance in 1789 under the authority of the Territory Clause, adapting it to the Constitution.⁸² These provisions signify the intent of the Framers to govern Indian country. Understood in its original context, the Territory Clause offers a sturdy basis for Congress to provide “needful rules and regulations” accompanied by a duty to respect tribal lands and rights to self-governance.⁸³

Part I of this Article reviews the origins of the Territory Clause: a story of war, peace, and the struggles of the Continental Congress to control the western Indian territory acquired from Great Britain.⁸⁴ Notably, this Part highlights George Washington’s principal role in developing a policy intended to promote peaceable settlement by protecting and purchasing tribal land rights.⁸⁵

79. See *infra* Sections I.C. and I.E; see also Ordinance of 1787: The Northwest Territorial Government, *reprinted in* 1 U.S.C. LVII (2012).

80. 1 U.S.C. LIX.

81. The Ordinance is reprinted in Volume One of the United States Code among the Organic Laws of the United States along with the Declaration of Independence, the Articles of Confederation, and the Constitution. See 1 U.S.C. at XLV–LXI. See generally Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929–68 (1995).

82. The Northwest Ordinance, 1 Stat. 50 (1789).

83. U.S. CONST. art. IV, § 3.

84. See generally REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783–1812 4–39 (1967) (discussing the difficulties the first Congress had in developing and implementing policies to govern Indian territory); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1009–38 (2014) (analyzing the creation and ultimate failure of many early policies attempting to govern Indian territory).

85. See HORSMAN, *supra* note 84, at 5–6 (addressing George Washington’s plan to settle members of the Continental Army on the frontier as a method to assure security and promote land sale); see also Letter from H. Knox, Secretary at War on Indian

Part II provides a detailed legislative history of the definition of “Indian country,” demonstrating its roots in the Territory Clause. Part III reviews the status of federal title in Indian land in the current era and considers the parallels to other aspects of federal land law. Part IV acknowledges, and respectfully challenges, the position taken by the revised editions Handbook of Federal Indian Law.⁸⁶ Next, Part V considers some implications of restoring the Territory Clause to its intended role. A return to understanding the role of the Territory Clause in federal Indian law may benefit Indian tribes, Congress, and the Court because it makes certain the source of federal authority and limitations on that power.

This Article closes by drawing some conclusions about the role of tribal governments within the structure of the Constitution. Tribal Nations are not “strange sovereigns” to the Constitution, as Professor Newton concluded.⁸⁷ Tribal territories were a central part of the Framers’ purpose to promote a peaceful land settlement policy by asserting federal control and adopting duties to protect tribal rights.⁸⁸ Indian tribal governments are inherent sovereigns firmly placed within the original framework of the Constitution, specifically the Territory Clause.

I. PRESIDENT WASHINGTON AND ORIGINS OF THE TERRITORY CLAUSE

[A]nd especially as landed matters are often the subject of our councils with you, a matter of the greatest importance and of general concern to us, in this case we hold it indispensably necessary that any cession of our lands should be made in the most public manner, and

Affairs, in 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 124–26 (1788) (reporting to Congress on national Indian policy). Secretary Knox noted that a confederation of western Indian tribes opposed settlement of land north of the Ohio River. *Id.* at 124. These tribes, he said, “have expressed the highest disgust, at the principle of conquest, which has been specified to them, as the basis of their treaties with the United States.” *Id.* Noting that the British government had always purchased tribal land, Secretary Knox argued that the United States should adopt the same policy. *Id.* at 125. This recommendation became the cornerstone of federal Indian policy.

86. See *infra* Part IV.

87. See Newton, *supra* note 18, at 197 (distinguishing the sovereignty of other foreign nations from the “strange sovereign[ty]” of Indian tribes, which were ultimately subject to the federal government).

88. Recent historical scholarship emphasizes the outsized role of western Indian lands in the drive towards the American Revolution and Constitutional Convention. See generally ALAN TAYLOR, AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804 (2016) (discussing how land disputes and territorial expansion were catalysts for the American Revolution).

by the united voice of the confederacy; holding all partial treaties as void and of no effect.⁸⁹

The purpose of the Territory Clause and Article IV, Section 3 was to settle the debate among the confederated states over the “crown lands,” those lands reserved for Indian tribes by the Proclamation of 1763 and ceded to the United States at the end of the Revolutionary War.⁹⁰ Since the start of the Revolutionary War, the colonies and then states argued over the disposition of these lands.⁹¹ The states without western land grants greatly resented the claims of the landed states.⁹² After the war ended, the Continental Army disbanded and the confederated states faced problems of crippling war debt, discontented veterans who had not received their pay, and increasingly violent conflicts with Indian tribes on the western border.⁹³ After much debate, states began to cede western land claims to the federal government.⁹⁴ Although the Northwest Ordinance and planning for new western states became a central concern for the Continental Congress, the Articles of Confederation contained no authority for the United States to hold or regulate territory, acquire and sell lands, or create new states.

At the time of the Constitutional Convention, the United States held little territory or property other than Indian lands, and was engaged in fierce wars with Indian tribes along the western frontier caused by land-hungry squatters and speculators.⁹⁵ George Washington and Secretary of War Henry Knox worked together with many of their Revolutionary War colleagues, all of whom held land bounties in the West as payment

89. Speech of the United Indian Nations, *reprinted in* ROBERT ALEXANDER, *THE NORTHWEST ORDINANCE: CONSTITUTIONAL POLITICS AND THE THEFT OF NATIVE LAND* 154, 155 (2017).

90. *See* *Mitchel v. United States*, 34 U.S. 711, 746–47 (1835) (discussing the Proclamation of 1763 in detail and how it controlled land rights).

91. *See* GREGORY H. NOBLES, *AMERICAN FRONTIERS: CULTURAL ENCOUNTERS AND CONTINENTAL CONQUEST* 87–93 (1997) (describing how the states fought for their own territorial interests during and immediately after the Revolutionary War).

92. *See id.* at 92–93 (noting that Maryland, a “land-poor” state, refused to ratify the Articles of Confederation until states ceded western territory to Congress).

93. *See* HORSMAN, *supra* note 84, at 5 (addressing the unanticipated financial difficulties and underestimated Indian resistance following the Revolutionary War).

94. *See* NOBLES, *supra* note 91, at 92–93 (explaining how New York, Connecticut, and Virginia eventually ceded their lands, and noting how the internal struggle over territory lasted longer than the Revolutionary War).

95. *Id.* at 91–96 (describing the continuous struggles the novice American government had in controlling the frontier).

for their war service.⁹⁶ They intended to limit or prevent war in the “Indian country,” and developed an orderly process of purchasing tribal lands through treaties.⁹⁷ Their efforts led to the Northwest Ordinance, the Territory Clause, and the first Trade and Intercourse Act in 1790.⁹⁸

Law reviews do not permit maps. However, the historical development of the Territory Clause requires an understanding of three overlapping maps. The first is a map created by centuries of rivalry between European powers in North America. Long before the French and Indian War in 1763, European powers claimed most of the continent along the major water routes.⁹⁹ The British colonies clung to the East Coast.¹⁰⁰ British colonists were settlers who cleared the land and displaced Indian tribes with dense agricultural settlements.¹⁰¹ The French held a far greater territory, though more loosely, from Quebec, along the St. Lawrence, the Great Lakes, the Mississippi, to Louisiana.¹⁰² The French were traders and trappers and lived more peacefully alongside Indian people as trading partners, creating integrated villages.¹⁰³ The Spanish Empire included Florida, the Southwest, and the coast of California.¹⁰⁴

The second map is more familiar. The thirteen colonies were not equals, as a matter of territory. Seven “landed” colonies had charters that reached west indefinitely.¹⁰⁵ Virginia was the largest, by far, but New York, Connecticut, and Massachusetts laid out competing claims

96. See generally HORSMAN, *supra* note 84, at 5–6 (explaining in detail the roles Washington and Knox played throughout the development of American Indian Policy).

97. See *id.* at 5–7 (discussing the initial plan developed by Washington and Knox to address land settlement and frontier insecurities).

98. See generally *id.* (outlining the development and implementation of various United States’ policies surrounding territory and expansion).

99. See CARL UBBELOHDE, *THE AMERICAN COLONIES AND THE BRITISH EMPIRE, 1607–1763* 16–17 (John Hope Franklin & Abraham S. Eisenstadt eds., 1968) (describing the settlement patterns of early Europeans on the North American continent).

100. *Id.* at 16.

101. *Id.* at 15–16 (mentioning how developing early British colonies pursued self-sustaining agriculture, tobacco production, and sugar plantations).

102. See *id.*; see also COLIN G. CALLOWAY, *NEW WORLDS FOR ALL: INDIANS, EUROPEANS, AND THE REMAKING OF EARLY AMERICA* 4 (Stanley I. Kutler ed., 2d ed. 2013) (discussing the interactions the various settlements had with native Indian tribes).

103. See CALLOWAY, *supra* note 102, at 5 (describing French and Indian settlements whose cultures frequently merged together).

104. See NOBLES, *supra* note 91, at 45–46 (addressing Spanish colonialism within North American).

105. See Merrill Jensen, *The Cession of the Old Northwest*, 23 *MISS. VALLEY HIST. REV.* 27, 28 (1964) (noting the debate between “landless” colonies and those with “claims extending to the South Seas”).

to Virginia.¹⁰⁶ The colonial charters of the Carolinas and Georgia laid out straight latitudinal lines from the eastern shore to the Mississippi.¹⁰⁷ Six “small” states had defined western borders: New Hampshire, Rhode Island, New Jersey, Delaware, Pennsylvania, and Maryland.¹⁰⁸ However, after 1783 and British cession of all lands east to the Mississippi, the thirteen states began a debate over the western lands.¹⁰⁹ All thirteen wanted access, and none had the ability to manage military and diplomatic relations with the Indian Nations on their own.¹¹⁰

The final map is of the journey of a young George Washington.¹¹¹ Washington’s first job at age sixteen was as a surveyor of unsettled Indian lands in the Shenandoah Valley for the Ohio Company of Virginia.¹¹² Ambitious and adept at appraising value, by age twenty, Washington had laid out many land claims.¹¹³ He bought and sold his way into nearly 2500 acres of prime land, much of it in Indian country.¹¹⁴ At twenty-one, Washington first traveled to the headwaters of the Ohio River and viewed its gateway into the fertile Midwest.¹¹⁵ Washington was in the service of the Virginia colony’s Lieutenant Governor Robert Dinwiddie, who was both an investor in, and

106. See NOBLES, *supra* note 91, at 92.

107. See 2 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 765, 770–71 (Francis Newton Thorpe ed., 1909) (reprinting the Charter of Georgia establishing the territory boundaries); 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2743–44 (Francis Newton Thorpe ed., 1909) (reprinting the Charter of Carolina expressing the western boundary as extending “as far as the south seas”).

108. See ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 246 (1990) (describing these as the “landless” colonies).

109. See NOBLES, *supra* note 91, at 91–94 (addressing some of the various disputes between states leading up to the Northwest Ordinance).

110. See generally HORSMAN, *supra* note 84, at 5–15 (dissecting the various difficulties the new government faced managing new territory and developing a federal Indian policy following American independence).

111. See generally JOHN FERLING, THE ASCENT OF GEORGE WASHINGTON: THE HIDDEN POLITICAL GENIUS OF AN AMERICAN ICON 12–13 (2009) (discussing the various journeys George Washington took throughout his career).

112. *Id.* at 12.

113. *Id.* at 13.

114. *Id.*

115. THE JOURNAL OF MAJOR GEORGE WASHINGTON: AN ACCOUNT OF HIS FIRST OFFICIAL MISSION, MADE AS EMISSARY FROM THE GOVERNOR OF VIRGINIA TO THE COMMANDANT OF THE FRENCH FORCES ON THE OHIO, OCT. 1753–JAN. 1754 v–vii (1959) (illustrating a map of Washington’s journey).

supervising official for, the Ohio Company of Virginia.¹¹⁶ Dinwiddie's goal was to assert British claims to the Ohio Valley and order the French to cease building a string of forts to defend their competing claims.¹¹⁷ Washington returned with a defiant answer from the French, and a vision for settlement in the Ohio Valley.¹¹⁸ Military leadership and speculation in Indian land would combine in ways that defined the remainder of Washington's life in public service.

These three maps are a starting point for understanding European settlement in North America, but they began to transform rapidly with the advent of the French and Indian War in 1754, and again with the Revolutionary War in 1775. They provide the backdrop for the United States acquisition of its western territory in 1783, and the original purpose of the Territory Clause to govern the Indian country.

A. *The French and Indian War and the Proclamation of 1763*

Washington started the French and Indian War in May of 1754, intending to halt the French invasion of Virginia's western lands as established by royal charter.¹¹⁹ Virginia militiamen and tribal allies from the Seneca, and others of the Six Nations Iroquois, ambushed a French patrol in a conflict over Fort Duquesne, near what is now Pittsburgh.¹²⁰ They were under the command of a twenty-two-year-old Washington and the Seneca Half King Tanaghrisson.¹²¹ The war exploded into an intercontinental conflict, known to Europeans as the Seven Years War, between the French and British and their respective

116. *Id.* at 3.

117. Letter from Robert Dinwiddie to the Commandant of the French Forces on the Ohio, *reprinted in* THE JOURNAL OF MAJOR GEORGE WASHINGTON 25–26 (1959).

118. Letter from Legardeur de St. Pierre to Robert Dinwiddie, *reprinted in* THE JOURNAL OF MAJOR GEORGE WASHINGTON 27–28 (1959) (translating the letter the French forces sent in response).

119. See THE JOURNAL OF MAJOR GEORGE WASHINGTON: AN ACCOUNT OF HIS FIRST OFFICIAL MISSION, MADE AS EMISSARY FROM THE GOVERNOR OF VIRGINIA TO THE COMMANDANT OF THE FRENCH FORCES ON THE OHIO, OCT. 1753–JAN. 1754 25–26 (1959). The letter from Virginia's Governor Dinwiddie to the French Commander stated in part that "[t]he Lands upon the River Ohio, in the Western Parts of the Colony of Virginia, are so notoriously known to be the Property of the Crown of Great-Britain, that it is a Matter of equal Concern & Surprize [sic] to me, to hear that a Body of French Forces are erecting Fortresses, & making Settlements upon that River, within his Majesty's Dominions." *Id.*

120. See Letter from George Washington to Robert Dinwiddie, 29 May 1754, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/02-01-02-0054> (last visited Oct. 17, 2018).

121. *Id.*

allies.¹²² The frontier war in America provided Washington with experiences that shaped his future Indian policy and exposed him to the realities of the Indian territory while leading and negotiating with experienced Native military commanders.¹²³

The end of the French and Indian War consolidated British control as France gave up its territories in North America.¹²⁴ It also started a chain of events that proved disastrous for Tribal Nations. Previously, British colonies had clung to the eastern seaboard, while French settlements were concentrated along the St. Lawrence River Valley and the Great Lakes.¹²⁵ After the war, Indian tribes could no longer use the French and British competition over the fur trade to preserve their lands.¹²⁶ Colonists poured into the Indian territory, causing Chief Pontiac's confederation of tribes to rise up and kill hundreds of settlers.¹²⁷

The British Crown wanted to avoid further war with Indian tribes.¹²⁸ Accordingly, King George III issued the Proclamation of 1763 soon after the end of the French and Indian War.¹²⁹ The text of the

122. NOBLES, *supra* note 91, at 82.

123. *Washington and the French & Indian War*, GEORGE WASHINGTON'S MOUNT VERNON, <http://www.mountvernon.org/george-washington/french-indian-war/washington-and-the-french-indian-war> (last visited Oct. 17, 2018).

124. NOBLES, *supra* note 91, at 116.

125. UBBELOHDE, *supra* note 99, at 16.

126. See generally William A. Starna & Jose Antonio Brandao, *From the Mohawk-Mahican War to the Beaver Wars: Questioning the Pattern*, 51 ETHNOHISTORY 725 (2004).

127. See NOBLES, *supra* note 91, at 84–86 (explaining that as soon as the British signed the Treaty of Paris, they were confronted with a series of frontier uprisings); see also DOCUMENTS OF UNITED STATES INDIAN POLICY 9–15 (Francis Paul Prucha ed., 3d ed. 2000) (demonstrating through letters and reports how violence between settlers and Indians escalated).

128. *Proclamation Line of 1763*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/proclamation-line-of-1763> (last visited Oct. 17, 2018) (discussing the numerous sociopolitical and economic reasons behind why the British Crown wanted to limit westward expansion).

129. KING GEORGE III, ROYAL PROCLAMATION OF 1763 (1763); see also *Proclamation Line of 1763*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/nproclamation-line-of-1763> (last visited Oct. 17, 2018) (prohibiting colonists from settling on lands acquired after the end of the Seven Years' War). *Johnson v. McIntosh* cites the Proclamation as the source of all federal Indian territory, and it is a cornerstone of the law in both the United States and Canada. 21 U.S. (8 Wheat.) 543, 594, 596–97 (1823). The Proclamation is referenced in Section 25 of the Constitution Act of 1982, which preserved the Charter of Rights and Freedoms in the Canadian Constitution and finalized Canadian independence from Britain. See Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

Proclamation is often mischaracterized.¹³⁰ The Proclamation did not simply prohibit colonial settlement beyond the Appalachians.¹³¹ Instead, it was a comprehensive policy and the first expression of three legal principles: (1) the right of preemption over all tribal lands, to be purchased with tribal consent and the Crown's approval; (2) the regulation of trade to prevent fraud and unfair practices that caused conflict; and (3) the imposition of provisions to address the flight of criminals and prevent violence towards Indians.¹³² These principles were later incorporated into the Northwest Ordinance, the Constitution, and the Trade and Intercourse Act of 1790.¹³³

B. The Revolutionary War and State Cessions of Western Indian Territory

The Proclamation's effort to manage frontier policy and protect the interests of Indian tribes contributed directly to the Revolutionary War.¹³⁴ Colonial governments and settlers resented the restriction on their rights to westward expansion.¹³⁵ Land speculators, like Washington and many of the Founders, begrudged the interference with their land in the Ohio Valley.¹³⁶ In 1767, Washington ordered his land agent to continue securing land from the newly acquired territory, believing that the Proclamation was only a "temporary expedient" used to pacify the Indian tribes and would have no lasting impact.¹³⁷

130. Royal Proclamation of 1763, 3 Geo. 3 (U.K.).

131. *Id.* (outlining Great Britain's plan to control the settlement of newly acquired land following the Seven Years' War).

132. *See id.* (imposing a number of regulations regarding the settlement of colonists on newly acquired territory and their interactions with Indian tribes).

133. *See* U.S. CONST. art. I, § 8; *id.* art. IV, § 3 (granting Congress the power to govern territories and regulate trade with Indian tribes); An Ordinance for the Government of the Territory of the United States North West of the River of Ohio, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 340–41 (1905) (asserting in Article 3 of the Northwest Ordinance that the property rights and liberty of Indians shall not be "invaded or disturbed"); DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 127, at 14–15 (reprinting the Indian Trade and Intercourse Act of 1790 which strictly regulated trade and land sale between settlers and Indians).

134. *See generally* COLIN G. CALLOWAY, *THE SCRATCH OF A PEN: 1763 AND THE TRANSFORMATION OF NORTH AMERICA* (2006) (discussing how policies and events served as catalysts for American independence).

135. *See id.* at 98 (noting how the Proclamation failed to prevent colonial settlement onto Indian lands).

136. *Id.* at 98–99.

137. Letter from George Washington to William Crawford, 17 September 1767, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/02-08-02-0020> (last visited Oct. 17, 2018).

The Quebec Act of 1774,¹³⁸ one of the “Intolerable Acts,”¹³⁹ dashed Washington’s hopes for riches from western lands, as it purported to transfer the northwest Indian territory to the Province of Quebec despite the land grants in the colonial charters.¹⁴⁰ However, those dashed hopes turned into new resolve. The Declaration of Independence lists both the Proclamation and the Quebec Act as grievances that required American independence.¹⁴¹

During the Revolutionary War, General Washington soon found himself in a position similar to King George with respect to Indian affairs. Freed from the restrictions of the Proclamation, settlers and land speculators moved into the western regions and conflicts with Indians increased.¹⁴² States like Virginia attempted to limit westward expansion through laws requiring state consent.¹⁴³ Thomas Jefferson noted the futility in 1776: “They will settle the lands in spite of everybody.”¹⁴⁴

The landed states’ claims to the “western lands” soon became a matter of intense controversy among the thirteen colonies.¹⁴⁵ The seven landed states laid out conflicting claims and wanted the western lands for their own citizens and for the value of land sales.¹⁴⁶ The other six states felt strongly that the western lands should be shared among

138. The Quebec Act, 1774, 14 Geo. 3 c. 83 (Eng.).

139. See Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 401–02 (explaining the “Intolerable Acts” as the series of five punitive acts passed by British Parliament following the rebellious “Boston Tea Party” protest).

140. See The Quebec Act, § 1 (detailing the boundaries of the land given to Quebec).

141. See THE DECLARATION OF INDEPENDENCE para. 9, 22 (U.S. 1776) (listing the abuses King George III took against the colonies, including “raising the conditions of new Appropriations of Lands” and “abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies”).

142. COLIN G. CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON 193–94*, 278–79 (2018) (describing the various violent clashes between Indians and settlers pushing westward).

143. See Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 30–31 (1964) (noting that the Virginia state constitution required consent of the Virginia Legislature for any western land purchases within the charter limits).

144. Letter from Thomas Jefferson to Edmund Pendleton, 13 August 1776, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-01-02-0205> (last visited Oct. 17, 2018).

145. See Reginald Horsman, *The Northwest Ordinance and the Shaping of an Expanding Republic*, 73 WIS. MAG. HIST. 21, 22 (1989) (highlighting how Maryland’s refusal to sign the Articles of Confederation brought the western land issue back to the surface).

146. *Id.*

the entire country.¹⁴⁷ They were concerned about losing influence to larger states, wanted their own citizens to have access, and needed the funds from western land sales to pay debts from the war.¹⁴⁸

Maryland led the effort among the small states, and refused to ratify the Articles of Confederation.¹⁴⁹ Maryland made three arguments in support of the motion to cede western land claims and form new states to the west. First, the landed states' conflicting claims would tear the new United States apart.¹⁵⁰ This concern was founded in the violent conflicts between Pennsylvania and Connecticut over the Wyoming Valley region, present day Scranton.¹⁵¹ Maryland reasoned that if all the states benefitted from the settlement of western lands, the lands would create bonds of common interest in fighting the war.¹⁵² Second, Maryland contended that funds from sales of western lands should pay the enormous war debt collectively.¹⁵³ Third, Maryland was unwilling to join the United States if the landed states could create vassal states, and insisted that new states be admitted as equal sovereigns.¹⁵⁴

Then financial and military pressures mounted. The Continental Army needed funding, and land speculation companies offered funds for clear title to western lands.¹⁵⁵ Conflicts with Indian tribes increased.¹⁵⁶ In the spring of 1780, the British army began raiding in Virginia, an immediate threat.¹⁵⁷ The French minister to the United

147. *Id.*

148. *Id.*

149. Horsman, *supra* note 145, at 36–37.

150. DONALDSON, *supra* note 74, at 61.

151. See Anne M. Ousterhout, *Frontier Vengeance: Connecticut Yankees vs. Pennamites in the Wyoming Valley*, 62 PA. HIST. 330, 336–37 (1995) (noting that the Wyoming massacre was one of the bloodiest battles of the Revolutionary War).

152. Jerry A. O'Callaghan, *The Western Lands, 1776–84: Catalyst for Nationhood*, 31 J. FOREST HIST. 133, 135 (1987) (describing how Maryland intended to use the western lands as an incentive for soldiers to join the war effort).

153. *Id.*

154. See DONALDSON, *supra* note 74, at 61–62 (arguing that powerful landed states could create a sub-confederacy of submissive landless states); see also HERBERT B. ADAMS, MARYLAND'S INFLUENCE UPON LAND CESSIONS TO THE UNITED STATES 35 (1885) (explaining that Maryland's vision for the west was destined to prevail).

155. See O'Callaghan, *supra* note 152, at 134 (describing the how the Continental Army used land bounties to pay soldiers).

156. John Butler, *New Sources on the Sullivan-Clinton Campaign in 1779*, 10 Q.J. N.Y. ST. HIST. ASS'N 185, 186 (1929).

157. St. George L. Sioussat, *The Chevalier de la Luzerne and the Ratification of the Articles of Confederation by Maryland, 1780–1781, With Accompanying Documents*, 60 PA. MAG. OF HIST. & BIOGRAPHY 391, 392 (1936) (noting that Virginia's governor appealed to Congress for help as the continental army struggled to defend the Chesapeake Bay and its tributary rivers).

States made clear that France would supply ships and soldiers if the States would ratify the Articles of Confederation.¹⁵⁸ In response to these pressures, and at the insistence of Maryland, the Continental Congress agreed in principle that the landed states would cede their claims and form new states to the west.¹⁵⁹

New York was the first to cede land to the central government with an explicit disclaimer to all tribal lands of the “Six Nations, and their tributaries.”¹⁶⁰ The very first “territory” ceded to the United States was Indian territory, which demonstrated the need for national authority—an authority that did not exist in the Articles of Confederation. The New York cession became effective on March 1, 1781 and Maryland ratified the Articles of Confederation on the same day.¹⁶¹ In response, the French sent thousands of troops and the British surrendered at the Battle of Yorktown six months later.¹⁶²

The Revolutionary War ended with the Treaty of Paris on September 3, 1783, setting the western boundary of the United States at the Mississippi River.¹⁶³ The Continental Congress issued three sets of instructions to the negotiators—John Adams, Ben Franklin, and John Jay—leaving no doubt that the primary goal of their negotiations was to gain possession of western tribal territory.¹⁶⁴ The first instruction, in August of 1779, demanded “clear and indisputable [b]oundaries” by a line drawn “[s]traight to the [s]ource of the River Mississippi.”¹⁶⁵ In October of 1780, the second set of instructions addressed Britain’s contention that it had no power to grant title to tribal lands, countering that the Proclamation of 1763 expressly declared that the western lands

158. *See id.* (detailing the impact of land speculators and the politics that led to the western land cessions); *see also* Merrill Jensen, *The Creation of the National Domain, 1781–1784*, 26 *MISS. VALLEY HIST. REV.* 323, 330 (1939).

159. *See* Motion Regarding the Western Lands, (Sept. 6, 1780), *in* 2 *THE PAPERS OF JAMES MADISON*, 72, 77–78 (William T. Hutchinson & William M. E. Rachal eds., 1962) (approving Virginia, North Carolina, and Georgia’s cession of western land for future states).

160. 4 *JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788* 21–22 (1823).

161. An Act to Facilitate the Completion of the Articles of Confederation and Perpetual Union Among the United States of America (Mar. 1, 1781), *in* 19 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789*, 211, 213–14 (1912).

162. RONALD L. HEINEMANN ET AL., *OLD DOMINION, NEW COMMONWEALTH: A HISTORY OF VIRGINIA, 1607–2007* 131 (2007).

163. Treaty of Peace, U.S.-Gr. Brit., art. II, Sept. 3, 1783, 8 Stat. 80.

164. A Draft of Instructions to be Appointed to Negotiate a Treaty of Peace with Great Britain (Aug. 14, 1779), *in* 14 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789* 956, 956–58 (1909).

165. *Id.* at 958.

“were within the sovereignty and dominion of that crown, notwithstanding the reservation of them to the use of the Indians.”¹⁶⁶

The third set of instructions, dated August 20, 1782, was a forty-page legal argument about the territorial rights of the thirteen states, reciting the boundaries set by colonial land grants, charters, royal commissions, and treaty cessions.¹⁶⁷ It cited the treaty ending the French and Indian War as the authority for the colonies to expand outward to the Mississippi River.¹⁶⁸ The instructions again seized on the Proclamation of 1763 as evidence of their claim: “In a word, this part of the proclamation seems to have been intended merely to shut up the land offices, not to curtail limits; to keep the Indians in peace, not to relinquish the rights accruing under the charters, and particularly that of pre-emption.”¹⁶⁹ The instructions expressed confidence that the western territories were the property of the United States and could be used to pay war debts.¹⁷⁰

The Revolutionary War had much to do with the American desire to control the West, a desire that only increased during the conflict.¹⁷¹ Historian William Hogeland stated, “American independence without the American West wouldn’t be American independence at all. Ceding the great region that Britain had long been struggling to reserve for Indians wasn’t generous but a sine qua non of peace.”¹⁷²

In the euphoria of victory, even more settlers and land speculators flooded west, while the states debated the terms of further western land cessions.¹⁷³ On September 23, 1783, Washington wrote to his Chief of Artillery, Knox, and drew his attention to the need for states cessions of western Indian lands:

166. Draft of Letter to John Jay, Explaining His Instructions, [17 October] 1780, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-02-02-0080> (last visited Oct. 17, 2018).

167. Committee Report for Negotiating a Treaty of Peace (Aug. 20, 1782), in 23 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 471–74 (1914).

168. *Id.* at 473–74.

169. *Id.* at 475.

170. *Id.* at 517.

171. WILLIAM HOGELAND, *AUTUMN OF THE BLACK SNAKE: THE CREATION OF THE U.S. ARMY AND THE INVASION THAT OPENED THE WEST* 92–93 (2017) (explaining that the U.S. and England were always going to fight over the expansion into western territory).

172. *Id.* at 92–93.

173. PAUL B. MOYER, *WILD YANKEES: THE STRUGGLE FOR INDEPENDENCE ALONG PENNSYLVANIA’S REVOLUTIONARY FRONTIER* 97 (2007) (noting that America’s merchants and economic elite focused on land speculation and western expansion over traditional commerce).

I have laboured since, & I hope not unsuccessfully, to convince the Members of Congress that while the United States and the State of Virginia are disputing about the right, or the terms of the Cession, Land jobbers and a lawless Banditti who would bid defiance to the Authority of either & more than probably involve this Country in an Indian War¹⁷⁴

When Washington left military service in 1783, his first action as a private citizen was to visit his extensive land holdings in western New York, Pennsylvania, and what became Ohio and Kentucky.¹⁷⁵ Washington spent thirty-four days traveling by horseback and discovered three things.¹⁷⁶ First, squatters occupied his land and defied his ownership.¹⁷⁷ Second, western settlers were drifting towards allegiances with the British and Spanish who controlled trade along the Great Lakes and the Mississippi River.¹⁷⁸ Third, American relocation to the West was creating extreme hostilities with Indian tribes.¹⁷⁹ Ultimately, Washington cut his trip short because of threats of violence from Indian tribes whose lands were under assault from unchecked western migration.¹⁸⁰

After returning from his western travels, Washington put a great deal of political effort into convincing the states to cede control over Indian territory to the federal government.¹⁸¹ Knox soon became Secretary of War to the Continental Congress, which at that time was the highest-ranking political position in the United States.¹⁸² Eventually Virginia ceded its western territory in 1784¹⁸³ and was quickly followed by Massachusetts¹⁸⁴

174. Letter from George Washington to Henry Knox, 23 September 1783, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/99-01-02-11847> (last visited Oct. 17, 2018).

175. W. W. Abbot, *George Washington, the West, and the Union*, 84 IND. MAG. HIST. 3, 8–10 (1988).

176. *Id.* at 10.

177. See Ablavsky, *supra* note 84, at 1018. Washington “found the ‘rage’ for land speculation unabated.” *Id.*

178. Abbot, *supra* note 175, at 11.

179. Ablavsky, *supra* note 84, at 1017.

180. JOHN E. FERLING, *THE ASCENT OF GEORGE WASHINGTON: THE HIDDEN POLITICAL GENIUS OF AN AMERICAN ICON* 247–50 (2009).

181. Reginald Horsman, *American Indian Policy in the Old Northwest, 1783–1812*, 18 WM. & MARY Q. 35, 36–37 (1961).

182. ROBERT M. S. McDONALD, *SONS OF THE FATHER: GEORGE WASHINGTON AND HIS PROTÉGÉS* 140 (2013).

183. Deed of Cession as Executed (Mar. 1, 1784), in 6 THE PAPERS OF THOMAS JEFFERSON 577, 577–80 (Julian P. Boyd ed., 1952).

184. Massachusetts Deed of Cession (Apr. 19, 1785), in 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 279, 280–82 (1933).

and Connecticut,¹⁸⁵ all ceding their claims to “territory.” This set the stage for the Northwest Ordinance, and eventually a new Constitution.

C. Development of the Northwest Ordinance

At first view, it may seem a little extraneous, when 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 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. [F]or I repeat it, again, and I am clear in my opinion, that policy and economy 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.

—George Washington¹⁸⁶

While Washington did not write the Northwest Ordinance, he and his military colleagues propelled it into existence.¹⁸⁷ The push for a new state in the Ohio Valley began near the end of the Revolutionary War, beginning as a petition from the officers of the Continental Army.¹⁸⁸ Unpaid and embarrassed by their poverty, 285 officers signed a letter urging Congress to buy land in the Ohio Valley from the Indian tribes, deliver their promised land bounties, and form a distinct government “to be admitted as one of the confederated States of America.”¹⁸⁹ Seven of the signatories were Generals—including Knox and Rufus Putnam.¹⁹⁰ Washington forwarded this plan to Congress: “[T]he appearance of so formidable a Settlement in the vicinity of their Towns (to say nothing of the barrier it would form against our other Neighbours) would be the most likely means to enable us to

185. Connecticut Deed of Cession (Sept. 14, 1786), in 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 653, 654–55 (1934).

186. Letter from George Washington to James Duane, 7 September 1783, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/99-01-02-11798> (last visited Oct. 17, 2018).

187. Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 936–37 (1995).

188. Timothy J. Shannon, *The Ohio Company and the Meaning of Opportunity in the American West, 1786–1795*, 64 NEW ENG. Q. 393, 395 (1991).

189. The Petition of the Subscribers, Officers in the Continental Line of the Army (June 16, 1783), in 1 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER 159, 159–60 (William Parker Cutler & Julia Perkins Cutler eds., 1888).

190. *Id.* at 160–67. Putnam was the promotor, and wrote a detailed plan for settlement that included peaceful relations with Indian tribes. *Id.* at 167–72.

purchase upon equitable terms of the Aborigines their right of [preoccupancy and to] induce them to relinquish our Territories, and to remove into the illimitable regions of the West.”¹⁹¹

Putnam pressed Washington to ensure Congress approved the officers’ petition.¹⁹² Washington responded that he “exerted every power [he] was master of” yet was not optimistic for a speedy response.¹⁹³ Instead, Jefferson led the early congressional efforts to plan for the western territories.¹⁹⁴ Fresh from a victory, the United States was not inclined to respect tribal rights to land and military strength.¹⁹⁵ The United States attempted to dictate treaties on exclusively American terms, intimidating some tribal leaders into signing without authority from their larger tribal government bodies.¹⁹⁶ However, Congress disbanded the Continental Army, and the tribes did not intend to withdraw from their lands.¹⁹⁷ They soon renounced the treaties and the Northwest Indian War followed.¹⁹⁸ Although Congress adopted an early version of the Northwest Ordinance in 1784, it was never effective because it failed to account for Indian rights.¹⁹⁹ Indian Nations grew increasingly hostile to encroachment on their lands, while British posts along the Great Lakes supplied trade goods and weapons.²⁰⁰

Congress appointed Knox Secretary of War in 1785, with 500 soldiers guarding the entire western frontier.²⁰¹ Large groups of southern

191. Letter from George Washington to Elias Boudinot, 17 June 1783, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-11469> (last visited Oct. 17, 2018).

192. Letter to George Washington from Rufus Putnam, 16 June 1783, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/99-01-02-11466> (last visited Oct. 17, 2018).

193. Letter from George Washington to Rufus Putnam, 2 June 1784, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/04-01-02-0286> (last visited Oct. 17, 2018).

194. Duffey, *supra* note 187, at 935.

195. Report on Indian Affairs in the Southern Department (May 28, 1784), in 27 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 456 (1928).

196. HORSMAN, *supra* note 84, at 16–24.

197. Horsman, *supra* note 181, at 39–40.

198. *Id.* at 42–44.

199. See generally Report on a Plan for a Temporary Government of the Western Territory (Apr. 23, 1784), in 26 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 274, 275–79 (1928) (highlighting the growing concern over Indian Nations and the British presence in the west).

200. See J. LEITCH WRIGHT JR., BRITAIN AND THE AMERICAN FRONTIER, 1783–1815 30 (1975).

201. See Election of a Secretary at War (Mar. 8, 1785), in 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 129, 129 (1933); see also Report of the Secretary at

Indians led by Dragging Canoe and Alexander McGillivray organized.²⁰² The frontier exploded with violence against settlers and state militias attempting to protect them.²⁰³ Knox soon raised an alarm with Congress through a series of reports, in which he proposed to reset national Indian policy, pay for voluntary Indian land cessions, regulate trade, and maintain a sufficient military force to keep the peace and restrain settlers who committed crimes against Indians.²⁰⁴ However, the Continental Congress lacked the authority to respond.²⁰⁵ In August of 1786, even before Shays' Rebellion, Washington wrote to Jay expressing concern that the Union would be unable to survive without a stronger centralized government.²⁰⁶ American efforts at imperialism sparked a military backlash from Indian Nations.²⁰⁷

By the end of 1786, the Indian tribes formed a confederacy with regular council meetings and a commitment to stop American settlements north of the Ohio River.²⁰⁸ This new union of Indian Nations met at Fort Detroit under British protection, adding considerably to its collective power.²⁰⁹ The Five Nations of the Iroquois, as well as Huron, Delaware, Shawnee, Ottawa, Chippewa, Pottawatomie, Miami, Cherokees and the Wabash Confederated, sent a unified demand to Congress. They demanded that the Ohio River be the permanent boundary with the United States, that land surveyors be prohibited from crossing the Ohio River, that "partial Treaties" were void, and that all treaties and land negotiations must be with the confederacy as a whole.²¹⁰

War on Indian Hostilities (July 10, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 327, 328 (1936).

202. Ablavsky, *supra* note 84, at 1028–31.

203. *Id.* at 1017, 1039. Conflicts over land triggered cycles of violence. Indians "killed or captured as many as three thousand Anglo-Americans between 1783 and 1790—two-thirds as many as had died fighting in the Revolution." *Id.* at 1039.

204. *Id.* at 1026–27.

205. *Id.*

206. Letter from George Washington to John Jay, 15 August 1786, FOUNDERS ONLINE, <https://founders.archives.gov/GEWN-04-04-02-0199> (last visited Oct. 17, 2018).

207. Horsman, *supra* note 181, at 339–40 (detailing how the U.S. Indian policy backfired in the Ohio Territory in part due to unfair treaty practices).

208. R. DOUGLAS HURT, THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1720–1830 100 (1996).

209. *Id.* at 100–01.

210. Henry Knox, Speech of the United Indian Nations at their Confederate Council (July 10, 1787), in PAPERS OF THE CONTINENTAL CONGRESS, 1774–1789, at 327–32.

In December 1786, Washington and Knox began to correspond about the need for a strong national government.²¹¹ Washington wrote that Great Britain “is at this moment sowing the Seeds of jealousy & discontent among the various tribes of Indians on our frontier . . . she will improve every opportunity to foment the spirit of turbulence within the bowels of the United States.”²¹² Knox responded in January of 1787, urging Washington to attend the Constitutional Convention, and laying out his famous sketch for a strong federal government “of the least possible powers.”²¹³ Indian lands were central to the concerns of the Framers from the beginning.

Putnam renewed his efforts to claim military land bounties and settle the Ohio Valley.²¹⁴ He and two other generals formed the Ohio Company, and in July 1787 sent Manasseh Cutler to New York to negotiate for the purchase of land, offering millions to the insolvent Continental Congress.²¹⁵ These were veteran officers who had experienced the French and Indian War and intended to settle in the Ohio Valley.²¹⁶ One of their principle terms of negotiation was a demand for an Indian peace policy in a revised Northwest Ordinance.²¹⁷

On July 10, 1787, Knox returned from a visit with Washington in Philadelphia, and submitted another alarming report to Congress about continued Indian hostilities:²¹⁸

And the whole western territory is liable to be wrested out of the hands of the Union by lawless adventurers, or by the savages . . . [i]n the present embarrassed state of public affairs and entire deficiency

211. Letter from George Washington to Henry Knox, 26 December 1786, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/04-04-02-0409> (last visited Oct. 17, 2018).

212. *Id.*

213. Letter to George Washington from Henry Knox, 14 January 1787, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/04-04-02-0444> (last visited Oct. 17, 2018).

214. Shannon, *supra* note 188, at 396.

215. *Id.* at 396, 402.

216. *Id.* at 396–97.

217. Letter to Nathan Dane (Mar. 16, 1787), in LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D. 193, 193–94 (William Parker Cutler & Julia Perkins Cutler eds., 1888) (requesting a change in Indian policy to remove instability in the region and improve economic opportunity).

218. See Letter to George Washington from Henry Knox, 29 May 1787, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/04-05-02-0185> (last visited Oct. 17, 2018).

of funds an [I]ndian war of any considerable extent and duration would most exceedingly distress the United States.²¹⁹

His report threatened great loss of revenue from western land sales and development.²²⁰ The next day, the first reading of the Northwest Ordinance appears in the Journals of the Continental Congress, with its pledge of utmost good faith towards the Indians and their lands.²²¹

Washington was deeply involved in the development of the Northwest Ordinance.²²² In early July 1787, a significant political shift brought finality to the Ordinance of 1787.²²³ Members of Congress who were also participating in the Convention began to travel from Philadelphia to New York.²²⁴ With Federalists now in the majority, Richard Henry Lee, Edward Carrington, John Kean, Melancton Smith, and Nathan Dane were appointed to a new drafting committee, which quickly produced the Northwest Ordinance.²²⁵ Edward Carrington served as chair,²²⁶ and had served under both Washington and Knox in the artillery at Yorktown.²²⁷

With his military colleagues in control of advising Congress on Indian policy, purchasing the first large settlement in the Ohio Valley, and the drafting committee, the Northwest Ordinance of 1787 closely resembles Washington's 1783 plan: purchase of tribal lands through treaty, settlements under federal control, and an orderly process for admission of new states.²²⁸

219. Report of the Secretary at War on Indian Hostilities (July 10, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 327, 331 (1936).

220. *Id.* at 329.

221. *Id.* at 340; see also HOGELAND, *supra* note 171, at 124 (“Informally he’d advised Members of the Congress on Indian policy and evaluated details of the relevant Northwest Ordinances, and given his immense prestige and expertise, informally usually meant decisively.”).

222. HOGELAND, *supra* note 171, at 124.

223. ROBERT ALEXANDER, THE NORTHWEST ORDINANCE: CONSTITUTIONAL POLITICS AND THE THEFT OF NATIVE LAND 88 (2017).

224. *Id.* at 86–87.

225. *Id.* at 87.

226. William Frederick Poole, *Dr. Cutler and the Ordinance of 1787*, 122 N. AM. REV. 229, 245 (1876).

227. William W. Reynolds, *The American Gunners at Yorktown*, J. AM. REVOLUTION (May 9, 2017), <https://allthingsliberty.com/2017/05/american-gunners-yorktown>.

228. Compare An Ordinance for the Government of the Territory of the United States North West of the River of Ohio, reprinted in 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 334–43 (1905) (providing a plan that allows Washington’s military colleagues to advise Congress on Indian policy and purchase the first large settlement in the Ohio Valley), with DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 127, at 1–4 (containing documents outlining and implementing Washington’s plan for Indian affairs).

D. *History and Structure Demonstrate the Indian Country Purpose of the Territory Clause*

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.²²⁹

Washington pressed forward with his plan for Indian affairs and western lands during the Constitutional Convention. He attended as a delegate from Virginia,²³⁰ and was elected unanimously as president of the Convention.²³¹

The Indian wars and western territories were not the only purpose of the Constitutional Convention, but fit into the fundamental structure of financial, military, and territorial reasons for a strong federal government.²³² Underlying Shays' Rebellion was the discontent of veterans who were receiving neither the pay for their service nor the land bounties promised in the west.²³³ The rebellion called into question the financial condition of the United States and the ability to secure the western lands.²³⁴ Washington had vast experience in the

229. U.S. CONST. art. IV, § 3.

230. *Virginia Delegates to the Constitutional Convention of 1787*, ENCYCLOPEDIA VIRGINIA, http://www.EncyclopediaVirginia.org/Virginia_Delegates_to_the_Constitutional_Convention_of_1787 (last visited Oct. 17, 2018) (stating that the Constitutional Convention occurred from May 14, 1787 to September 17, 1787).

231. DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 127, at 1 (outlining the principles that Washington planned that eventually formed the basis for the Indian policy of the Continental Congress); William P. Klady, *Constitutional Convention*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/constitutional-convention>.

232. See *The Constitution: An Enduring Document*, in *Outline of the U.S. Government* 4, U.S. DEP'T. OF STATE, https://photos.state.gov/libraries/amgov/30145/publications-english/1310_Outline_of_US_Government_English_TEXT_Low_WEB.pdf (providing that the Constitutional Convention's delegates aimed to construct a more centralized government to remedy the Articles of Confederation's inability to collect taxes, force states to contribute troops or equipment, or enforce decisions of state disputes over boundaries).

233. Rahul Tilva, *Shays' Rebellion*, GEORGE WASHINGTON'S MOUNT VERNON, <http://www.mountvernon.org/digital-encyclopedia/article/shays-rebellion>. Shays' Rebellion was a result of the monetary debt crisis after the American Revolutionary War. *Id.* Daniel Shays led a violent uprising against debt collections in Massachusetts that highlighted the inherent weaknesses of the national government under the Articles of Confederation. *Id.*

234. See *id.* (describing how the rebellion cast doubt on the state of the new country's finances and raised issues about the weak governmental structure under the Articles of Confederation).

western lands,²³⁵ his contemporaries recognized the weight of his influence,²³⁶ and his support among military veterans was nearly complete.²³⁷ The Territory Clause was the capstone to Washington's plan for western Indian lands and the admission of new states.

There are four reasons to postulate that the Territory Clause was originally intended to include Indian lands. First, Indian lands were expressly included within the territorial boundaries established by the Treaty of Paris.²³⁸ The Continental Congress insisted on including the tribal lands protected by the Proclamation of 1763, so there can be no doubt that the Framers considered these boundaries to be "territory . . . belonging to the United States."²³⁹ Jefferson, as the first Secretary of State, declared: "What did I understand to be our right in the Indian soil? 1. A right of preemption of their lands, that is to say, the sole [and] exclusive right of purchasing from them whenever they should be willing to sell. 2. A right of regulating the commerce between them and the whites."²⁴⁰ Here, Jefferson readily distinguishes the federal interest in Indian land title from the authority to regulate commerce.

Second, New York, Virginia, Massachusetts, and Connecticut had recently ceded their claims to 175 million acres of western Indian lands after a great debate that turned the tide of the Revolutionary War and consumed the deliberations of the Continental Congress.²⁴¹ The state

235. See generally CHARLES H. AMBLER, *GEORGE WASHINGTON AND THE WEST* 147, 149–50 (1936) (suggesting Washington's expertise in surveying western lands and noting his expansive land ownership).

236. See John C. Ranney, *The Bases of American Federalism*, 3 WM & MARY Q. 1, 28, 32 (Jan. 1946).

237. *Id.* at 17, 28 (describing Washington's influence in the Constitution's acceptance and his importance to military veteran support).

238. See Treaty of Peace, U.S.-Gr. Brit., art. II, Sept. 3, 1783, 8 Stat. 80 (outlining the geographical boundaries of the United States after the Revolutionary War).

239. In 1793, the Chief of Engineers of the War Department produced a map showing the territories of the United States, Britain, and Spain on the North American continent. This map demonstrates plainly that the United States asserted its territory to include all lands west to the Mississippi, as described in the Treaty of Paris. The region west of the Appalachians is described as the "Western Territory." The lands of various Tribal Nations are depicted on the map within that territory. See United States of North America with the British Territories and Those of Spain According to the Treaty of 1784, <https://catalog.archives.gov/id/78116872> (last visited Oct. 17, 2018).

240. Notes of a Conversation with Mr. Hammond (June 3, 1792), in 1 THE WORKS OF THOMAS JEFFERSON 219, 225 (Paul Leicester Ford, ed., 1904).

241. Acquisition of the Public Domain, 1781–1867, Bureau of Land Management, Public Land Statistics, Table I-1, Acquisition of the Public Domain BLM/OC/ST-16/003+1165, P-108-5. May 2016. The western land cessions at this stage included all of present-day Ohio, Indiana, Michigan, Illinois, Wisconsin, and half of Minnesota.

cessions demonstrated the Framers' understanding that the United States held title to a vast territory of tribal lands. The state cessions all used the term "territory," to describe the claims to western Indian lands transferred to the United States.²⁴² The Northwest Ordinance also uses the term "territory" repeatedly to describe the vast land area northwest of the Ohio River.²⁴³ It is reasonable to assume that the Framers used the term in the same sense as the contemporaneous expressions of four state legislatures and Congress.

Third, the Northwest Ordinance specifically called for federal rules and regulations on tribal lands.²⁴⁴ It provided that "laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to [Indian tribes], and for preserving peace and friendship with them."²⁴⁵ A fundamental purpose of the Territory Clause was to address the problems of crime and violence on the tribal lands.

Finally, the Indian territory was the only federal territory in existence at the time. In the current era, we think of the Territory Clause for the management of National Forests or the territorial islands such as Puerto Rico or Guam.²⁴⁶ However, none of these existed in 1787, and the drafters of the Constitution could not have imagined they would.

The purpose of the Territory Clause for tribal lands is evident not only in its structure and history, but also in the writing of the Framers. In the *Federalist Papers* No. 7, Alexander Hamilton stated that the purpose of the Territory Clause was to manage these recently ceded western lands and avoid conflict between the states.²⁴⁷ Furthermore, in the *Federalist Papers* No. 38, James Madison expressed a strong view

After the North Carolina and Georgia cessions, the total was 237 million acres ceded to the federal government. *Id.*

242. *See supra* notes 161, 183–185 and accompanying text.

243. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 314–20 (1936).

244. *Id.* at 318.

245. *Id.*

246. *See* *Light v. United States*, 220 U.S. 523, 536–37 (1911) (holding that Congress has the authority to establish national forest reservations under the Territory Clause); *United States v. Rivera Torres*, 826 F.2d 151, 154 (1st Cir. 1987) ("We begin with the proposition that Congress can, pursuant to the plenary powers conferred by the Territory Clause, legislate as to Puerto Rico in a manner different from the rest of the United States" (citations omitted)).

247. Alexander Hamilton, *The Federalist No. 7*, [17 November 1787], FOUNDERS ONLINE, <http://Founders.archives.gov/documents/Hamilton/01-04-02-0159> (last visited Oct. 17, 2018).

that the Articles contained no authority to govern the ceded western lands, and that the new constitution should contain such authority.²⁴⁸

This purpose of the Territory Clause was not the subject of controversy during the Constitutional Convention because the need for federal authority was apparent. In the *Federalist Papers* No. 43, Madison wasted little ink: “This is a power of very great importance . . . rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.”²⁴⁹

Just prior to the Constitutional Convention, Georgia and South Carolina entered the Treaty of Beaufort to settle a border dispute. This resolved South Carolina’s claim to a narrow strip of western land, ceding to the United States all “right of preemption of the soil from the native Indians.”²⁵⁰ Only the southern claims of North Carolina and Georgia remained.²⁵¹ Madison’s Journal of the Constitutional Convention demonstrates how these were handled, and confirms the purpose of the Territory Clause to provide federal control of the Indian lands reserved by the Proclamation.²⁵²

E. Journal of the Constitutional Convention Regarding the Territory Clause

On August 30, 1787, Daniel Carroll of Maryland, the last holdout to sign the Articles of Confederation, began the discussion of the “crown lands” that led to the text of the Territory Clause.²⁵³ Carroll suggested, “that it might be proper to provide, that nothing in the Constitution should affect the right of the United States to lands ceded by Great Britain in the treaty of peace.”²⁵⁴

After some discussion of the process for new states, Carroll again offered his proviso of federal jurisdiction for all lands “ceded to [the United States] by the treaty of peace.”²⁵⁵ Madison suggested that the

248. James Madison, *The Federalist No. 38*, [12 January] 1788, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/01-10-02-0228> (last visited Oct. 17, 2018).

249. James Madison, *The Federalist No. 43*, [23 January] 1788, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Madison/01-10-02-0248> (last visited Oct. 17, 2018).

250. LAWS OF THE UNITED STATES, RESOLUTIONS OF CONGRESS UNDER THE CONFEDERATION, TREATIES, PROCLAMATIONS, AND OTHER DOCUMENTS HAVING OPERATION AND RESPECT TO THE PUBLIC LANDS 35 (1817).

251. *Id.*

252. James Madison, JOURNAL OF THE FEDERAL CONVENTION 654, 704 (E.H. Scott ed., 1893) [hereinafter Madison, JOURNAL OF THE FEDERAL CONVENTION] (suggesting the United States has power to regulate commerce with Indian tribes).

253. Mary Virginia Geiger, DANIEL CARROLL, A FRAMER OF THE CONSTITUTION (1943).

254. Madison, JOURNAL OF THE FEDERAL CONVENTION, *supra* note 252, at 634.

255. *See id.* at 634–37.

proviso should not affect the claims of particular States. Abraham Baldwin from Georgia raised the doctrine of *uti possidetis*, a principle of international law that newly formed states should have the same territorial rights as before their independence.²⁵⁶ By this, Baldwin intended to reserve Georgia's claim to western lands.²⁵⁷

Madison suggested a savings clause to address Baldwin's concern.²⁵⁸ There was a postponement on the issue, following which Gouverneur Morris proposed the current text of the Territory Clause.²⁵⁹ Gouverneur Morris was a brilliant lawyer, leading drafter of the Constitution, and one of Washington's strongest congressional supporters.²⁶⁰ He wrote, "The Legislature shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution contained, shall be so construed as to prejudice any claims, either of the United States or of any particular State."²⁶¹

Madison's involvement is also noteworthy. He was a leading advocate for addressing the perplexing problems of Indian Affairs under the Articles of Confederation.²⁶² The Articles had created ambiguously shared power of "regulating the trade and managing 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."²⁶³ With the borders of seven states essentially undefined, this provision was meaningless. In 1784, he wrote to James Monroe, "If this proviso be taken in its full latitude, it must destroy the authority of Congress altogether, since no act of Cong[ress] within the

256. See *id.* at 638; *Uti Possidetis Juris*, LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/uti_possidetis_juris (last visited Oct. 17, 2018).

257. See Madison, JOURNAL OF THE FEDERAL CONVENTION, *supra* note 252, at 638.

258. *Id.* at 637–38.

259. See *id.* at 638.

260. See *Delegates to the Constitutional Convention: Gouverneur Morris*, TEACHING AM. HIST., http://teachingamericanhistory.org/static/convention/delegates/morris_g.html (last visited Oct. 17, 2018).

261. Madison, JOURNAL OF THE FEDERAL CONVENTION, *supra* note 252, at 638. The proposed language was slightly amended and added to Article IV of the Constitution. See *id.* at 760.

262. See Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1152–53, 1155 (1995) (highlighting Madison's role in ensuring that the federal government, rather than state governments, retained authority to safeguard Indian affairs).

263. ARTICLES OF CONFEDERATION OF 1777, art. IX.

limits of a State can be conceived which will not in some way or other encroach upon the authority [of the] States.”²⁶⁴

At the beginning of the Constitutional Convention, Madison had proposed a series of powers for Congress, the first three all related to issues of western territory and Indian tribes: (1) disposing of unappropriated lands of the United States; (2) instituting temporary governments for new states formed in those lands; and (3) regulating affairs with the Indians, both within and outside the limits of the United States.²⁶⁵ Madison’s proposal for power to regulate all affairs with the Indians did not succeed entirely and was limited to regulating commerce with the Indian tribes.²⁶⁶ However, he and the other federalists expanded the federal power “to dispose of” unappropriated lands to include the power of “all needful rules and regulations respecting the territory or other property belonging to the United States.”²⁶⁷ This provided the federal government with the authority to regulate wherever it held territory, including Indian lands where the federal government claimed the right of preemption.²⁶⁸ By suggesting the savings clause for “any claims of the United States, or of any particular state,” Madison quelled further debate and entrenched federal authority over Indian territory in the text.²⁶⁹

All state claims to Indian lands were resolved through subsequent land cessions. North Carolina ceded its lands at the time of ratification.²⁷⁰ Georgia maintained a claim on lands until 1802 when its cession required that “the United States shall, at their own expense, extinguish . . . the Indian title to all the other lands within the State of Georgia.”²⁷¹ This last land cession from an original colony settled any questions of claims for state authority on Indian lands.

264. Letter from James Madison to James Monroe, 27 November 1784, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-08-02-0083> (last visited Oct. 17, 2018).

265. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 477 (1987).

266. See Clinton, *supra* note 262, at 1153–55 (finding that, although Madison’s proposal was not fully incorporated, Madison was the “primary proponent and architect of the Indian Commerce Clause”).

267. U.S. CONST. art. IV, § 3, cl. 2.

268. Kyle S. Conway, *Inherently or Exclusively Federal: Constitutional Preemption and the Relationship Between Public Law 280 and Federalism*, 15 U. PA. J. CONST. L. 1323, 1328–29 (2013) (listing several federal statutes that allow the government to regulate activities on Indian lands).

269. U.S. CONST. art. IV, § 3, cl. 2.

270. An Act to Accept a Cession of the Claims of the State of North Carolina to a Certain District of Western Territory, ch. 6, 1 Stat. 106 (1790).

271. See DONALDSON, *supra* note 74, at 81.

Thus, the purpose of the Territory Clause, as drafted, was to grant authority to the federal government to govern the huge expanse of Indian territory that stretched both inside and outside the boundaries of states.²⁷² President Washington and the First Congress seized that power immediately after ratification.

F. The Indian Trade and Intercourse Act of 1790 and Washington's Promise to Indian Nations

Washington was sworn in as the first President of the United States on April 30, 1789. He was anxious to come to peaceful terms with the Indian tribes. While North Carolina continued to debate ratification and its western land cession, Knox continued as Secretary of War.²⁷³ In 1789, Knox sent an extensive memorandum to Washington compiled by a group of federal Indian commissioners who had traveled to meet with the southern tribes.²⁷⁴ The memorandum reported discussions with Piominko, who was the Principal War Chief of the Chickasaw

272. The relation of the Territory Clause to Indian lands was noted by early American legal scholar James Kent, in his *Commentaries on American Law*:

The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain The principle is, that the Indians are . . . to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country. The constitution gave congress the power to dispose of, and to make all needful rules and regulations respecting the territory, or other property belonging to the United States, and to admit new states into the union.

1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 258 (6th ed. 1848), <https://archive.org/details/commentariesonam01kent>.

Kent also recognized the provisions of the Northwest Ordinance as principles of law governing all tribal lands:

But while the ultimate right of our American governments to all the lands within their jurisdictional limits, and the exclusive right of extinguishing the Indian title by possession, is not to be shaken; it is equally true, that the Indian possession is not to be taken from them, or disturbed, without their free consent, by fair purchase, except it be by force of arms in the event of a just and necessary war.

3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 311–12 (1st ed. 1828).

273. MARK PULS, HENRY KNOX: VISIONARY GENERAL OF THE AMERICAN REVOLUTION 200–01 (2008).

274. Washington's Memoranda on Indian Affairs, 1789, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-04-02-0333> (last visited Oct. 17, 2018).

Nation, and highlighted the need for federal authority over Indian land cessions from the states.²⁷⁵

Knox's memorandum also includes a recommendation for licensing Indian traders, to prevent fraudulent traders from creating strife with the Indian tribes.²⁷⁶ Knox wrote to Washington again on July 7, 1789:

It would reflect honor on the new government and be attended with happy effects were a declarative Law to be passed that the Indian tribes possess the right of the soil of all lands within their limits respectively and that they are not to be divested thereof but in consequence of fair and bona fide purchases, made under the authority, or with the express approbation of the United States.²⁷⁷

On January 4, 1790, in a comprehensive statement of Indian affairs along the southern frontier, Knox estimated the cost of war and peace with the Indian Nations along the southwestern frontier, and concluded that peace and diplomacy were more honorable and more cost-effective than war:

The various opinions which exist on the proper mode of treating the Indians, require that some system should be established on the subject.

That the [I]ndians possess the natural rights of man, and that they ought not wantonly to be divested thereof cannot be well denied.

Were these rights ascertained, and declared by law—were it enacted that the [I]ndians possess the right to all their territory which they have not fairly conveyed, and that they should not be divested thereof, but in consequence of open treaties, made under the authority of the United States, the foundation of peace and justice would be laid.²⁷⁸

As a result, Congress enacted the Indian Trade and Intercourse Act on July 22, 1790.²⁷⁹ It contains virtually identical legal principles to those incorporated into the Proclamation of 1763 and repeated in the

275. Piominko believed North Carolina would probably adopt the Constitution and cede its western lands to the United States, and he expected better protection from the federal government than North Carolina had provided, citing 25 killed, 8 wounded, and a considerable number of horses taken in one summer. Washington's Memoranda on Indian Affairs, 1789, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-04-02-0333> (last visited Oct. 17, 2018).

276. *Id.*

277. Letter to George Washington from Henry Knox, 7 July 1789, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-03-02-0067> (last visited Oct. 17, 2018).

278. Letter to George Washington from Henry Knox, 4 January 1790, FOUNDERS ONLINE, <http://Founders.archives.gov/documents/Washington/05-04-02-0353> (last visited Oct. 17, 2018).

279. Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790).

Northwest Ordinance: (1) regulation of trade in Section 3; (2) a federal right of preemption to tribal lands in Section 4; and (3) criminal laws to prevent violence between Indians and non-Indians in Section 5.²⁸⁰

Two things are noteworthy in the statutory language. First, it affirms a federal right of preemption in tribal lands, a property or territorial interest tied to the Framers' understanding that the federal government is trustee and tribal lands cannot be sold without tribal consent.²⁸¹ Second, the criminal provisions demonstrate that Congress did not limit its authority to only Indian commerce or treaties. The First Congress asserted criminal jurisdiction in Indian territory.²⁸²

Soon after enactment of the Indian Trade and Intercourse Act, President Washington wrote to the Seneca Nation of New York in 1790:

I am not uninformed that the six nations have been led into some difficulties with respect to the sale of their lands since the peace. But

280. *Id.* at 137–38. The three sections of the Indian Trade and Intercourse Act asserting these rights are:

SEC. 3. *And be it further enacted*, That every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

SEC. 4. *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

SEC. 5. *And be it further enacted*, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Id.

281. *Id.*

282. *Id.* at 137.

I must inform you that these arose before the present government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands.

But the case is now entirely altered—the general government only has the power to treat with the Indian nations, and any treaty formed and held without its authority will not be binding.

Here then is the security for the remainder of your lands—No state nor person can purchase your lands, unless at some public treaty held under the Authority of the United States. The general Government will never consent to your being defrauded—But it will protect you in all your just rights

But your great object seems to be the security of your remaining lands, and I have therefore upon this point, me[a]nt to be sufficiently strong and clear.

That in future you cannot be defrauded of your lands—That you possess the right to sell, and the right of refusing to sell your lands.²⁸³

Washington's covenant with the Indian Nations to protect Indian lands and hold them in trust is woven into the fiber of the Territory Clause, the Northwest Ordinance, and is in effect today.²⁸⁴ Washington's commitment will remain in effect so long as the United States remembers the promises made to Indian Nations during the framing of the Constitution.

II. THE ORIGIN OF THE DEFINITION OF INDIAN COUNTRY

Washington and his military commanders used the term “Indian country” during the Revolutionary War, referring to land that was occupied and held by Indian tribes.²⁸⁵ This term entered federal law

283. Letter from George Washington to the Seneca Chiefs, 29 December 1790, FOUNDERS ONLINE, (alterations in original), <https://founders.archives.gov/documents/Washington/05-07-02-0080> (last visited Oct. 17, 2018).

284. See 25 U.S.C. § 177 (2012) (“No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.”); see also *supra* notes 52–64, 81–83.

285. See, e.g., Letter from George Washington to Major General Philip Schuyler, 11 February 1779, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/03-19-02-0178> (last visited Oct. 17, 2018) (“The route being fixed on, what time . . . will it require to penetrate to the heart of the Indian country or to the principal object or point of the expedition?”); Letter to George Washington from Timothy Pickering, 19 May 1778, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/03-15-02-0162> (last visited Oct. 17, 2018) (“Congress have in

early on, and is still in use today. Indian country is defined at 18 U.S.C. § 1151 (2012), and determines the geographic scope of federal, tribal, and state government jurisdiction for many purposes:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.²⁸⁶

This Part provides a detailed legislative history of the definition of “Indian country,” demonstrating its roots in the Territory Clause. The definition was created during codification of Title 18 of the United States Code in 1948.²⁸⁷ Because of this, its legislative history is very limited. The short note from the House Committee on the Revision of the Laws cites a few cases and provides that: “This section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law.”²⁸⁸ In light of this scarce record, this Part traces the history of the definition of Indian country at 18 U.S.C. § 1151.

A. *Indian Country in the Early Federal Laws*

Knox developed the first Indian Trade and Intercourse Act in 1790 and included the undefined term “Indian country,” using it interchangeably with “any town, settlement or territory belonging to any nation or tribe of Indians.”²⁸⁹

The first Indian Trade and Intercourse Act included provisions punishing crimes committed within the Indian territory.²⁹⁰ The House of Representatives debated the criminal provisions during

contemplation an expedition against Detroit, or at least into the Indian country, that they may strike at the root of the mischief.”)

286. 18 U.S.C. § 1151 (2012).

287. Act of May 24, 1949, ch. 139, § 25, 63 Stat. 89, 94 (1949); Act of June 25, 1948, ch. 645, 62 Stat. 683, 757 (1948).

288. H.R. Rep. No. 80-304, at A91 (1947).

289. Act of July 22, 1790, ch. 33, § 5, 1 Stat. 137, 138 (1790).

290. *Id.*

reauthorization in December of 1792. Some urged removal of the criminal provisions because they were fully provided for by treaties or by the laws of the States.²⁹¹ The motion was defeated with an argument based in the Territory Clause. Specifically, the government has the power to legislate in the territories because without this power there cannot be peace with the Indian tribes, and it was impossible for every case to be addressed by the terms of treaties.²⁹²

Congress reauthorized the Indian Trade and Intercourse Act successively every three years until 1802 when Congress made the Act permanent.²⁹³ The amendments grew more specific to address problems on the frontier, and succeeding versions described “Indian country” by the boundaries established in treaties. For example, the 1796 Act fixed a western boundary and required passports for non-Indians to travel across the border, providing that the line could be adjusted for ongoing treaty cessions.²⁹⁴ In 1799 and 1802, the boundary was conformed to new treaties.²⁹⁵ In both of these new laws, the terms “Indian country” and “Indian territory” are undefined and used synonymously.²⁹⁶

In 1817, Congress enacted the first version of the Indian Country Crimes Act.²⁹⁷ It provided for federal punishment of crimes whether committed by an Indian or non-Indian. However, it provided an exception for “any offence committed by one Indian against another.” This exception is still found in current law.²⁹⁸ While the 1817 Act did not use the term “Indian country,” it applied to “any town, district, or territory, belonging to any nation or nations, tribe or tribes, of Indians.”²⁹⁹

The Indian Trade and Intercourse Act of 1834³⁰⁰ was a significant adjustment of federal Indian policy in the wake of the Indian Removal Act³⁰¹ and President Jackson’s policy of dispossessing the southeastern

291. 2 ANNALS OF CONGRESS 750–51 (Gales & Seaton eds., 1792).

292. *Id.* at 751.

293. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139 (1802); Act of Mar. 3, 1799, ch. 46, 1 Stat. 743 (1799); Act of May 19, 1796, ch. 30, 1 Stat. 469 (1796); Act of Mar. 1, 1793, ch. 19, 1 Stat. 329 (1793).

294. *See* § 3, 1 Stat. at 470.

295. *See* § 1, 2 Stat. at 139–41; § 1, 1 Stat. at 743–44.

296. *See* 2 Stat. 139; 1 Stat. 743.

297. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (1817) (codified as amended at 18 U.S.C. § 1152 (2012)).

298. *Id.*

299. *Id.*

300. Act of June 30, 1834, ch. 161, 4 Stat. 729 (1834).

301. Act of May 28, 1830, ch. 148, § 5, 4 Stat. 411, 412 (1830).

tribes of their lands and relocating them to Oklahoma.³⁰² The 1834 Act's updated definition of "Indian country" was intended to hasten the removal of the southeastern tribes to the West:

That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.³⁰³

This new definition caused significant confusion, particularly over tribal lands located within the boundary of a state but expressly exempted from the state's jurisdiction by treaty or statute.³⁰⁴ The term "Indian country" became even more perplexing after 1874 when Congress omitted the definition. The Revised Statutes of 1874 was the first codification of federal laws and repealed all prior federal statutes passed.³⁰⁵ The Indian Trade and Intercourse Act of 1834 was codified in its entirety, omitting only the definition of "Indian country."³⁰⁶ The omission was likely intentional, as treaty boundaries had shifted significantly westward.

302. Jackson passed the Indian Removal Act in violation of Supreme Court rulings that American Indian lands were protected by treaties. Jackson's aggressive relocation policies resulted in the mass displacement and forced resettlement of more than 100,000 Indians. For a discussion of the consequences of Indian removal policies in the United States, see T.S. Twibell, *Rethinking Johnson v. M'Intosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001)*, 23 GEO. IMMIGR. L.J., 129, 153–54 (2008).

303. See § 1, § 4 Stat. at 729 ("That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.").

304. See, e.g., *United States v. Seveloff*, 27 F. Cas. 1021, 1024 (D.C.D. Or. 1872) (No. 16,525) (holding that the 1834 definition of Indian country did not extend to Alaska because Alaska was not United States territory until 1868, but cautioning that the conclusion was made "with hesitation," and "subject to correction" until Congress clarified the definition of Indian country); *United States v. Ward*, 28 F. Cas. 397, 398–99 (C.C.D. Kans. 1863) (No. 16,639) (struggling to determine whether the 1834 Act applied to Indians residing in Kansas, which became a state after the passage of the Act); see also H.R. Rep. No. 23-474, at 4 (1834) (noting that the limits and extent of Indian country is difficult to determine with accuracy because of the various treaties since 1802 that adjusted its boundaries).

305. See generally 1 REVISED STATUTES OF THE UNITED STATES (2d ed. 1878).

306. *Id.* at 369–70.

In *Bates v. Clark*,³⁰⁷ the Supreme Court grappled with this statutorily undefined “Indian country.”³⁰⁸ An Army officer had seized a shipment of alcohol, and the question presented was whether this occurred within the federal jurisdiction of “Indian country.”³⁰⁹ Justice Miller was undeterred by the lack of a specific definition and observed that “[n]otwithstanding the immense changes which [had] since taken place in the vast region covered by the act of 1834,” Congress had not changed the definition of Indian country nor changed the large body of laws governing the territory.³¹⁰ From this, he reasoned that Congress intended for the definition of Indian Country to be adaptable to “the altered circumstances of what was then Indian country as to enable [Congress and the courts] to ascertain what it was at any time since then.”³¹¹

The Court then adopted the territorial concept of Indian lands that was the constant in the Indian Trade and Intercourse Acts from 1790 to 1834: “The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer.”³¹²

Congress soon created a different rule in the Major Crimes Act of 1885.³¹³ In a departure from previous Indian legislation, Congress did not define federal jurisdiction in terms of “Indian country.” Instead, the Major Crimes Act was written to apply “within the limits of any Indian reservation,” including those “within the boundaries of any state.”³¹⁴ With its zeal to punish Indian crime, Congress appears to have deliberately expanded the scope of federal criminal jurisdiction to include fee lands on Indian reservations. By 1885, lands within many reservations were allotted to individual Indians in fee under the terms of treaties.³¹⁵ Additionally, some reservation lands were granted to states

307. 95 U.S. 204 (1877).

308. *See id.* at 206–07 (explaining that, despite the addition of new states and territories, “Congress has not thought it necessary to make any new definition of Indian country” since the 1834 Indian Trade and Intercourse Act, over forty years earlier).

309. *Id.* at 204–06.

310. *Id.* at 207.

311. *Id.*

312. *Id.* at 208.

313. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362 (1885) (codified as amended at 18 U.S.C. § 1153 (2012)).

314. *Id.* § 9, 23 Stat. at 385.

315. *See* Marc Slonim, Speech at Gonzaga University Law School Indian Law Lecture Series: *Indian Country, Indian Reservations, and the Importance of History in Indian Law*

under federal land grants and for rights-of-way.³¹⁶ Congress later incorporated this expanded boundary into the definition of “Indian country.”

The General Allotment Act of 1887³¹⁷ accelerated the process of transferring trust lands to fee status, cutting up reservations into individual allotments, opening the remainder to settlement, and granting citizenship to Indian people who received lands in fee.³¹⁸ Indian tribes lost more than ninety million acres, or two-thirds of tribal land base.³¹⁹ In his 1901 inauguration address, President Roosevelt restated the vision for Indian allotment: “The General Allotment Act is a mighty pulverizing engine to break up the tribal mass . . . Under its provisions some sixty thousand Indians have already become citizens of the United States.”³²⁰ As the General Allotment Act began to run its course, legal questions began to arise about federal jurisdiction with the changing circumstances.

These questions culminated in the controversial Supreme Court decision in *In re Heff*³²¹ in 1905, which declared that Indians who were granted citizenship by the General Allotment Act were subject to state jurisdiction, and were not to receive the protections of federal criminal laws within Indian reservations.³²² This was perhaps the nadir for the United States regarding the commitments made by the constitutional founders to the Indian tribes. The decision caused significant controversy because Indian people were no longer protected by federal laws. The Supreme Court soon cut back on *Heff*, reconsidering the text of the Major Crimes Act and Congress’s power under the Territory Clause.

(Oct. 27, 2009), in 45 GONZ. L. REV. 517, 521–22, 524, 527 (2009–2010) (describing the progression of Indian land ownership from 1802–1903).

316. *Id.* at 524.

317. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887).

318. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8–10 (1995) (“Under the [General Allotment] Act, individual Indians received a certain number of acres in reservation land. . . . [T]he allottee was expected to assimilate to agriculture, to Christianity, and to citizenship.”).

319. Slonim, *supra* note 315, at 522.

320. See Theodore Roosevelt’s First Annual Message, December 3, 1901, 35 Cong. Rec. 81, at 90 (1902).

321. 197 U.S. 488 (1905), *overruled in part by* United States v. Nice, 241 U.S. 591 (1916).

322. See *id.* at 50 (declaring that “when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress”).

B. *Celestine* + *Sandoval* + *Pelican* = 18 USC § 1151(a)(b) and (c)

In three cases, the Supreme Court settled the question of the scope of federal jurisdiction in Indian Country, and Congress codified their rulings into the current statutory definition of Indian Country. The most important is *United States v. Celestine*.³²³

Celestine is a lynchpin of contemporary federal Indian law. Often cited in cases involving reservation diminishment,³²⁴ or the Indian canon of construction,³²⁵ its broader significance is generally unrecognized. The impact of *Celestine* on federal Indian law is seen in a 1911 report to Congress from the Secretary of Interior.³²⁶ The report explained that after the decision in *Heff*, the “question of federal police jurisdiction over allotted Indian territories was up in the air.” As an answer to that question, the report cited the Court’s holding in *Celestine* that “upheld the jurisdiction of the Federal Courts upon Indian allotments within an Indian reservation even though the allotment had been patented” as the answer to that question.³²⁷

Consider if the *Celestine* Court had ruled the other way and continued to follow *Heff*.³²⁸ *Kagama* and its progeny had shifted the legal analysis away from federal territorial jurisdiction, and towards a notion of Indians as trust wards.³²⁹ As Indians became citizens under the allotment laws, the notion of Indian incompetency was not sustainable.³³⁰ Under *Heff*, Indians who received allotments would be outside federal jurisdiction.³³¹ State jurisdiction would have entered all allotted reservations, and reservation borders would have in effect vanished. Roosevelt’s vision of a “pulverizing engine” would have become reality.³³²

323. 215 U.S. 278 (1909).

324. See, e.g., *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

325. See Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 2–3, 6, 8, 9, 21–22 (2013) (explaining the canons, or different methods of judicial interpretation, in approaching ambiguities in federal statutes and treaties relating to the Indian nations).

326. See R.A. BALLINGER, LETTER FROM THE SECRETARY OF INTERIOR IN RESPONSE TO SENATE RESOLUTION OF JANUARY 13, 1911, S. DOC. NO. 61-707 (1911).

327. *Id.* at 13.

328. 197 U.S. 488 (1905). *Heff* was later overturned in *United States v. Nice*, which relied on the principle from *Celestine* that federal jurisdiction was based on tribal land status. See 241 U.S. 591, 601 (1916).

329. See, e.g., *United States v. Kagama*, 118 U.S. 375, 383–84 (1885).

330. See Royster, *supra* note 318, at 9–10.

331. See *In re Heff*, 197 U.S. at 509.

332. See Theodore Roosevelt’s First Annual Message, December 3, 1901, 35 Cong. Rec. 81, at 90 (1902).

In direct reliance on the Territory Clause, *Celestine* restored federal criminal authority in Indian country. Justice Brewer wrote for a unanimous Court and began his analysis with the Territory Clause:

By the second clause of [Section] 3, Art. IV, of the Constitution, to Congress, and to it alone, is given “power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” From an early time in the history of the government, it has exercised this power, and has also been legislating concerning Indians occupying such territory.³³³

Justice Brewer then explained the scope of federal jurisdiction under the Major Crimes Act as including “all land within the limits of any reservation”:

[It] was decided, in *Bates v. Clark* . . . , that all the country described in the act as “Indian country” remains such “so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.”

But the word “reservation” has a different meaning The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and, when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.³³⁴

From *Celestine*, we can see how § 1151(a) of the Indian country definition was constructed: all land “within the limits of any Indian reservation” is lifted directly from the text of what was then the Major Crimes Act.³³⁵ “Notwithstanding the issuance of any patent” is the holding in *Celestine* that Indian allotments are not excepted from the reservation.³³⁶ As stated by the Court: “Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits,

333. *United States v. Celestine*, 215 U.S. 278, 284 (1909).

334. *Id.* at 285 (citations omitted).

335. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2012)).

336. *Celestine*, 215 U.S. at 278, 289–91. At least one court has noted this derivation of 18 U.S.C. § 1151(a) from *Celestine*. See *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1084 (D. Utah 1981) (noting that after *Celestine*, “[t]he courts continued to expand the definition of Indian country until 1948, when Congress codified these judicial expressions into statutory law as 18 U.S.C. § 1151”).

also patented, both tracts remained within the reservation until Congress excluded them therefrom.”³³⁷

The *Celestine* Court relied on an important tax decision six years earlier, *United States v. Rickert*,³³⁸ which preempted state taxes within Indian country in direct reliance on the Territory Clause.³³⁹ A young Willis Van Devanter, who served as Assistant Attorney General for the Department of the Interior from 1897 to 1903, instituted the lawsuit and argued for the government.³⁴⁰ In 1903, President Roosevelt appointed Justice Van Devanter an appellate judge on the Eighth Circuit.³⁴¹ President Taft nominated him for the Supreme Court, where he served from 1910 to 1937 and wrote many opinions addressing federal Indian law.³⁴² Justice Van Devanter gained a deep understanding of both federal land law and Indian law long before he became a Justice. Beginning with *Rickert*, Justice Van Devanter’s reasoning from the Territory Clause pervades the cases codified into the statutory definition of “Indian country.”

Justice Van Devanter authored *United States v. Sandoval*,³⁴³ widely recognized as a landmark decision affirming the federally-protected status of tribal lands. Here again, the citizenship of Indians did not prevent Congress from enacting laws to protect and benefit tribes.³⁴⁴ Subsection (b) of the Indian country definition is a verbatim excerpt from Justice Van Devanter’s opinion:

Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over *all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.*³⁴⁵

337. *Celestine*, 215 U.S. at 284.

338. 188 U.S. 432 (1903).

339. *Id.* at 439.

340. *See* Collins, *supra* note 325, at 29.

341. *Id.*

342. *Id.* at 30.

343. 231 U.S. 28 (1913).

344. *See id.* at 45–46.

345. *Compare id.* (emphasis added), with 18 U.S.C. § 1151(b) (2012) (incorporating the emphasized language).

The *Sandoval* decision relied on the terms of the New Mexico Enabling Act³⁴⁶ which reserved Indian lands to federal jurisdiction.³⁴⁷ The Enabling Act demonstrates the close relationship between creation of new states and reservation of federal lands contemplated in Article IV, Section 3. Its language echoes the Territory Clause:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States *or any prior sovereignty*, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.³⁴⁸

The Court in *Sandoval* cites *Celestine* and *Rickert* for the principle that federal jurisdiction is not based on citizenship, but on the federal status of Indian lands.³⁴⁹ The *Sandoval* Court also found that fee simple lands held communally by an Indian tribe are federal territory.³⁵⁰

346. Act of June 20, 1910, ch. 310, 36 Stat. 557 (1910).

347. See *Sandoval*, 231 U.S. at 36–37 (articulating the purposes of the Enabling Act, which included treating the lands of the Pueblo Indians as Indian country).

348. 36 Stat. at 569. “Any prior sovereignty” is a reference to the 1848 transfer of lands from Mexico to the United States through the Treaty of Guadalupe Hidalgo. Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Mex.-U.S., art. V, VII, IX, XI, May 30, 1848, 9 Stat. 922. Under the laws of Spain and Mexico, Indian lands were similarly subject to a right of preemption. See *United States v. Candelaria*, 271 U.S. 432, 442 (1926). Just as with the Treaty of Paris in 1783, this right of preemption transferred to the United States under the Treaty of Guadalupe Hidalgo, while Indian tribes retained title. See 9 Stat. at 930.

349. *Sandoval*, 231 U.S. at 48.

350. The Court explained:

[i]n other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the Government’s guardianship over those tribes and their affairs.

See *id.* (citing *United States v. Wright*, 229 U.S. 226 (1913); *Gritts v. Fisher*, 224 U.S. 640 (1912); *Heckman v. United States*, 224 U.S. 413 (1912); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902); *Stephens v. Cherokee Nation*, 174 U.S. 445, 488 (1899)). In *United States v. Chavez*, the Court again found that the Pueblo of Isleta’s “communal ownership of the full title in fee simple” is not an obstacle to federal protection of Indian lands. See 290 U.S. 357, 363 (1933). Patented fee title likewise does not undermine Indian country status of Creek Nation lands. See *United States v. Creek Nation*, 295 U.S. 103, 109–11 (1935).

Sandoval is particularly significant because the lower court had relied on *Heff* to find that Pueblo lands were subject to state police jurisdiction and state taxation and land seizure along with “emancipation from federal control.”³⁵¹ *Celestine* and *Sandoval* together marked a significant retreat from the assimilationist policies of the nineteenth century, and both were based on federal territorial authority in Indian country.

The other source of § 1151(b) is *United States v. McGowan*.³⁵² In 1917, the federal government purchased twenty acres near Reno, Nevada for three traditionally nomadic Indian tribes displaced by settlement.³⁵³ The question was whether lands purchased for Indian tribes also fell within the scope of “Indian country.”³⁵⁴ After considering elements similar to those in *Sandoval*, the Court concluded: “The Government retains title to the lands, which it permits the Indians to occupy. The Government has authority to enact regulations and protective laws respecting this territory.”³⁵⁵

Subsection 1151(c) of the Indian country definition includes “all Indian allotments, the Indian titles to which have not been extinguished.”³⁵⁶ This subsection derived from *United States v. Pelican*,³⁵⁷ where the Court upheld a federal indictment for a murder on an Indian allotment outside the boundaries of a reservation.³⁵⁸ The northern half of the Colville Indian Reservation had been “vacated and restored to the public domain.”³⁵⁹ However, tribal citizens residing on that portion of the reservation were entitled to trust allotments.³⁶⁰ The Court again relied on *Celestine*, finding that “the lands, being so held, continued to be under the jurisdiction and control of Congress.”³⁶¹

Both § 1151(a) and § 1151(c) include rights-of-way within a reservation or allotment.³⁶² These are included on the basis of *United States v. Soldana*³⁶³ stating “it is clear that it was not the purpose of

351. *United States v. Sandoval*, 198 F. 539, 552–53 (D.N.M. 1912) (quoting *In re Heff*, 197 U.S. 488, 509 (1905)).

352. 302 U.S. 535 (1938).

353. *Id.* at 537.

354. *Id.* at 536.

355. *Id.* at 539.

356. 18 U.S.C. § 1151(c) (2012).

357. 232 U.S. 442 (1914).

358. *Id.* at 451–52.

359. *Id.* at 445 (citing Act of July 1, 1892, chap. 140, 27 Stat. 62, 63 (1893)).

360. *Id.* at 449.

361. *Id.* at 447.

362. 18 U.S.C. §§ 1151(a), (c) (2012).

363. 246 U.S. 530 (1918).

Congress to extinguish the title of the Indians in the land comprised within the right of way.”³⁶⁴ In *Minnesota v. United States*,³⁶⁵ another case addressing rights of way, the Court explained, “the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party.”³⁶⁶

Each of the Supreme Court decisions used to construct the statutory definition of Indian country relies on authority from the Territory Clause. A significant number of cases from this era built on the Territory Clause principles in *Celestine* and *Rickert*.³⁶⁷

Justice Van Devanter retired in 1937, and the fertile period of Supreme Court decisions reasoning from the Territory Clause came to a close. However, Congress picked up the torch. During the codification of Title 18 in 1948, the House Committee on the Revision of the Laws constructed the definition of Indian country from these territorial decisions, at 18 U.S.C. § 1151 (1946). Although legislative history from this enormous codification project is limited, the provisions in the statute trace directly to quotations from both *Celestine* and *Sandoval*. Legal digests from the era support the relationship between these decisions and the definition. For example, the 1916 edition of *Ruling Case Law* (the predecessor to *American Jurisprudence*) includes a section on “What is Indian country” citing prominently to *Celestine*, *Sandoval*, and *Pelican*.³⁶⁸

In 1962, the Supreme Court interpreted § 1151 in *Seymour v. Superintendent of Washington State Penitentiary*³⁶⁹ and, relying heavily on *Celestine*, confirmed federal jurisdiction over fee lands within reservation boundaries.³⁷⁰ Although the State argued that the words

364. *Id.* at 532–33.

365. 305 U.S. 382 (1939).

366. *Id.* at 386.

367. *See, e.g.*, *United States v. Ramsey*, 271 U.S. 467, 469–71 (1926); *United States v. Candelaria*, 271 U.S. 432, 440 (1926); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 88–90 (1918); *United States v. Nice*, 241 U.S. 591, 600–01 (1916); *United States v. Noble*, 237 U.S. 74, 80–81 (1915); *Perrin v. United States*, 232 U.S. 478, 486 (1914); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 509–10 (1913); *United States v. Wright*, 229 U.S. 226, 234 (1913); *Choate v. Trapp*, 224 U.S. 665, 673 (1912); *Clairmont v. United States*, 225 U.S. 551, 557–58 (1912); *Heckman v. United States*, 224 U.S. 413, 436 (1912); *Hallowell v. United States*, 221 U.S. 317, 324 (1911); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911); *United States v. Sutton*, 215 U.S. 291, 294–96 (1909).

368. 14 RULING CASE LAW § 33 (William M. McKinney & Burdett A. Rich eds., 1916).

369. 368 U.S. 351 (1962).

370. *Id.* at 359.

“notwithstanding the issuance of any patent” in § 1151(a) should be interpreted as “notwithstanding the issuance of any patent to an Indian,” which would terminate federal jurisdiction on patents issued to non-Indians, the Court found that such an interpret would create “an impractical pattern of checkerboard jurisdiction” that § 1151 sought to avoid.³⁷¹ Instead, the Court reemphasized that all parts of a reservation remained under federal jurisdiction until removed by Congress.³⁷²

Later cases interpreting the scope of federal criminal jurisdiction in Indian country frequently described the principle of federal authority in the language of territorial authority. In *United States v. Antelope*,³⁷³ the Indian defendants asserted a violation of equal protection where the federal murder statute did not require the same proof of premeditation as state law.³⁷⁴ Justice Brennan discounted the equal protection claims because defendants were “subjected to the same body of law as any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave.”³⁷⁵

The status of the Mississippi Choctaw lands became the subject of *United States v. John*,³⁷⁶ where the Supreme Court made it clear that any lands placed into trust for an Indian tribe are Indian country.³⁷⁷ Furthermore in *Oliphant v. Suquamish Indian Tribe*,³⁷⁸ the Court found that “Indian reservations are ‘a part of the territory of the United States,’” but held that Congress had not provided for Indian tribes to exercise criminal jurisdiction over non-Indians.³⁷⁹ However, the Court anticipated Congress’s authority to do so: “Finally, we are not unaware of the prevalence of non-Indian crime on today’s reservations which the tribes forcefully argue requires the ability to try non-Indians. But

371. *Id.* at 358.

372. *Id.*

373. 430 U.S. 641 (1977).

374. *Id.* at 643–44.

375. *Id.* at 648.

376. 437 U.S. 634 (1978).

377. *Id.* at 649. (“The Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a ‘reservation,’ at least for the purposes of federal criminal jurisdiction at that particular time.”).

378. 435 U.S. 191 (1978).

379. *Id.* at 208–09, 211.

these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.”³⁸⁰

The most recent case was *Lara*, discussed above,³⁸¹ where the Supreme Court rejected a challenge to tribal criminal authority over non-member Indians.³⁸² Justice Breyer, writing for a seven justice majority, reaffirmed the role of the Territory Clause as one of the sources of Congress’s “broad” and “exclusive” powers “to legislate in respect to Indian tribes.”³⁸³ Thus, the principles of the Territory Clause are embedded in contemporary Supreme Court decisions affecting federal and tribal criminal jurisdiction in Indian country.

III. INDIAN COUNTRY IS FEDERALLY PROTECTED TRIBAL TERRITORY

This Part returns to the primary basis for contending that the Territory Clause is authority for federal laws in Indian country—structure. It briefly examines the federal title interest in Indian lands as well as common legal principles shared with other federal lands regarding land transactions, water rights, criminal law, as well as federal jurisdiction over matters on fee inholdings and adjacent lands.

A. Federal Title Interest in Indian Lands

The status of Indian lands as federal territory is self-evident. The federal government in fact holds a title interest in Indian lands.³⁸⁴ The first principle of property law is that property is a bundle of rights, frequently divided among different parties.³⁸⁵ This is the case with Indian lands. The Indian tribe holds the original Indian title, sometimes known as aboriginal title, or right of occupancy.³⁸⁶ The

380. *Id.* at 212.

381. *See supra* notes 29–33, 45–46 and accompanying text.

382. 541 U.S. 193, 210 (2004).

383. *Id.* at 200 (quotation marks omitted). *Lara* thus resolved an issue, debated in academic circles, about whether Indian trust lands “belong[] to the United States,” within the meaning of the Territory Clause. *See infra* Section IV (discussing the evolution of FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW in its treatment of the Territory Clause).

384. *See supra* note 74 and accompanying discussion.

385. *See* J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712–14 (1996).

386. The Supreme Court found “their right of occupancy is considered as sacred as the fee simple of whites.” *Mitchel v. United States*, 34 U.S. 711, 746 (1835). “Trust” and “restricted fee” are often used interchangeably and are essentially synonyms, as a “restraint on alienation” is a trust provision that prohibits or penalizes alienation of the trust corpus. *See Restraint on Alienation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

United States holds an interest in Indian land title known as the right of preemption or alienation.³⁸⁷ This is the origin of the land title system in the United States and the reason that property law textbooks have included *Johnson v. M'Intosh*³⁸⁸ for generations. “The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.”³⁸⁹

The Supreme Court has consistently acknowledged the federal title interest in Indian land. In *The New York Indians*,³⁹⁰ the Court voided a state tax on reservation lands of the Seneca Nation.³⁹¹ The Court explained that “the Indian right of occupancy creates an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption.”³⁹² More than a century later, in *Oneida Indian Nation v. County of Oneida*,³⁹³ the Court unanimously restated this principle.³⁹⁴

The bedrock source of the federal interest in Indian land is the restriction on alienation found in the Indian Trade and Intercourse Act—also known as the Nonintercourse Act.³⁹⁵ This was one of the first laws passed in 1790 at the insistence of President Washington, and it remains federal law.³⁹⁶ The text of the statute prohibits any taking of title to Indian land that is not made pursuant to the Constitution

Tribal lands are better termed as federal territory rather than property of the United States. The tribes hold full possession and occupancy, while the United States asserts a right of preemption combined with a right to govern. See Michael C. Blumm, *Why Aboriginal Title is a Fee Simple Absolute*, 15 LEWIS & CLARK L. REV., 975, 983–85 (2011).

387. Blumm, *supra* note 386, at 983–85.

388. 21 U.S. (8 Wheat.) 543 (1823).

389. *Id.* at 586.

390. 72 U.S. (5 Wall.) 761 (1866).

391. *Id.* at 771.

392. *Id.* at 771.

393. 414 U.S. 661 (1974).

394. *Id.* at 667 (“It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized.”).

395. Ch. 33, 1 Stat. 137 (1790) (codified at 25 U.S.C. § 177 (2012)).

396. See Department of Justice, General Information: Environment and Natural Resources Division, *Congress Passes the First Indian Trade and Intercourse Act*, U.S. DEP'T OF JUST. (May 14, 2015), www.justice.gov/enrd/timeline-event/congress-passes-first-indian-trade-and-intercourse-act (mandating that Congress first ratify any conveyance of Indian interests in land).

through treaty or conventions.³⁹⁷ “We emphasize what is obvious, that the ‘trust relationship’ we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act.”³⁹⁸

The United States acquired its territory through land cessions from foreign nations, subject to the land titles of the indigenous peoples.³⁹⁹ Throughout U.S. history, western settlement has followed a pattern of Indian land cessions leading to establishment of federal territories and then admission of new states. Congress documented this history in painstaking detail in 1884, with the publication of Thomas Donaldson’s report, *The Public Domain: Its History, with Statistics*.⁴⁰⁰ Both Donaldson and Cohen emphasize that purchase of Indian title was always the first step.⁴⁰¹ “From the organization of the National Government, it has been the rule of the Nation to purchase the occupancy right from the Indians The Government has never attempted to survey and dispose of lands prior to their cession by the Indians.”⁴⁰²

Importantly, this is not only a history of land *cessions*; it is a history of federal land *reservations*, which continue to serve as homelands for Indian Nations. Indian land cessions and land reservations are two sides of the same coin under the federal land laws. Since 1790, the United States has maintained records for every cession and every reservation of land from an Indian tribe.⁴⁰³ In the official records of Congress, United States Serial Set Number 4015 includes two tables entitled:

397. See 25 U.S.C. § 177.

398. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975); see also CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 355 (1886) (“The right of alienation is as much a vested right as the right of possession or the right of enjoyment . . .”).

399. See Cohen, *supra* note 72, at 33–36, 50–51 (providing case examples, such as Spanish grants for the Louisiana Territory were “subject to the rights of Indian occupancy”).

400. DONALDSON, *supra* note 74, at 240.

401. See generally Cohen, *supra* note 72 (discussing at length the misunderstood process through which the United States received land from the Indians); DONALDSON, *supra* note 74, at 240.

402. See DONALDSON, *supra* note 74, at 240.

403. See *Indian Land Cessions in the United States, 1784–1894: United States Serial Set, No. 4015*, LIBR. OF CONGRESS, <https://memory.loc.gov/ammem/amlaw/lwss-iloc.html> (last visited Oct. 17, 2018) (detailing the United States Congressional Serial Set and providing information on the House and Senate Documents and Reports within).

(1) Schedule of Treaties and Acts of Congress Authorizing Allotments of Lands in Severalty, and (2) Schedule of Indian Land Cessions.⁴⁰⁴

In the broader context of federal land law, “there are three types of reserved federal lands: military, public, and Indian.”⁴⁰⁵ Just like other federal reservations, the vast majority of tribal lands do not have land patents or deeds; they are reserved under treaty, executive order, or federal statute prior to any land disposition.⁴⁰⁶ Approximately 56.2 million acres of Indian land are reserved, held in trust, or subject to the restriction on alienation.⁴⁰⁷ Most reservations are the remainder of a tribe’s original land base, though many others were created from the public domain for tribes who were displaced from their homelands.⁴⁰⁸

Federal title in Indian land is embedded in current practice at the Department of the Interior, which maintains millions of title records.⁴⁰⁹ The Division of Land Titles and Records at the Bureau of Indian Affairs in the Department of the Interior has twelve regional offices, 156 employees, and an annual budget of approximately \$16 million.⁴¹⁰ It exists solely to maintain federal title in Indian land, and has been doing so since the nineteenth century.⁴¹¹ It “is the office of record for the recording of Indian land title documents, for the

404. *Id.* The Schedule of Indian Land Cessions table “[i]ndicat[es] the number and location of each cession by or reservation for the Indian tribes from the organization of the Federal Government to and including 1894, together with descriptions of the tracts so ceded or reserved, the date of the treaty, law or executive order governing the same, the name of the tribe or tribes affected thereby, and historical data and references bearing thereon.” See *Schedule of Indian Land Cessions*, Libr. of Congress, <https://memory.loc.gov/cgi-bin/ampage?collId=llss&fileName=4000/4015/llss4015.db&recNum=129> (last visited Oct. 17, 2018).

405. DON PHILPOTT, UNDERSTANDING THE DEPARTMENT OF THE INTERIOR 128 (2016).

406. *Id.*

407. *Id.*

408. *Id.*

409. See DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS MANUAL, Part 51, ch. 2, 1–3 (2012) [hereinafter BIAM PART 51]. “Indian land,” as used by the BIA Division of Land Titles and Records, “is an inclusive term describing all real property or land . . . held in trust by the United States for individual Indians or tribes, or all lands, titles to which are held by individual Indians or tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy and/or benefit of certain tribes” collectively, and “include[s] land for which the title is held in fee simple status by Indian tribes” where subject to the federal restriction on alienation. *Id.* at 3.

410. *Budget Justifications and Performance Information Fiscal Year 2017: Indian Affairs*, U.S. DEP’T OF INTERIOR, IA-RES-7 https://www.doi.gov/sites/doi.gov/files/uploads/FY2017_IA_Budget_Justification.pdf [hereinafter 2017 Budget Justifications].

411. BIAM PART 51, *supra* note 409, ch. 4 at 1.

maintenance of the chain-of-title, and the examination, reporting, and certification of land title [and encumbrance] for Indian trust and restricted [fee] lands.”⁴¹²

B. Common Legal Principles Shared with Other Federal Lands

Tribal lands are distinct, but share features with other federal lands. First, federal land title records are found in the Department of the Interior. Tribal leaders sometimes question why the Bureau of Indian Affairs is housed within the Department of the Interior, along with “rocks and trees.” It is because the Department’s original purpose was to manage federal lands, and the lands managed by the Bureau of Indian Affairs are the remainder or “reservations” from the vast landscape of tribal lands subjected to nearly two centuries of acquisition, survey, platting and sale by the federal government.⁴¹³ The Department also runs the Bureau of Land Management, the National Park Service, Fish and Wildlife Service, U.S. Geological Survey, Bureau of Reclamation, and the Office of Surface Mining and Insular Affairs (U.S. island territories).⁴¹⁴ The commonality among these government agencies is that all manage federal lands with authority derived from the Territory Clause, and are the offspring of the General Land Office.⁴¹⁵ Although tribal lands have a unique purpose to serve as tribal homelands, many aspects of federal Indian law are comparable to other federal land laws. The similarities are most pronounced with land transactions, taxation, water rights, criminal law, and regulation of non-federal inholdings.

Congress and the Department of the Interior exercise extensive propriety control over Indian land. Large sections of Title 25 of the U.S. Code are devoted to exercising the federal trustee’s control of Indian lands. The Secretary of Interior is required to approve all leases and to approve any right of way, any sale of hard rock minerals, timber,

412. *Id.*

413. PHILIP S. DELORIA, ET AL., REPORT ON FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS: FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 45–46 (1976). This is not to say that Indian Affairs should remain in the Department of the Interior. For many years, tribal leaders have been considering new administrative structures. *See id.* at 49–50.

414. *See Bureaus*, DEP’T. OF INTERIOR, <http://www.doi.gov/bureaus> (last visited Oct. 17, 2018).

415. *See* MALCOLM J. ROHRBOUGH, THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789–1837 55, 62 (1968); GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 26 (2014).

oil and gas, use of land for housing, and agriculture.⁴¹⁶ In recent years, Indian tribes have gained somewhat greater self-determination over land management through laws such as the HEARTH Act, but even here tribal regulations are approved by the Secretary of Interior and lease terms are limited.⁴¹⁷ The Bureau of Indian Affairs had a budget of over \$137 million for realty services in Indian country in its 2017 fiscal year.⁴¹⁸

Indian lands are immune from state taxation because of their status as federal lands. As previously discussed, *Rickert* found that the tax immunity stems from the Territory Clause,⁴¹⁹ and that “no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians.”⁴²⁰ *Rickert* is the cited authority for the string of modern cases pre-empting state taxation of tribal lands and improvements on those lands.⁴²¹

The *Winters* doctrine states that reserved water rights spring from the same source for Indian reservations and all other federal lands.⁴²² In 1908, the Supreme Court held that the right to use non-navigable waters flowing through the Fort Berthold Reservation in Montana was impliedly reserved by the government and the Tribe in the treaty establishing the reservation.⁴²³ In 1963, in *Arizona v. California*,⁴²⁴ the Supreme Court expanded the *Winters* Doctrine as the source of all federally-reserved water rights for all federal lands, whether a wildlife refuge or National Park, in an amount intended to fulfill for the purposes of the reservation.⁴²⁵ For non-navigable waters, the Court

416. See 25 U.S.C. §§ 311–28 (2012) (rights-of-way); § 415(a) (leases of restricted lands); §§ 2102–08 (mineral resources); §§ 3101–20 (national Indian forest resources management); §§ 3501–06 (Indian energy); §§ 3701–46 (American Indian agricultural resource management); §§ 4101–17 (Native American housing assistance and self-determination).

417. § 415(h).

418. See 2017 Budget Justifications, *supra* note 410, at IA-ST-2.

419. *United States v. Rickert*, 188 U.S. 432, 439 (1903) (citing *Wisconsin Cent. R.R. Co. v. Price Cty.*, 133 U.S. 496, 504 (1890)).

420. *Id.* at 441.

421. See, e.g., *Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973); *Confederated Tribes of Chehalis Reservation v. Thurston Cty. Bd. of Equalization*, 724 F.3d 1153, 1155 (9th Cir. 2013).

422. See generally *Winters v. United States*, 207 U.S. 564 (1908).

423. *Id.* at 575–77.

424. 373 U.S. 546 (1963).

425. See *id.* at 599–602; see also Harold A. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. REV. 639, 647–49 (1975).

cited the Territory Clause as the source of power of the United States “to reserve water rights for its reservations and its property.”⁴²⁶

Congress asserts and maintains police power in the Indian country, just as it does for other federal lands.⁴²⁷ Although some Indian country crimes are unique,⁴²⁸ many prosecutions entail the same federal criminal laws that apply to all other federal lands.⁴²⁹ Since 1817, the Indian Country Crimes Act has extended all of the federal enclave criminal laws to Indian country, with an exception for crimes committed by one Indian against another.⁴³⁰ Moreover, since 1825, the Department of Justice has prosecuted crimes in Indian country under the Assimilative Crimes Act,⁴³¹ which adopts state criminal laws where there is no corresponding federal crime.⁴³²

Finally, Indian reservations and other federal reservations, like national parks, often include privately owned fee lands within their boundaries.⁴³³ Federal jurisdiction over private inholdings is familiar terrain for federal land law. In *Minnesota v. Block*,⁴³⁴ the Eighth Circuit upheld federal police jurisdiction over private lands in a wilderness area when reasonably related to the purpose of the reservation.⁴³⁵ In *Celestine*, the Supreme Court similarly found everything included in a reservation—military, Indian, or otherwise—remains part of that

426. *Arizona*, 373 U.S. at 597–98; *see also* *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (“Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.”).

427. 18 U.S.C. §§ 1151–52 (2012).

428. § 1151 et. seq. (2012).

429. *See, e.g.*, § 1153(a) (explaining that an Indian charged with committing a number of crimes within Indian country, including murder, kidnapping, and other felonies, “shall be subject to the same law and penalties as all other persons committing any of the [listed] offenses, within the exclusive jurisdiction of the United States”).

430. *See* Act of Mar. 3, 1817, ch. 92, § 2, 3 Stat. 383 (1817) (codified as amended at 18 U.S.C. § 1152 (2012)) (excluding “any offence [sic] committed by one Indian against another, within any Indian boundary”).

431. *See* Act of Mar. 3, 1825, ch. 65, § 3, 4 Stat. 115 (1825) (codified as amended at 18 U.S.C. § 13 (2012)).

432. *Id.*; *see also* *Williams v. United States*, 327 U.S. 711, 713 (1946) (emphasizing that “many sections of the Federal Criminal Code apply to the reservation,” including those covered by the Assimilative Crimes Act).

433. *See* Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 3–4 (2001).

434. 660 F.2d 1240 (8th Cir. 1981).

435. *Id.* at 1244, 1249–51.

reservation once established by Congress. *Celestine* relied directly on the Territory Clause and was confirmed by *Solem v. Bartlett*.⁴³⁶ The entire boundary set by Congress will remain a reservation until it is explicitly made otherwise, regardless of any individual titles within, because Congress alone can modify the boundaries of a reservation.⁴³⁷ In 2016, the Supreme Court affirmed this principle with a unanimous opinion in *Nebraska v. Parker*.⁴³⁸

The text of the Territory Clause broadly authorizes Congress to make needful rules and regulations “respecting” the territory or other property belonging to the United States.⁴³⁹ This authority includes extra-territorial matters, so long as the federal government demonstrates a nexus between the rule or regulation and the protected federal territory.⁴⁴⁰ For this reason, the Territory Clause should be considered as authority for a broad range of matters affecting Indian tribes. The federal government has adopted a trust responsibility to protect tribal lands not only as a natural resource, but more importantly as homelands for tribal cultures and tribal self-government. As a result, the Territory Clause provides Congress with extensive power to protect Indian tribes even on matters that arise outside of reservation boundaries.

IV. OMISSION FROM REVISED EDITIONS OF THE HANDBOOK OF FEDERAL INDIAN LAW

It is important to acknowledge, and respectfully challenge, the position that recent editions of the *Cohen’s Handbook of Federal Indian Law* have taken on the Territory Clause.⁴⁴¹ *Cohen’s Handbook* is the fundamental treatise on federal Indian law, first published in 1941 by

436. 465 U.S. 463 (1984).

437. *Id.* at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

438. 136 S. Ct. 1072 (2016). In this case, the State challenged a tribal liquor tax as it applied to the Village of Pender, which is inside reservations boundaries but generally in private ownership. *Id.* at 1077–78. The Supreme Court sustained the Omaha Tribe’s argument that the reservation has not been diminished through changes in ownership patterns. *Id.* at 1087–88.

439. *See supra* Section I.D.

440. *See, e.g.*, *United States v. Alford*, 274 U.S. 264, 266–67 (1927); *Camfield v. United States*, 167 U.S. 518, 528 (1897). *See generally* Appel, *supra* note 433 (discussing the extraterritorial power extensively and the required nexus the government must show).

441. *See generally* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK (2012)]; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton 2005) [hereinafter COHEN’S HANDBOOK (2005)].

the Department of Interior.⁴⁴² In 1982, a group of law professors published a significantly revised version of *Cohen's Handbook*, reporting that the content was “updated, reorganized, and rewritten, but the abiding principles of Indian law have changed little since Cohen so carefully articulated them.”⁴⁴³ Although Cohen's original work recognized the continuing role of the Territory Clause in federal Indian law, the revised editions note only a historical purpose.⁴⁴⁴

The analysis in the revised *Cohen's Handbook* may be incorrect, beginning with the legal history of the term “Indian country.” The 2012 edition of *Cohen's Handbook* states that Congress relied on *Donnelly v. United States*⁴⁴⁵ for the definition in § 1151(a), “all land within the limits of any Indian reservation,” and states that the wording comes from the Major Crimes Act.⁴⁴⁶ *Donnelly* is an important case because it clarified that Executive Order reservations are included within the term “Indian country.”⁴⁴⁷ But *Donnelly* is not a Major Crimes Act decision. The defendant was a non-Indian, the prosecution was under the Indian Country Crimes Act, and the decision construed the then-undefined term “Indian country.”⁴⁴⁸ *Donnelly* considered the Major Crimes Act only to reject an ancillary argument raised by the defendant and is not authority for anything related to the phrase “[all land] within the limits of any Indian reservation.”⁴⁴⁹

Instead, this primary definition of “Indian country” was derived from the much more important and earlier Supreme Court decision in *Celestine*. As discussed, *Celestine* was the landmark decision citing the Territory Clause as the source of authority to include all land “within the limits of any Indian reservation.”⁴⁵⁰ *Celestine* is also cited authority

442. See COHEN'S HANDBOOK (2012), *supra* note 441, at vii.

443. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW x (Rennard Strickland ed., 1982) [hereinafter COHEN'S HANDBOOK (1982)].

444. Compare FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 94–97, 310–11 (Dep't. of Interior 1941) [hereinafter COHEN'S HANDBOOK (1941)], with COHEN'S HANDBOOK (2012), *supra* note 441, at 384–86 (briefly discussing and noting that the property clause of Article IV is one of the powers that “[has] played a significant role historically”).

445. 228 U.S. 243 (1913).

446. COHEN'S HANDBOOK (2012), *supra* note 441, at 190.

447. See 228 U.S. at 256–59.

448. *Id.* at 252, 254, 269.

449. *Id.* at 269–70.

450. 215 U.S. 278, 283–85 (1909).

in *Sandoval*, *Pelican* and *Seymour*.⁴⁵¹ In this way, the revised *Cohen's Handbook* misconstrued the legal history and missed the constitutional source of the term “Indian country.”

The revised editions also stand in contrast to Cohen's original work. The 1941 edition—written before the definition of “Indian country” was created in 1948—contains an extensive discussion of federal power in a subsection titled “United States Territory and Property.”⁴⁵² The discussion of tribal lands begins by acknowledging that “[t]he control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs.”⁴⁵³ Cohen's analysis of plenary power and *Kagama* is placed within this section devoted to U.S. territorial power and stresses the constitutional limitations created by the trust responsibility.⁴⁵⁴ Cohen cites Justice Van Devanter: “Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own.”⁴⁵⁵

Unlike Cohen's original work, the 1982 edition includes only a brief mention of the Territory Clause, commenting that it is no longer considered to be an important source of federal power in Indian country.⁴⁵⁶ When did the status of tribal lands change? It does not say. Instead, the 1982 edition works to distinguish tribal lands from public lands, stating that “Indian property, however, is more properly classified as private property.”⁴⁵⁷ Cohen would never have written that sentence. In fact, in 1941, Cohen wrote, “Actually, we find that tribal property partakes of some of the incidents of both individual private property and public property of the United States,” at the outset of his chapter on tribal property rights.⁴⁵⁸ The revised editions also elevate

451. See *Seymour v. Superintendent of Wash. St. Penitentiary*, 368 U.S. 351, 359 (1962); *United States v. Pelican*, 232 U.S. 442, 447, 451 (1914); *United States v. Sandoval*, 231 U.S. 28, 48 (1913).

452. COHEN'S HANDBOOK (1941), *supra* note 444, at 94.

453. *Id.*

454. *Id.* at 95–96.

455. *Id.* at 96 (citing *Chippewa Indians of Minn. v. United States*, 301 U.S. 358, 375–76 (1937)).

456. COHEN'S HANDBOOK (1982), *supra* note 443, at 209.

457. *Id.* at 210.

458. COHEN'S HANDBOOK (1941), *supra* note 444, at 287.

plenary power to a separate subsection, detached from the limitations created by the federal trust responsibility.⁴⁵⁹ Cohen's more careful, contextual analysis places tribal territory, federal power, and the trust obligation together in a relationship.⁴⁶⁰

The more recent 2005 and 2012 editions of *Cohen's Handbook* dismiss the Territory Clause even more succinctly as historically relevant only to "activities in the territories prior to statehood."⁴⁶¹ This antebellum view⁴⁶² of the Territory Clause has been long abandoned.⁴⁶³ The revised *Cohen's Handbook* also states that "[u]nless the land taken into trust originated as public land, however, the property clause cannot be the source of power."⁴⁶⁴ This statement confuses the Enclave Clause with the Territory Clause.

The Enclave Clause requires state consent and has a limited purpose: exclusive federal jurisdiction for the seat of federal government and for military bases.⁴⁶⁵ The Territory Clause applies

459. See COHEN'S HANDBOOK (2012), *supra* note 441, at 381–82.

460. See COHEN'S HANDBOOK (1941), *supra* note 444, at 96.

461. See COHEN'S HANDBOOK (2012), *supra* note 441, at 385; COHEN'S HANDBOOK (2005), *supra* note 441, at 392.

462. In 1846, Chief Justice Taney's decision in *United States v. Rogers* stated that Congress has authority over tribal lands under the Territory Clause only "where the country occupied by them is not within the limits of one of the States." 45 U.S. 567, 572 (1846). Eleven years later, Justice Taney went further in *Dred Scott v. Sandford* and found the Territory Clause "cannot, by any just rule of interpretation, be extended to territory which the new Government might afterwards obtain from a foreign nation." 60 U.S. 393, 442 (1857), *superseded by constitutional amendment*, U.S. CONST. amend XIV. The *Kagama* decision in 1886 returned to Taney's assertion in *Rogers* that the Territory Clause did not apply within the boundaries of a state, then found the power "not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." 118 U.S. 375, 380 (1886). The *Kagama* construction of plenary power was developed in reaction to an antebellum conception of the Territory Clause, driven at least in part by the nation's conflict over slavery and the Missouri Compromise. See Appel, *supra* note 433, at 36–57 (discussing the largely disregarded narrow reading of the Property Clause in the *Dred Scott* case).

463. See, e.g., *Light v. United States*, 220 U.S. 523, 535–37 (1911) (rejecting most forcefully the narrow view of the Territory Clause); see also CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST*, 223–30, 240–42 (1992) (offering expert perspectives on public lands and reservations, including discussions on legal history and development of land regulations).

464. COHEN'S HANDBOOK (2012), *supra* note 441, at 385.

465. See U.S. CONST. art. I, § 8, cl. 17 ("Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government

more broadly to any territory or other property “belonging to the United States.”⁴⁶⁶ Justice Story, in his *Commentaries on the Constitution*, noted the limited nature of the Enclave Clause: “The public money expended on such places, and the public property deposited in them, and the nature of the military duties . . . all demand, that they should be exempted from state authority.”⁴⁶⁷ Justice Story also explained the broader reach of the Territory Clause: “The power is not confined to the territory of the United States; but extends to ‘other property belonging to the United States;’ so that it may be applied to the due regulation of all other personal and real property rightfully belonging to the United States. And so it has been constantly understood, and acted upon.”⁴⁶⁸

State consent to federal jurisdiction over all federal lands, including Indian lands, was frequently included as a disclaimer in state enabling acts, particularly after 1881 when the Supreme Court’s *United States v. McBratney*⁴⁶⁹ decision reserved the question of whether federal jurisdiction continued after statehood.⁴⁷⁰ Because state consent is a constitutional requirement for the Enclave Clause, there is often confusion over whether public lands are governed under the Enclave Clause or the Territory Clause. The revised *Cohen’s Handbook* discusses these Enabling Act provisions as progeny of *Worcester v. Georgia*,⁴⁷¹ but fails to recognize that these are reservations of authority under the Territory Clause.⁴⁷²

of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings . . .”).

466. Under the Territory Clause, states retain concurrent jurisdiction over matters that do not interfere with the federal purpose of the land. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). On tribal lands, state jurisdiction is very limited. *Draper v. United States* and *United States v. McBratney* are examples where the states retain jurisdiction in Indian country over crimes not involving Indians. See *Draper v. United States*, 164 U.S. 240, 241–44, 247 (1896); *United States v. McBratney*, 104 U.S. 621, 624 (1881).

467. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 1224, at 131 (Melville M. Bigelow, 5th ed. 1994).

468. *Id.* § 1325, at 204.

469. 104 U.S. 621 (1881).

470. *Id.* at 623–24.

471. 31 U.S. 515 (1832).

472. See COHEN’S HANDBOOK (2012), *supra* note 441, at 500; COHEN’S HANDBOOK (1982), *supra* note 443, at 268. Although the decision in *Worcester* does not reference the Territory Clause directly, it uses the term “Indian territory” and confirms the federal title interest in Indian land. 31 U.S. at 557. “Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government.

These provisions in the statehood acts demonstrate the link between the dual purpose of Article IV, Section 3—to admit new states while retaining federal jurisdiction over Indian land and other federal lands. In each instance, the language echoes the text of the Territory Clause—to dispose of and to regulate. Although the Enabling Acts are strong evidence of congressional intent to reserve Territory Clause jurisdiction, the Court has found them unnecessary because they simply confirm the status of the land as federal territory or property.⁴⁷³

There are other issues with the revised *Cohen's Handbook*. The history chapter does not include the western land cessions of the original states, the purpose of the Northwest Ordinance, or the Territory Clause.⁴⁷⁴ The tribal lands chapter could clarify that the federal restriction on alienation of Indian lands is the source of both federal power and responsibilities under the Territory Clause.⁴⁷⁵

The revised *Cohen's Handbooks'* omissions may be a product of reliance on Professor Newton's brilliant and oft-cited article on federal power in Indian affairs, which argued the "Court never developed the property clause as a principle basis of [c]ongressional power."⁴⁷⁶ The role of the Territory Clause is not so much undeveloped as it is deeply embedded in federal Indian law, buried under elaborate constructions of precedent rather than citations to constitutional authority. The burial was aided by the spotty legislative history of 18 U.S.C. § 1151, the tendency of historians to overlook the role of Indian tribes in early U.S. history, and the federal desire to seize power without the responsibilities to tribal lands and peoples. To Professor Newton's credit, much of the research in this article would have been impossible without access to searchable databases of historic documents, or exposure to the practices of the federal Indian land title system. These observations are offered in a collaborative spirit to encourage reconsideration of the Territory Clause within the subject of federal Indian law.

This may be called the right to the ultimate domain, but the Indians have a present right of possession." *Id.* at 580 (M'lean, J., concurring).

473. See, e.g., *Van Brocklin v. Anderson*, 117 U.S. 151, 164–65 (1886) (discussing the opinions of two eminent constitutional scholars, Stephen Douglas and Daniel Webster, as to the power of states over federal land held under the Territory Clause).

474. See generally COHEN'S HANDBOOK (2012), *supra* note 441, at 3–108 (dedicating a chapter to the history and development of U.S. policy surrounding American Indians from 1492 to present, yet failing to discuss land cessions, the purpose of the Northwest Ordinance, or the Territory Clause).

475. COHEN'S HANDBOOK (2012), *supra* note 441, at 17–23 (noting the omission of key elements from early U.S. and Indian history and policy).

476. Newton, *supra* note 18, at 210 n.73.

V. IMPLICATIONS OF RESTORING THE ORIGINAL MEANING OF THE TERRITORY CLAUSE

Renewed recognition of the Territory Clause may help to restore cohesion to an area of federal law that is frequently difficult to reconcile, and addresses many questions and problems with “plenary power.” Just like other federal lands, Congress makes “needful rules and regulations” to promote the federal purpose of lands belonging to the United States.⁴⁷⁷ For Indian Nations and tribal lands, the federal purpose is to hold self-governing native homelands aside from state settlement and control.⁴⁷⁸ This was the original intention of the Founders and is an uninterrupted use of the Territory Clause.⁴⁷⁹

There are other implications of renewed recognition of the Territory Clause, but this Article will briefly mention four. The first is the role of inherent tribal sovereignty within the text of the Constitution; the second regards the role of state law within Indian country; the third suggests reconsideration of *Kagama*; and the fourth looks towards future legislation that will improve public safety and support tribal government self-determination.

A. Tribal Sovereignty within the Structure of the Constitution

Justice Thomas will not be surprised by this proposed source of federal power in Article IV, Section 3, Clause 2. In *Lara*, he suggested as much.⁴⁸⁰ However, because other federal territories such as Puerto Rico are considered an instrumentality of the United States for double jeopardy purposes, Justice Thomas questions whether Indian tribes can be both separate sovereigns and subject to the Territory Clause.⁴⁸¹ The history of the Territory Clause provides an answer to this question about the source of tribal authority and constitutional structure.

In *United States v. Wheeler*,⁴⁸² the Court held that the Double Jeopardy Clause does not bar the prosecution of an Indian in a federal court when he had previously been convicted in a tribal court of an offense arising out of the same incident.⁴⁸³ The Court distinguished between

477. U.S. CONST. art. IV, § 3, cl. 2.

478. See *supra* note 272 and accompanying text.

479. See *supra* notes 267–269 and accompanying text.

480. See *United States v. Lara*, 541 U.S. 193, 225–26 (2004) (Thomas, J., concurring) (suggesting that the source of congressional power over Indians might be found within the Territory Clause).

481. *Id.*

482. *United States v. Wheeler*, 435 U.S. 313 (1978).

483. *Id.* at 332.

tribal governments and other territorial governments such as Puerto Rico and Guam: “Before the coming of the Europeans, the tribes were self-governing sovereign political communities.⁴⁸⁴ In contrast, a territorial government is not acting as an independent political community but as “an agency of the federal government.”⁴⁸⁵

Wheeler was recently confirmed by the Supreme Court in *Puerto Rico v. Sanchez Valle*⁴⁸⁶ in a decision that drew attention to this distinction between inherent and delegated authority. As Justice Kagan explained, a territorial government derives its authority as a delegation from the federal government.⁴⁸⁷ Conversely, Indian country is a federal territory reserved for an Indian tribe to exercise inherent authority that has existed since time immemorial.⁴⁸⁸

There is no doubt that Washington and Knox thought of Indian tribes as sovereign governments. In July of 1789, two months after Washington’s inauguration, Knox wrote to President Washington with his plan for Indian affairs: “The independent nations and tribes of [I]ndians ought to be considered as foreign nations, not as the subjects of any particular state.”⁴⁸⁹ Two months later, President Washington wrote to the Senate: “It doubtless is important that all treaties and compacts formed by the United States with other nations whether civilized or not, should be made with caution, and executed with fidelity.”⁴⁹⁰ Washington went on to urge Congress to ratify “the treaties with certain Indian nations.”⁴⁹¹ These are but a few, but in the correspondence among the Framers, there are hundreds of references to Indian Nations.⁴⁹²

484. *Id.* at 322–23 (citations omitted).

485. *Id.* at 321 (citing *Domenech v. Nat’l City Bank*, 294 U.S. 199, 204–05 (1935)).

486. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876–77 (2016) (upholding the precedent that double jeopardy attaches with respect to prosecutions in Puerto Rico because it is not a separate sovereign).

487. *Id.* at 1873, n.5.

488. See *id.* at 1872 (noting that tribal power is a “pre-existing” sovereign power that exists separate from federal authority).

489. Letter from Henry Knox to George Washington (Jul. 7, 1789), FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-03-02-0067> (last visited Oct. 17, 2018).

490. Letter from George Washington to the United States Senate (Sep. 17, 1789), FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-04-02-0032> (last visited Oct. 17, 2018).

491. *Id.*

492. The National Archives website Founders Online, <http://founders.archives.gov>, is repository of the correspondence and other writings of the major participants in the framing of the Constitution. A search for the term “Indian Nation” reveals 159 uses. The two terms occur near each other 896 times.

The original purpose of the Territory Clause was to prevent crime and violence on the western Indian frontier.⁴⁹³ Washington and Knox recognized tribal inherent jurisdiction over territory but wanted to limit violent conflicts.⁴⁹⁴ The intent of the Territory Clause was to harmonize the expansionist drive of settlers with the existence of tribal territory by regulating both non-Indians who threatened the peace and the manner in which Indian tribes exercised their inherent local powers.⁴⁹⁵

The 1896 Supreme Court decision in *Talton v. Mayes*⁴⁹⁶ reflects this understanding of the relationship between inherent tribal sovereignty and federal territorial authority. The defendant challenged his conviction where the Cherokee tribal court provided only five grand jury members.⁴⁹⁷ The Court held the Fifth Amendment guarantee of indictment by grand jury inapplicable to tribal courts: “But the existence of the right in [C]ongress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the Constitution of the United States.”⁴⁹⁸

In this way, the Supreme Court recognized inherent tribal sovereignty as separate from the authority of Congress to regulate the manner of its exercise. As in other federal territories, civil rights are protected by federal statute and not through direct application of the Constitution. The Indian Civil Rights Act imposes meaningful due process constraints on tribal courts, and the right of federal habeas corpus review in federal courts, while maintaining tribal court independence and traditions.⁴⁹⁹ This structure is as old as the Constitution, respectful of tribal sovereignty, and affords flexibility for Congress to accommodate changing needs.

493. See *supra* notes 69–71 and accompanying text.

494. See *supra* notes 96–98 and accompanying text.

495. See *supra* notes 96–98 and accompanying text.

496. 163 U.S. 376 (1896).

497. *Id.* at 378–79.

498. *Id.* at 384.

499. 25 U.S.C. §§ 1301–1303 (2012); see also *United States v. Bryant*, 136 S. Ct. 1954, 1962, 1966 (2016) (summarizing the due process and habeas requirements imposed by the Indian Civil Rights Act).

B. *Noninterference of State Law*

In two early cases, *United States v. McBratney*⁵⁰⁰ and *Draper v. United States*,⁵⁰¹ the Supreme Court found that a federal reservation of land for Indian tribes did not remove the power of states to punish crimes committed between two non-Indians, because state jurisdiction in that limited instance did not interfere with the purpose of the reservation.⁵⁰² For federal reservations of all types, Justice Van Devanter laid out the broader principle in *Utah Power & Light Co. v. United States*.⁵⁰³ It is a general rule of non-interference with the established purpose of any federal lands: “True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them.”⁵⁰⁴ The Supreme Court has repeatedly confirmed this principle.⁵⁰⁵

State jurisdiction on any federal land exists only to the extent that it does not interfere with the federal purpose of the reservation, or with federal legislation.⁵⁰⁶ If it is an Indian reservation, state jurisdiction should exist only to the degree that it does not interfere with tribal self-government.

This is a more administrable standard than those that have developed in the last fifty years. For example, in *White Mountain v. Bracker*,⁵⁰⁷ the Supreme Court considered the issue of state taxes on tribal land. The Court looked at the issues through the lens of the Commerce Clause, established a balancing test—a “fact specific inquiry” into the relative state, tribal and federal interests, where interference with tribal self-government is permissible as long as state interests are deemed more compelling.⁵⁰⁸ This fact-specific balancing

500. 104 U.S. 621 (1881).

501. 164 U.S. 240 (1896).

502. See *Draper*, 164 U.S. at 244–45, 247 (stating that the rule of “equality of statehood” compels that federal reservations cannot deprive a state of such power); *McBratney*, 104 U.S. at 623–24 (observing that Colorado’s enabling act included no provision allowing a federal reservation to infringe the state’s authority over non-Indians within the federal reservation).

503. 243 U.S. 389 (1917).

504. *Id.* at 404.

505. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976); *United States v. California*, 332 U.S. 19, 33–35 (1947); *United States v. City & Cty. of San Francisco*, 310 U.S. 16, 30 (1940); *McKelvey v. United States*, 260 U.S. 353, 359 (1922).

506. *Utah Power & Light Co.*, 243 U.S. at 404.

507. 448 U.S. 136 (1980).

508. *Id.* at 144–45.

test and its inconsistent application provide strong incentives for state and local governments to assert tax jurisdiction in Indian country and litigate any challenges. The *Bracker* decision creates great business uncertainty, undermines tribal self-government and drives economic development and tax revenue away from Indian country.⁵⁰⁹

In contrast, the Territory Clause provides a straightforward rule of non-interference with the purposes of an Indian reservation, or with any federal law. This principle was well stated in the landmark decision of *Williams v. Lee*⁵¹⁰ in 1959: “Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”⁵¹¹ *Williams* relies on Territory Clause decisions for this proposition.⁵¹² Viewed through the lens of the Territory Clause, state jurisdiction should exist only to the degree that it does not interfere with tribal self-government and the tribe’s ability to provide for its citizens. For Indian country and the federal courts, this is a more justiciable standard.⁵¹³

C. Reconsideration of *Kagama*

The source of the Plenary Power Doctrine is traced to the Supreme Court’s 1886 decision in *United States v. Kagama*, upholding the Major Crimes Act’s extension of federal jurisdiction to certain felony crimes

509. See Kelly Croman & Jonathan Taylor, *Why Beggar thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, JOINT OCCASIONAL PAPERS ON NATIVE AFFAIRS 1, 8 (May 4, 2016), http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf (arguing that the Court’s decision created an unpredictable situation where a fact-specific balancing test of federal and tribal interests are weighed against state interests leading to uncertain tax policies).

510. 358 U.S. 217 (1959).

511. *Id.* at 220.

512. See *id.* at 218–20. Here, the Court cites *Worcester v. Georgia*, 31 U.S. 515 (1832), where the Court rejected Georgia’s enforcement of state statutes against the Cherokee nation. See *Williams*, 358 U.S. at 218–19. The Court asserted that such reservations were distinct communities subject only to treaties made between them and the U.S. government. See *id.* at 219. This ruling has only been modified over the years where state action would not affect tribal relations or the right of the tribes to govern themselves. *Id.* at 219–20.

513. In *Oneida Tribe v. Village of Hobart*, Judge Posner draws an important distinction between state taxes in Indian country, which should be forbidden, and fees for governmental services, which are not. See 732 F.3d 837, 841–42 (7th Cir. 2013). This distinction would be useful in ameliorating any consequences of a shift away from *Bracker* balancing.

committed by Indians.⁵¹⁴ *Kagama* is widely criticized for its bare assertion of federal power over Indian people: “It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.”⁵¹⁵ However, neither the courts nor legal scholars have reflected on the role of tribal lands and the Territory Clause within the decision.

Kagama should be reconsidered for two reasons: one internal and one external to the Court’s reasoning. First, apart from its broadly stated conclusion, the bulk of the opinion wrestles with a question long settled. *Kagama*’s rejection of federal Article IV authority as inapplicable after statehood is no longer good law.⁵¹⁶ Professor Peter Appel has written forcefully about the disappearance of the Territory Clause from late nineteenth Century jurisprudence, tracing it to *Dred Scott v. Sanford* and the struggle over the prohibition on slavery found in the Northwest Ordinance.⁵¹⁷ He also detailed the broad revival of the Territory Clause since that time, where the Supreme Court has repeatedly clarified that it continues in force after statehood.⁵¹⁸ The *Kagama* decision is a relic of its era in many ways, and there are good reasons to revisit its reasoning.

Second, the *Kagama* decision had a stealthier purpose. Nine months before the *Kagama* was issued, the New York Times editorialized in favor of the General Allotment Act, “In short, the flimsy theory of tribal sovereignty should be extirpated, the reservation system replaced by fee-simple grants in severalty, the surplus land opened to white settlement, and the Indians placed under the restraint and protection of ordinary and impartial laws, with a view of making them self-reliant and self-supporting.”⁵¹⁹

514. *United States v. Kagama*, 118 U.S. 375, 375–77, 385 (1886).

515. *Id.* at 384–85.

516. *Id.* at 380 (finding the power “not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else”).

517. See Appel, *supra* note 433, at 44–46.

518. *Id.* at 93–94. Professor Appel’s article is a touchstone legal analysis of the Territory Clause. His article did not consider the role of Indian tribes and tribal lands in the history of the Northwest Ordinance and the Territory Clause, or limitations on federal power that may arise from trust ownership of land.

519. The Century, *The Indian Problem*, N.Y. TIMES, Aug. 9, 1885, <https://timesmachine.nytimes.com/timesmachine/1885/08/09/109310997.pdf>.

The *Kagama* decision arrived in the middle of Congress's sweeping debate on the General Allotment Act.⁵²⁰ Congress seized on the plenary authority of the *Kagama* decision, and the General Allotment Act was signed into law in February of 1887.⁵²¹ The *Kagama* decision provided Congress with plenary power to justify taking Indian land absent tribal consent.⁵²² This purpose has been disavowed by Congress and, similar to the *Dred Scott* decision, should be removed from consideration as Supreme Court precedent.

*D. Congressional Authority for Expansion of
Tribal Jurisdiction over Crime*

In 2013, Congress responded to over a decade of advocacy from tribal leaders, Native women's organizations, and many others who demanded action to address domestic violence on Indian reservations.⁵²³ In reauthorizing the Violence Against Women Act, Congress included amendments to the Indian Civil Rights Act that restored tribal government criminal jurisdiction over domestic violence committed by non-Indian defendants.⁵²⁴ The new law affirms the inherent authority of Indian tribes to exercise criminal jurisdiction over all persons committing certain crimes within "Indian country," while guaranteeing rights to due process and habeas review.⁵²⁵ The law alters the Supreme Court's decision in *Oliphant*, which held that tribal government criminal jurisdiction did not extend to non-Indians, absent further clarification from Congress.⁵²⁶ After five years of

520. See *Montana v. United States*, 450 U.S. 544, 559–60, n.9 (1981) (discussing the congressional debate regarding the allotments).

521. See Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887).

522. The Century, *supra* note 519.

523. See generally National Congress of American Indians, VAWA's 2013 SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT (2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.

524. 25 U.S.C. § 1304 (Supp. I 2013).

525. See § 1304(b)(1) (providing that "the powers of self-government of a participating tribe include the inherent power of that tribe . . . to exercise special domestic violence criminal jurisdiction over all persons"); see also § 1303 (authorizing the use of habeas corpus by "any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe").

526. 435 U.S. 191, 212 (1978).

implementation, there are now eighteen Indian tribes implementing the law with significant success for public safety.⁵²⁷

Territory Clause analysis demonstrates a strong source of legislative authority for Congress to enact this law, and to address future questions of public safety and tribal criminal jurisdiction. Congress can build on the original purpose of the Territory Clause: to harmonize the existence of non-Indians within tribal self-governing territory, by regulating both non-Indians who threaten the peace and the manner in which Indian tribes exercise their inherent local powers.

CONCLUSION—PRINCIPLES TO ACCOMPANY THE FEDERAL TRUST OBLIGATION TO INDIAN LANDS

The Proclamation of 1763 declared British dominion over tribal lands from the eastern shore of North America to the Mississippi, asserting a right of pre-emption in tribally owned lands, a system for regulation of trade, and jurisdiction over fugitive criminals.⁵²⁸ This was an assertion of dominion over territory intended to prevent violent conflict. After the Revolutionary War, the United States found itself in a similar position, and replicated the British Indian policy.

From our vantage point in the twenty-first century, there is a tendency to look back and view this as paternalism. Perhaps it was, but the alternative was violent bedlam on the frontier. Eighteenth century European settlers in America were incredibly ethnocentric, violent, and land hungry. Jay, later our first Chief Justice, wrote to Jefferson in December 1786: “Indians have been murdered by our People in cold Blood and no satisfaction given, nor are they pleased with the avidity with which we seek to acquire their Lands.”⁵²⁹ Jay labeled these frontiersmen “white Savages.”⁵³⁰ The purpose of the Territory Clause was to authorize the plan from the Northwest Ordinance, a plan for

527. See, e.g., SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT, NAT'L CONG. OF AM. INDIANS 2 (2015); Angela Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1595 (2016).

528. *Proclamation Line of 1763, Quebec Act of 1774 and Westward Expansion*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1750-1775/proclamation-line-1763> (last visited Oct. 17, 2018).

529. Letter to Thomas Jefferson from John Jay, (Dec. 14, 1786), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-10-02-0457> (last visited Oct. 17, 2018).

530. *Id.*

consensual purchase of tribal lands, and orderly settlement of new states along the western frontier.⁵³¹

This was the original intent, but the United States did not keep the Framers' promise of good faith. Settlers and speculators continued to invade tribal lands, violence and war ensued, and after the hostilities, the United States used threats and intimidation to gain even greater cessions.⁵³² This cycle repeated itself throughout the nineteenth century as the United States grew in military strength.⁵³³ Congress enacted laws to take tribal lands and undermine tribal languages, cultures and existence, and the Supreme Court wrote decisions to justify these actions.⁵³⁴ These decisions were products of their times, and legal scholars will not summon an impossible coherence out of the Court's plenary power jurisprudence.

Even with the terrible losses, the remaining tribal lands have survived as a bulwark against annihilation of tribal sovereignty and tribal cultures. Tribal lands remain the center of indigenous civilizations in the United States, the places where the elders pass on culture, languages and traditions to succeeding generations. They are the places where tribal governments make their own laws, run their own schools, and have become important sources of economic development and jobs in their regions.⁵³⁵ President Nixon's Special Message to Congress heralded the era of tribal self-determination, and the federal government has not attempted to take tribal lands or undermine tribal governments since that time.⁵³⁶ Instead, Congress has enacted laws that expand tribal self-government.⁵³⁷ Congress has both historic obligations and contemporary

531. See *supra* notes 79–80 and accompanying text.

532. See *supra* notes 171–185 and accompanying text.

533. ROBERT MARSHALL UTLEY & WILCOMB E. WASHBURN, *THE AMERICAN HERITAGE HISTORY OF THE INDIAN WARS* 130–31, 147–48 (1977) (highlighting the struggles of Tecumseh and other 19th century Indian leaders to prevent U.S. westward expansion).

534. See Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258–59 (1986); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 387–88 (1993).

535. JOSEPH P. KALT ET AL., *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* (2008); JONATHAN TAYLOR, *SOCIAL AND ECONOMIC CHANGE ON AMERICAN INDIAN RESERVATIONS: A DATABOOK OF THE US CENSUSES AND AMERICAN COMMUNITY SURVEY* (2014).

536. Richard Nixon, *Special Message to the Congress on Indian Affairs, July 8, 1970*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=2573> (last visited Oct. 17, 2018).

537. See, e.g., Indian Trust Asset Reform Act of 2016, Pub. L. No. 114-178, 130 Stat. 432 (codified at 25 U.S.C. §§ 5601–36 (Supp. V 2017)); Violence Against Women Act

reasons to protect tribal lands, affirm tribal sovereign authorities, and prevent interference with the tribal self-determination era.

In this era, federal courts are demanding closer adherence to the text of the Constitution. Further solutions to the problems in Indian country are likely to be legislative or will depend on principled application of existing laws that protect tribal lands and rights. In this time it is also reasonable to expect that good faith will be observed and laws will be made for preventing wrongs and preserving peace and friendship with Indian tribes. Washington's Indian policy, framed in the Territory Clause and the Northwest Ordinance, may find greater acceptance in the twenty-first century, than in the nineteenth.

The federal government has asserted and held territorial jurisdiction in Indian country since the framing of the Constitution. Since that time, it has become embedded in the federal land title system at the Department of Interior, in federal criminal jurisdiction administered by the Department of Justice, and in many federal court decisions. Understanding the Framers' intentions brings coherence to federal Indian law, and empowers Congress and tribal governments to work together to protect public safety and to advance the goals of tribal self-determination.

of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of the U.S. Code); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified at 25 U.S.C. §§ 2801-15 (2012)); American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773 (codified at 25 U.S.C. §§ 2201-2221 (2012)); American Indian Trust Fund Management Reform Act 1994, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended at 25 U.S.C. §§ 4001-61 (2012)); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-63 (2012)); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301-5423 (Supp. IV 2013-2017)).