“ACCORDING TO THE CUSTOM OF THE COUNTRY”:

INDIAN MARRIAGE, PROPERTY RIGHTS, AND LEGAL TESTIMONY IN THE JURISDICTIONAL FORMATION OF INDIANA SETTLER SOCIETY, 1717-1897

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For Mom, whose commitment to the Golden Rule had a profound impact on my own moral philosophy.

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A Note on Terms and Definitions

Formal definitions elude the historian. Not only do words and ideas shift in meaning over time, but interpretations and representations of the past entail diverse perspectives as well. Rather than prescribe specific terms, definitions, and concepts here, I elaborate upon their meaning in further detail as this study unfolds.

However, because my thesis addresses historical issues involving ethnicity and cultural identity, I use this introductory opportunity to clarify related terms and concepts. Throughout this study I rely on descriptors such as "Native American," "American Indian," "tribal," and "Indigenous," interchangeably, largely for purposes of narrative style. By employing this lexicon, I recognize not only its colonial derivation and Euro-centric etymology but also the potential danger that broad application poses in obscuring an otherwise rich cultural diversity of Native peoples and polities. Tribes such as the Miami, Shawnee, Delaware, Illini, Potawatomi, Wyandot, Wea, Kickapoo, Piankeshaw, and Anishinaabe, to name only a few, formed extensive village networks throughout today's midwest region, embodying a plurality of languages, traditions, laws and customs, systems of government, and kinship structures.[1]

Terminology used to describe peoples of European descent becomes no less difficult to articulate. The flood of settlers that populated the trans-Appalachian west following the War of Independence represented a diversity of English, German, Irish, and American-born cultures. Adding yet another complex layer to this cultural mosaic, Indian-settler relations led to significant shifts in the ethnic composition of the region's social topography.

[1] For a general reference guide on the history and pre-history of Indigenous peoples in Indiana, see Gail Hamlin-Wilson, ed., *Encyclopedia of Indiana Indians: Tribes, Nations and People of the Woodlands Areas,* 2 vols., St. Clair Shores, Mich.: Somerset, 1998.

This mixing and blurring of cultural boundaries undermines the common assumption that the world is historically composed of distinct racial or ethnic communities. This worldview, according to Brian Slattery's "theory of national segmentation," holds that "humanity is naturally divided into a host of 'national,' 'ethnic,' or 'tribal' groups," each of which occupies a distinct territory or community and forms, independent of the other, "a more or less uniform whole, united by such factors as ancestry, historical experience, physical characteristics, culture, language, religion, laws, customs, and social and political structures."[2] While these facets—characterizing our ethnic or cultural "roots" so to speak—provide us with a modern sense of identity and belonging, they have never evolved in complete isolation from each other.

With this context in mind, terms of generalization remain necessary for purposes of ethnic or cultural distinction, comparison, analysis, and descriptive simplicity. However, by referring specifically to tribes and individuals by name, this study seeks to create a more intimate historical portrait, providing greater insight into the diversity of peoples that played an important role in the historical periods under consideration.

Ethical Considerations in American Indian Legal History

For many Indigenous peoples, the Euro-centric pursuit of knowledge—the research methods, disciplinary theory, source provenance, narrative composition, and intellectual discourse in general—is linked to Western forms of imperialism and colonialism.[3] Until recently, non-Native scholarship has largely substantiated this sentiment.

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[2] Brian Slattery, "Our Mongrel Selves: Pluralism, Identity and the Nation," in Ysolde Gendreau, ed., *Communautés de Droits/Droits de Communautés,* Montreal: Editions Themis, 2003, pp. 88, 97.
[3] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples,* New York: Zed Books, Ltd., 1999, pp. 1-2. "Western" here is used in the Occidental sense (that of European origin) and should be distinguished from the term "western," which I use to describe the region or territory west of the Appalachian Mountains, bounded generally by the Mississippi River to the east, the Great Lakes to the

Modern historians often refer to Frederick Jackson Turner's 1893 frontier thesis as the quintessential paradigm of Indian dispossession narratives.[4] Despite Native Americans' unique role in settler society, Turner's historical imagination left little room for the Indian perspective in exploring the "significance of the frontier in American history."[5] Ironically, a fascination with Indigenous culture pervaded the scholarly mind and American Indians were an integral component to western historical writing.[6] However, with national expansion came new historical perspectives in which conceptions of chronology and linear progress associated the "uncivilized" state with an oppressive past.[7]

Today, most non-Native scholars acknowledge the ethical obligations that arise when researching and writing American Indian history from a culturally external perspective.[8] Moreover, in recent years, the Native voice has begun to penetrate the

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north, and the Ohio River to the south (what became known as the Northwest Territory) settled by Euro-Americans during the late-eighteenth/early-nineteenth century.

[4] See for example, Robert Utley, *The Indian Frontier of the American West,* Albuquerque: Univ. of New Mexico Press, 1984; Lee Benson, "The Historian as Mythmaker: Turner and the Closed Frontier," in David M. Ellis, ed., *The Frontier in American Development: Essays in Honor of Paul Wallace Gates,* Ithaca: Cornell Univ. Press, 1969, pp. 3-19; and R. David Edmunds, "Native Americans, New Voices: American Indian History, 1895-1995," *American Historical Review,* Vol. 100, No. 3 (June, 1995): pp. 717-740.

[5] Frederick Jackson Turner, *The Significance of the Frontier in American History*, Madison: State Historical Society of Wisconsin, 1894.

[6] Despite the persistent ethnocentric impulse, few nineteenth-century scholars recognized the cultural biases of having American Indian history written from the non-Native perspective: "Could [Indians] now come up from their graves, and tell the tale," noted one prominent historian, "Indian history would put on a different garb. . . and the voice of justice would cry much louder in their behalf." See Jared Sparks, "Materials for American History," *North American Review,* Vol. 23, No. 53 (Oct., 1826), p. 283.

[7] The "problem" with American Indian history, according to one twentieth-century scholar, is of "a people, divided into many tribes. . . who kept no historical records themselves." "[T]he Indian does not characteristically think in strict historical terms," the author adds, and "seems also to have little sense of time sequence." See Stanley Pargellis, "The Problem of American Indian History," *Ethnohistory,* Vol. 4, No. 2 (Spring, 1957), pp. 113-114. For a modern critical analysis, see generally Martin Calvin, ed., *The American Indian and the Problem of History,* New York: Oxford University Press, 1987. For an early twentieth-century legal analysis on this issue, see Ray A. Brown, "The Indian Problem and the Law," *Yale Law Journal,* Vol. 39, No. 3 (Jan. 1930): pp. 307-331.

[8] American Indian scholar Donald Fixico identifies several of these responsibilities, which include the removal of ethnocentrism; the consideration of Indian viewpoints; and the fair treatment in the historical portrayal of Native peoples; see Fixico, "Ethics and Responsibilities in Writing American Indian History," *American Indian Quarterly,* Vol. 20, No. 1 (Winter, 1996): pp. 35-36; on ethical issues in Indian

research, literature, and scholarly debates. Since the 1960s, American Indian history has emerged with renewed methodological vigor in academic studies. "Over the past several decades," notes Native American historian Philip Deloria, "[Indian history] has shifted: rather than existing as the *subject* of inquiry, [it] has become a critical *agent* of history-telling itself—both in local native communities and in the world of global intellectual discourse."[9]

Despite these important accomplishments, cultural and intellectual barriers remain. While legal and historical scholarship have provided a forum for inter-cultural dialogue and debate, principles of comity and reciprocity have taken longer to penetrate methodology and practice.[10] In writing legal histories involving Native peoples, these issues must be taken into consideration to help overcome ethnocentric biases.

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scholarship from a non-Native perspective, see Susan Dabulskis-Hunter, *Outsider Research: How White Writers 'Explore' Native Issues, Knowledge, and Experiences,* Bethesda, MD.: Academica Press, LLC, 2002.

[9] Philip J. Deloria, "Historiography," in Philip J. Deloria and Neal Salisbury, eds., *A Companion to American Indian History* (Blackwell, 2004), p. 1.

[10] This is particularly true in law. Only in recent years have corporate legal publishers begun to include tribal court decisions in their reporters and online databases. For example, West published its first volume of the *American Tribal Law Reporter* in 1997. The online database version includes published case law dating back only to the mid-1990s from a dozen or so tribes including the Cherokee Nation of Oklahoma, Mohegan Tribe, Navajo Nation, Confederated Salish and Kootenai Tribes, and Hopi Tribe. For an earlier attempt to overcome this disparity, see the publisher's introduction to the *Indian Law Reporter*, Vol. 10 (Jan., 1983): p. 6001. For a general assessment of legal comity in practice, see Gordon K. Wright, "Recognition of Tribal Decisions in State Courts," *Stanford Law Review* Vol. 37, No. 5 (May 1985): pp. 1397-1424. For a critical analysis of pervasive ethnocentric methods in history, see James A. Clifton, "The Tribal History—An Obsolete Paradigm," *American Indian Culture and Research Journal,* Vol. 3, No. 4 (1979): pp. 81-100.

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INTRODUCTION: THE NARRATIVES AND COUNTER-NARRATIVES OF INDIANA LEGAL HISTORY, REVISITED[11]

Indiana legal history embodies an array of cultural traditions, social norms, customary practices, and multi-national sources; it begins before the modern institutions of representative government, rules of procedure, and volumes of case law. Situated in the vast colonial periphery of European empire and far from the centers of metropolitan government, the region that encompassed what we know today as Indiana existed beyond the effective reach of formal regulatory structures. Yet despite the "legal vacuum" that American history often portrays the state to have filled with the territorial charter of the 1787 Northwest Ordinance and subsequent common law "reception" statutes, the region's early inhabitants had planted their own common law systems.[12] For nearly a century before the American territorial period, the region's jurisprudence evolved in the written laws and unwritten customs and usages of its inhabitants.

Prior to European settlement, the region's North American Indigenous peoples exercised their own forms of sovereignty, recognized territorial jurisdictions, held tribal councils, established confederacies, practiced inter-tribal diplomacy, and orchestrated the complex social order under varied rules, governing structures, and mechanisms of dispute resolution. Tribal laws and customs continued in force internally following contact with European colonists. However, through inter-cultural alliances of political, social, or economic intent, a hybrid system of Indian-settler norms emerged to regulate the small

[11] "Revisited" here implies an evaluation of Indiana legal history subsequent to the publication of David J. Bodenhamer and Randall T. Shepard's introductory chapter under the same name in *The History of Indiana Law*, Ohio University Press, 2006, a monograph in which American Indians are conspicuously absent.
[12] For literature perpetuating the myth of the region as a "lawless" frontier prior to American territorial organization, see, for example, George Packard, "The Administration of Justice in the Lake Michigan Wilderness," *Michigan Law Review,* Vol. 17, No. 5 (March 1919): pp. 382-383 (describing the early settlements at Sault St. Marie, Detroit, Kaskaskia, Vincennes, as "primitive centers.").

settlements and villages that dotted what became known to the French as the *Pays d'en Haut.*[13] Over time, Indigenous and European settlers created a frontier society of multi-faceted legal traditions, a constitution of trans-national common laws from which the state would emerge in 1816.

This story, therefore, begins with the penetration of the cultural divide in the interior region of the continent; yet it departs from the traditional conquest narrative that typically follows the period of contact.[14] That the American Indians lost much of their self-governing status is clear; however, a closer look at the ways in which nations historically defined, exercised, asserted, and shared jurisdiction provides greater detail and depth to concepts of sovereignty and how it affected the region's inhabitants, Natives and newcomers alike.[15]

By distinguishing territorial from personal and subject matter jurisdiction, the historical record reveals a more intricate story of influence, authority, and concession. During the colonial and early national periods, Indian-settler relations often displayed a mutual preference for substantive justice and equity rather than a strict adherence to form

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[13] For a historical overview of tribal law and tribal legal systems, see Justin B. Richland and Sarah Deer, eds., *Introduction to Tribal Legal Studies,* Lanham, Maryland: Alta Mira Press, 2004. For an introduction to the transformation of American Indian legal systems following contact, see Katherine A. Hermes, "The Law of Native Americans, to 1815," in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America,* Vol. 1: *Early America (1580-1815),* Cambridge: Cambridge University Press, 2008, pp. 32-62. For a map and socio-geographic description of the *Pays d'en Haut* (or upper country), see Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815,* Cambridge: Cambridge University Press, 1991, pp. x-xiii.

[14] On conquest narratives see, for example, the exceptional studies of Richard Slotkin, *Regeneration Through Violence: The Mythology of the American Frontier, 1600-1860,* Norman: University of Oklahoma Press, 2000; Francis Jennings, *Invasion of America: Indians, Colonialism, and the Cant of Conquest,* Chapel Hill: University of North Carolina Press, 2010; and Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York: Oxford University Press, 1992.

[15] As Katherine Hermes notes, "[b]y expanding the view of the function and evolution of law, historians may increase our ability to understand both the formation and articulation of structures of governance and the changing boundaries of sovereignty that emerged in the newly developing sphere of colonization." See Hermes, "Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance," *American Journal of Legal History,* Vol. 43, No. 1 (Jan., 1999): p. 56.

or procedure.[16] Neither the French, British, or American settlers displaced tribal customs or self-governance entirely; rather, they adjusted to and often accommodated Indian concepts of law and justice. Foremost within this middle ground was the idea and practice of reciprocity. In essence, the concept signifies a normative relationship between sovereign nations where the conduct of one state is juridically contingent upon that of the other.[17] "Whether this common norm existed," notes Katherine Hermes, and the extent to which colonial authorities recognized and applied it, "had great implications for how individual [Indians] and their tribes would fare in their own demands" of settler society.[18]

By rejecting the thesis of unilateral conquest by law, this study suggests that Indiana's legal past was, in many respects, an *ad hoc* process of cultural brokerage, reciprocity, and inter-personal accommodation.[19] The story that follows situates Indiana and its pre-territorial history within a larger "middle ground" of Indian-settler relations, focusing on reciprocally formative legal relations rather than persistent conflict. Through sustained interaction, a shared set of rules, principles, and jurisdictional practices merged, forming a *sui generis* legal order unique to frontier society, albeit one with varying degrees of success and fidelity.[20] Only with the early nineteenth-century rise of legal

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[16] Katherine Hermes, "'Justice Will Be Done Us': Algonquian Demands for Reciprocity in the Courts of European Settlers," in Christopher L. Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America,* Chapel Hill: University of North Carolina Press, 2001, p. 128.

[17] Bruno Simma, "Reciprocity," in R. Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition, www.mpepil.com (accessed 11 May 2010); also see Francesco Parisi and Nita Ghei, "The Role of Reciprocity in International Law," *Cornell International Law Journal,* Vol. 36, No. 1 (Spring, 2003): p. 94.

[18] Hermes, "Justice Will Be Done Us," p. 129.

[19] See, generally, White, *Middle Ground;* and Richard J. Ross, "The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History," *William and Mary Quarterly* Vol. 50, no. 1. 3rd Series (Jan. 1993), especially at pp. 37-38.

[20] Ibid. p. 126. As Richard White describes the process, inter-cultural accommodation results from a series of "creative, and often expedient, misunderstandings." The parties involved "often misinterpret and distort both the values and the practices of those they deal with, but from these misunderstandings arise new meanings and through them new practices." See White, *Middle Ground,* p. x.

positivism and the principle of territorial jurisdiction would Indians lose their status in settler society as equal sovereigns.

On the Significance of Custom: Continuity and Discontinuity in "Common Law" Cultures

To conceive of law historically as a body of statutes and cases fails to consider the diverse origins of a legal culture. As Harold Berman points out, the "common law" is an evolving concept, "a process in which rules have meaning only in the context of institutions and procedures, values and ways of thought."[21] "From this broader perspective," he adds, "the sources of law include not only the will of the lawmaker but also the reason and conscience of the community and its customs and usages."[22]

"Custom" and "usage" relate to longstanding social practices that—as unofficial and unenacted sources of community obligation—come to possess the force of law, either through "formal" recognition of state legal institutions or by means of "informal," community-based enforcement mechanisms.[23] The precise meaning of these terms varies according to place, time, and user, but implies a common emphasis on modes of social regulation other than or outside state-imposed law.[24]

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[21] Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition,* Cambridge, Mass: Harvard University Press, 1983, p. ii.
[22] Ibid.
[23] David J. Bederman, *Custom as a Source of Law,* New York: Cambridge UniversityPress, 2010, pp. ix, 171; also see George Rutherglen, "Custom and Usage as Action under Color of State Law: An Essay on the Forgotten Terms of Section 1983," *Virginia Law Review,* Vol. 89, No. 4 (June 2003): p. 926; and Andrea C. Loux, "The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century," *Cornell Law Review,* Vol. 79, No. 1 (Nov., 1993): p. 183. "Custom" refers to the law to which a social practice gives rise whereas "usage" indicates the social practice itself. Usage, therefore, becomes custom (and thus law) upon judicial notice.
[24] M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws,* Oxford: Oxford University Press, 1975, p. 119. Scholars often refer to custom as "law from below" in that its basis and legitimacy stem from established community practices rather than the assertion of state authority; see Loux, "Ancient Regime," p. 183.

The conceptual origins of customary law emerged from distinctions made in Greek philosophy between the written and unwritten law, or *nomos eggraphos* and *nomos agraphos.* Roman philosophers borrowed this distinction but not until the Justinian Code would they consider the *ius ex non scripto* as a particular source of law. Under Book One of the *Institutes,* "[a] *lex* is that which was enacted by the Roman people on its being proposed by a senatorian magistrate, as a consul."[25] "The unwritten law," on the other hand, "is that which usage has established; for ancient customs, *being sanctioned by the consent of those who adopt them,* are like laws."[26]

During the medieval period, the common laws of Europe existed in multiplicity, defined not strictly by their positive, territorial character but by their relational, local, and even mobile nature. The *ius commune* evolved from a synthesis of Roman law, canon law, and established custom. Described as "the cultural bridge of the Western legal tradition," the *ius commune* served to reconcile customary norms with positive and natural law doctrines.[27]

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[25] Paul Halsall, ed., "The Institutes, 535 CE," *Internet Medieval Sourcebook,* available at http://www.fordham.edu/halsall/sbook.html (accessed 4 December 2010).

[26] Ibid [emphasis added]. Not until the medieval period would jurists develop a prescriptive set of legal criteria or system of rules by which to prove a custom's force of law. In addition to identifying the general prerequisite of established usage, the *Decretum Gratiani,* a twelfth-century compilation of canon law, validated custom so long as it conformed to the dogmatic tenets of divine or natural law, reason, or equity; see G.C.J.J. Van den Bergh, "The Concept of Folk Law in Historical Context: A Brief Outline," in Alison Dundes Renteln and Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of Lex Non Scripta,* Vol. 1, Madison: University of Wisconsin Press, 1994, p. 12; and (for an extended analysis of the Decretum Gratiani) Jean Porter, "Custom, Ordinance and Natural Right in Gratian's Decretum," in Amanda Perreau-Saussine and James Bernard Murphy, eds., *The Nature of Customary Law: Legal, Historical, and Philosophical Perspectives,* Cambridge: Cambridge University Press, 2007, pp. 79-100.

[27] On the "common laws" of Europe, see H. Patrick Glenn, *On Common Laws,* Oxford: Oxford University Press, 2005, pp. 1-44; on custom in the *ius commune* as "the cultural bridge of the Western legal tradition," see David J. Bederman, *Custom as a Source of Law,* New York: Cambridge UniversityPress, 2010, pp. 22, 24-25; and, for an extended book-length treatment, see Manlio Bellomo, *The Common Legal Past of Europe: 1000-1800,* trans. Lydia G. Cochrane, Washington, D.C.: Catholic University of America Press, 1995.

Other legal systems, such as the English common law and French *Coutume de Paris,* held custom and community usage as sources of authority.[28] As colonial transplants, these legal traditions provided diaspora settlers with a framework for developing legal cultures independent of the European imperial constitution.[29] In the interior region of North America, custom played an important role in mediating conflict and ensuring justice in the absence of a formal system of law and government. As Peter Karsten notes, "[s]everal . . . customs devolved from the day-by-day doings of Spanish, French, and British traders and settlers in . . . the Mississippi and Ohio Valleys." "These residents," he adds, ". . . had developed tradition bound claims . . . by the time the Common Lawyers and their courts arrived in the early and mid-nineteenth century."[30] For Indigenous peoples, whose informal yet complex laws commonly entailed oral tradition, custom represented a significant aspect of domestic or family governance, communal property allocation, criminal sanctions, and dispute resolution.[31] Broadly speaking, each of these (otherwise distinct) societies and their legal traditions considered custom as flexible, relational, accommodative of social change, and adaptive to unique circumstances beyond political boundaries.

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[28] The standard text on the role of custom in English common law is J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century,* A Reissue with a Retrospect, Cambridge: Cambridge University Press, 1987, especially pt. 1, ch. 2, "The Common-law Mind: Custom and the Immemorial." On the *Coutume de Paris,* see infra, pp. 38-43.

[29] On the role of customary law in Anglo-American colonial society, see John Phillip Reid, "In Accordance with Usage: The Authority of Custom, the Stamp Act Debate, and the Coming of the American Revolution," *Fordham Law Review,* Vol. 45, No. 2 (Nov., 1976): pp. 335-368; and Julius Goebel, Jr., "King's Law and Local Custom in Seventeenth Century New England," *Columbia Law Review,* Vol. 31, No. 3 (March, 1931): pp. 417, 420. Premised upon the "jurisdictional diversities" of England, "the local courts and the customary law . . . assume[d] a position of transcendent importance" in colonial America.

[30] Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora—The United States, Canada, Australia, and New Zealand, 1600-1900,* Cambridge: Cambridge University Press, 2002, p. 33.

[31] Bederman, *Custom,* p. 11. As a construct of Western legal culture, H. Patrick Glenn questions the accuracy of applying the concept of custom to Indigenous law; see Glenn, *Legal Traditions of the World: Sustainable Diversity in Law,* 4th ed. Oxford: Oxford University Press, 2010, pp. 78-79.

The persistence of custom thus suggests the legal force of a body of social norms notwithstanding changes in territorial jurisdiction or state sovereignty. Many of those customs—whether written or located only in the usages of its inhabitants—that had arisen from the social makeup of a local community, persisted throughout cycles of imperial conquest, colonial settlement, revolution, and territorial cession.[32] Within a brief forty-year period during the late-eighteenth and early-nineteenth centuries, North America experienced an enormous transfer of political space. By the 1763 Treaty of Paris, the French ceded to the British jurisdiction over Quebec and the Ohio and upper Mississippi River valleys (among other territories).[33] In 1783, following the American Revolution, the British ceded to the United States the Great Lakes region and the Ohio and upper Mississippi River valleys.[34] The following year, Virginia ceded to the U.S. its vast

[32] The idea that conquered peoples possess the right to self-governance is an ancient and fundamental facet of Western legal thought. Scholars often trace the historical development of this recognition doctrine to early Roman policy that allowed subject communities to retain municipal laws and to administer justice *inter se.* As the Romans encountered foreign legal systems during the course of imperial expansion, they often treated local custom in the provinces as a matter of pragmatic policy rather than a question of law. Although the Justinian Code introduced the possibility of conflict between law and custom (Book VIII, Title LII of the Code stipulated that custom was not to be in conflict with positive law), the Romans generally failed to articulate a clear solution to the problem as a legal principle; see A. Arthur Schiller, "Custom in Classical Roman Law," in Dundes and Dundes, *Folk Law,* Vol. 1, p. 35; and Van den Bergh, "Concept of Folk Law," in Ibid. pp. 10-11. For an overview of North American conquest and the recognition of Indian laws and customs, see James W. Zion and Robert Yazzie, "Indigenous Law in North America in the Wake of Conquest," *Boston College International and Comparative Law Review,* Vol. 20, No. 1 (Winter 1997): pp. 56-61. For thirteenth-century theological debates on the existence of non-Christian laws (*lex fomitis*) and whether human custom (rather than natural or divine law) could acquire the force of law, see Saint Thomas Aquinas, *Treatise on Law: The Complete Text,* trans. Alfred J. Freddoso, South Bend, Ind.: St. Augustine's Press, 2009, pp. 17-19, 73-75.

[33] The French also relinquished to the British the Islands of Dominica, Grenada, Saint Vincent, and Tobago. Spain received Louisiana and ceded Florida to the British. See "Definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain," 10 February 1763, in Adam Shortt, and Arthur G. Doughty, eds., *Documents Relating to the Constitutional History of Canada* [hereinafter cited as *DRCHC*], *1759-1791,* Vol. 1, Ottawa: Printed by J. de L. Taché, 1918, pp. 113-126.

[34] "Definitive Treaty of Peace," 3 September 1783, in Hunter Miller, ed., *Treaties and Other International Acts of the United States of America,* Vol. 2: *Documents 1-40: 1776-1818,* Washington: Government Printing Office, 1931, pp. 151-157.

claims over the territory northwest of the Ohio River. And in 1803, France sold the massive Louisiana Territory to the United States.[35]

During this period, a gradual shift in legal ideology began to emphasize the authority of the state as an autonomous entity possessing complete territorial jurisdiction. The naturalist idea that customary law rights persisted in the absence of express legislation to the contrary (the principle or doctrine of continuity) became qualified by the positivist view that such rights remained enforceable by explicit recognition only (the rule or doctrine of recognition). According to the latter philosophy, custom's validity depended not on actual practice or community acceptance *per se,* but rather upon external criteria of authority, which the successor state defined on its own terms.[36]

With each shift in political authority in North America, questions arose over such issues as the inhabitants' acquired rights (to property in particular); established laws and governmental institutions; and the continuing force of existing treaties. The extent of recognition in cases of state succession depended upon several variables, including the terms of negotiation among nations in the transfer of political power; the variable conditions of the ceded territory, such as its population and institutions of government (the colony's "legal personality"); and the legislative prerogative of the newly-formed

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[35] "Treaty for the Cession of Louisiana," dated 30 April 1803, in Ibid. pp. 498-511.

[36] Kent McNeil, *Common Law Aboriginal Title,* Oxford: Oxford University Press, 1989, p. 161. As Daniel O'Connell observes, "[t]he explanation of this survival of law goes to the heart of legal philosophy; the theory that law is a concomitant of man's social nature presumes survival of the legal system." On the other hand, "the theory that law is a manifestation of the sovereign will—the imperative theory—predicates this survival on the tacit or explicit consent of the successor State." See D.P. O'Connell, *State Succession in Municipal Law and International Law,* Vol. 1: *Internal Relations,* Cambridge: Cambridge University Press, 1967, p. 101. In describing the paradox of the law of state succession, Matthew Craven notes that while "its objective might be said to be the 'minimization' of the effects of political change, it is also obviously about the simultaneous recognition of that change: about order *and* disorder, about securing the continuity of certain legal relationships, *and* about legitimizing the discontinuity of others [emphasis in original]." See Craven, *The Decolonization of International Law: State Succession and the Law of Treaties,* Oxford: Oxford University Press, 2007, p. 25.

state sovereign.[37] In most cases, specific legislative and treaty provisions expressly acknowledged the inhabitants' pre-existing laws and customs, which became part of the general municipal law of the successor state.[38]

Examining these developments leads to the realization that the state legal system grew not only from the English common law and local statutory supplements but also from the integration of pre-existing norms and customs. Accordingly, this study posits that Indiana possessed a legal culture of historical depth and complexity by the time of statehood. When Indiana entered the Union in 1816, the western legal terrain embodied a mixed system of Indigenous customs, colonial transplants, popular norms, community usages, and federal territorial law (the latter of which comprised a synthesis of pre-existing laws from the original states).[39] Legal pluralism defined jurisdictional practice.

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[37] Jack P. Greene, "The Cultural Dimensions of Political Transfers: An Aspect of the European Occupation of the Americas," *Early American Studies,* Vol. 6, No. 1 (Spring 2008): p. 3. As Mark D. Walters suggests, "imperialist powers were not always interested in exporting their municipal laws to the nations they subjugated." Rather, "the political hegemony of an empire often depended upon an imperial constitution premised upon legal pluralism." See Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982," *McGill Law Journal,* Vol. 44, No. 3 (Nov., 1999): p. 714.

[38] Acquired rights provisions and principles of continuity under the Treaty of Paris (1763), Royal Proclamation (1763), Quebec Act (1774), Act Establishing the County of Illinois (Virginia, 1778), Virginia Deed of Cession (1781), Northwest Ordinance (1787), Louisiana Cession Treaty and subsequent U.S. legislation (1803-1805), and various Native American treaties are discussed at length throughout this study.

[39] In the introduction to his edited compilation of Indiana Territorial Laws, Francis Philbrick comments on the limited extent to which the statutes adapted to local circumstances or reflected the community norms of the region's diverse inhabitants. In emphasizing the necessity of context and empirical analysis in constructing a more accurate picture of Indiana's legal history, his comments deserve extended quotation:

> The statutes in this volume cannot support the theory, of which lawyers are vainly and inordinately fond, that the laws of a community are unique memorials of its history. These statutes were not an indigenous product, slowly developed, responsive and nicely adjusted to the peculiar needs of the territory. Some, indeed, do represent a rough attempt at such adjustment. The rest are foreign systems of older states, imposed upon the scattered villages of the territory. They did not embody the attainments, and only in a very partial sense did they express the traditions and the spirit of the territory—even of the American element. It is not in the statute-book, but outside of it, that one must seek for a view of the real life of the territory. Far from representing accurately what was being done in the community, we have seen that the laws most fundamental and most painfully drafted were very indifferently observed; and it is almost certain that the same was true of all the statutes. They were commands to live in a certain way that was an unfamiliar way, awkwardly and slowly learned. Despite the legislative mandates in this volume, to a large extent the people undoubtedly lived quite otherwise than commanded. To imagine that such things . . . were a reality

However, for many jurists, the diversity of legal traditions signified a crisis of legitimacy within the new constitutional order. As the nineteenth century progressed, the reconfiguration of the common law as a positive science began to displace custom as a fundamental source of law. As binding precedent and legal uniformity became guiding principles, the shift to a state-centered legal order signaled the decline of the complex, pragmatic jurisprudence of frontier life.

Traditional legal history often depicts the transition from a custom-based society to a "mature" legal system as signifying the normal growth of a state. This idea regards custom-based societies as pre-legal, or lacking a particular system of rules, procedures, and civil institutions. Whereas law "consists in rules laid down by judicial or legislative authority," custom—while sufficient for order and administration among societies with "simple social structures"—is "not quite the same as law."[40] Yet this projection of positivist concepts of law onto the past ignores the possibility that historical actors held a different sense of legal obligation. While the idea of the sovereign state as an autonomous legal entity had become axiomatic by the early 1800s, custom—as this study

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> in the Illinois country would be absurd. The whole system was overwrought, too complicated for application—or even, as regards the French inhabitants, for understanding; it could actually have worked only where it had been long familiar. It was not alone, but only in a greater degree than of the American, that all this was true of the French population.
>
> Lawyers are prone to believe that a society is civilized in proportion as its law is elaborated. By this test, in view of the bulky legislation of the Northwest and Indiana territories dealing with the administration of justice, there must have been a prodigious forward step in civilization between 1787 and 1809. Yet anyone who reflects upon the life which was led, before the American period, in the French villages of the Illinois, may recall the other doctrine, implicit in our national political professions, that "civilization consists in teaching men to govern themselves by letting them do it," and must harbor doubts as to the progress.
>
> The truth is, of course, that the bulk of the statute-book is no test at all. The legislation on the courts in the book before us is bulky precisely because most of it was ineffective and had no adjusted relation to the social life that it supposedly served.

See Francis S. Philbrick, ed., *Laws of Indiana Territory, 1801-1809,* Collections of the Illinois State Historical Library, v. 21, Springfield, Ill: Trustees of the Illinois State Historical Library, 1930, pp. ccxxiii-ccxxiv.

[40] Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge*, Chicago: University of Chicago Press, 1994, pp. 67, 71, quoting legal historians John H. Baker and H.L.A. Hart.

attempts to relate—remained an important source of community obligation throughout the nineteenth century.

Perhaps more indicative of customary law's vitality is its presence in fully-developed, modern societies. Today, custom survives as a source of obligation in several areas of law: public easement rights to private property; the construction of contracts; American Indian tribal courts; and private and public international law.[41] Customary law endures not only because of its deep jurisprudential foundations, but also because of its practical and rational nature. Although conflicts with state law and policy inevitably arise, "[c]ustom thrives in legal cultures that are accepting of multiple sources of legal obligation and the possibility that different rules could be applied on the same facts to the same actors."[42]

Scope and Content

The foregoing context raises several important questions. How did the transition from colonial to territorial and state government affect the popular customs and community usages that existed among the region's inhabitants? How and to what extent did civil government accommodate, either in policy or practice, the plurality of norms among its diverse settler communities? What were the legal foundations upon which the government recognized those laws and customs in place prior to territorial acquisition? Did Indiana lawmakers interpret and apply these rules or principles differently in respect

[41] See Bederman, *Custom,* pp. 75-79 (discussing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) and other state cases on public easement rights), 84-88 (discussing the Uniform Commercial Code's codification of trade custom), 131-132 (discussing forums and methods of dispute resolution in international commercial arbitration), 135-136 (discussing dispute resolution among nation-states under article 38 of the Statute of the International Court of Justice). On the role of custom in American Indian tribal courts, see Gloria Valencia-Weber, "Tribal Court: Custom and Innovative Law," *New Mexico Law Review,* Vol. 24, No. 2 (Spring, 1994): pp. 225-263.

[42] Bederman, *Custom,* pp. 179, 180; also see Robert Ellickson, *Order with out Law: How Neighbors Settle Disputes,* Cambridge, Mass.: Harvard University Press, 1991.

to the French? The Indians? How and to what extent did these groups take part in the recognition process?

This study attempts to answer these questions by examining Indiana and its pre-territorial landscape within the context of Indigenous-settler legal relations, specifically in matters related to marriage, property rights, and testimony. Each of these areas of law illustrates, in a microcosm, the nineteenth-century shift from a custom-based society to a state-centered legal order and how the positivist rule of recognition either conferred or denied validity to the law of the "other."

Between 1717—the year marking the commencement of French expansionist efforts in the region—and 1897—the year in which the Miami Indians became the last federally recognized tribe in the State of Indiana—the region's legal terrain transformed dramatically. Periods of conquest and state succession introduced distinct and often-discordant legal systems to the region. And with each transition, settlers carried with them a new set of social, economic, and cultural value systems. Ultimately, however, community norms and practices, rather than the unilateral acts of state, often dictated the character of local legal culture and its pace of change.

The geographic scale of this study centers on the state of Indiana; however, because it considers the pre-statehood period, this is also a story of the *Pays d'en Haut* ("Upper Country"), Ohio Country, Western Great Lakes Region, Illinois and Wabash Countries, trans-Appalachian west, and Northwest Territory. Although the spatial scope of inquiry narrows as the frontier recedes and the western states take shape, a regional analysis provides an essential starting point, a practical framework for identifying

patterns of social and legal organization that local or national studies often overlook.[43] On a larger scale, Indiana legal history reveals shared characteristics with Anglophone settler polities throughout the nineteenth-century colonial world.[44] These commonalities existed from a shared history of conquest and settlement, resulting in a global diaspora of English language, common law culture, governmental institutions, household structures, and land tenure regimes.

While the Northwest Ordinance of 1787 was "seminal in establishing a midwestern legal culture," each state carved out of the Old Northwest has its own story that warrants further attention.[45] However, in matters of nineteenth-century American Indian law and policy, Indiana history departs little from contemporary developments in other state jurisdictions, whether contiguous or non-contiguous. Following the federal removal efforts of the 1830s, Indiana lawmakers—like those in other states—assumed broad discretion in regulating those Indians that remained within state borders. While Indiana may have tailored its law and policy toward the tribes in response to shifting settler demographics or unique socio-economic needs, the state typically followed the lead of others, enacting legislation similar to that found in New York, Georgia, Alabama, or Tennessee.[46] The reason for this uniformity of law is straightforward: the exercise of jurisdiction beyond matters traditionally reserved for the states—such as property and

[43] James W. Ely, Jr. and David J. Bodenhamer, "Regionalism and American Legal History: The Southern Experience," *Vanderbilt Law Review,* Vol. 39, No. 3 (April, 1986): p. 540.
[44] "Regionalism cannot account for all legal change because other forces—some particular, others global—have an impact on law." Ibid. p. 544.
[45] Quote from Bodenhamer and Shepard, *History of Indiana Law,* p.5.
[46] For introductory, state-level studies, see Deborah Rosen, "Colonization through Law: The Judicial Defense of State Indian Legislation, 1790-1880," *American Journal of Legal History,* Vol. 46, No. 1 (Jan., 2004): pp. 26-54; Tim Alan Garrison, "Beyond Worcester: The Alabama Supreme Court and the Sovereignty of the Creek Nation," *Journal of the Early Republic,* Vol. 19, No. 3 (Autumn, 1999): p. 450; Cynthia Cumfer, "Local Origins of National Indian Policy: Cherokee and Tennessean Ideas about Sovereignty and Nationhood, 1790-1811," *Journal of the Early Republic,* Vol. 23, No. 1 (Spring, 2003): pp. 21-46. For a brief overview on the state of this literature, see infra, n. 67, and corresponding text.

inheritance, marriage, and testimony—would have been seen as an explicit encroachment into the federal sphere of U.S.-tribal relations.[47]

The significance of Indiana in this study originates less from historical circumstances than it does with more contemporary developments in American Indian law and policy. Today, among the six states that emerged from the Old Northwest, only three—Michigan, Wisconsin, and Minnesota—have federally recognized tribes that retain sovereign status. Ohio, Illinois, and Indiana, on the other hand, exercise complete territorial jurisdiction over their Native American residents.[48] Of these states, only Indiana has had a tribe petition for federal recognition since the Bureau of Indian Affairs (BIA) instituted new regulations in 1978.[49] In 1992, however, the BIA formally declined acknowledgment to the Indiana Miami Nation of Indians, a tribe with whom the federal government held long-standing relations until 1897.[50]

Although tribal recognition extends from a complex history of federal relations (through treaty making, congressional acts, executive orders, Supreme Court cases, or otherwise), the states have played an important part in defining tribal legal status as well,

[47] As Bethany Ruth Berger observes, "[i]t was often at the state level that judges combined the shifting national perception of the 'Indian problem' with local exigencies of that problem, particularly in their treatment of traditional state law matters such as descent, marriage and property law." See Berger, "After Pocahontas: Indian Women and the Law, 1830 to 1934," *American Indian Law Review,* Vol. 21, No 1 (1997), p. 3, note 7.

[48] Certain federal measures, however, such as the Indian Child Welfare Act (discussed at length in the afterword), reserve specific subject matter jurisdiction for the tribal courts, thus qualifying all states—including those without federally recognized tribes—from exercising complete territorial jurisdiction.

[49] Since 1979, several tribes from Illinois, Ohio, and Indiana (18 in total) have filed letters of intent to petition the BIA for federal acknowledgment status, but only the Miami Tribe formally submitted their petition in 1984; see U.S. Department of the Interior, Bureau of Indian Affairs, "List of Petitioners by State (as of April, 29, 2011)," *Basic Administrative and Regulatory Documents,* pp. 22-23, 39-40, available at http://www.bia.gov/WhoWeAre/AS-IA/OFA/index.htm (accessed 27 October 2011).

[50] See the afterword for an extended discussion of the BIA regulations and the Miami petition for recognition.

particularly during the period leading up to the Civil War.[51] As the only state in the region to have had a tribe been denied recognition under modern federal regulations (which require unrecognized tribes to meet several criteria to demonstrate historical continuity as a distinct, autonomous community), Indiana deserves extended attention for its historical role in this process.

The structure of this study entails three distinct chapters. Chapter one focuses on the period leading up to 1816, providing thematic context to the issues discussed at length in subsequent chapters. Each section, organized chronologically, collectively examines the effects of French and British colonialism and U.S. territorial government on Indian-settler relations and the shifting norms that governed community life within the continental interior. By studying the pre-statehood legal landscape in greater detail, I am concerned not only with outlining the impact that both Indigenous and Western legal thought had on the region, but also with distinguishing the origins of a normative dialogue that persisted across cultural lines and throughout cycles of imperial conquest and state succession.

The French play a particularly unique role in this chapter for several reasons. First, in contrast to British and early American accounts of the frontier as a "lawless" hinterland, these early settlers had created a self-sufficient and sustainable system of law and government along the peripheries of colonial empire. Second, in adjusting to the unique circumstances of frontier life, the French adaptation to Indian laws and customs

[51] For example, *Roche v. Washington* (the 1862 Indiana Supreme Court case discussed at length in chapter three) deals squarely with matters of tribal recognition two and three years prior to, what are often considered, the first U.S. Supreme Court cases to address the issue; see William W. Quinn, Jr., "Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept," *American Journal of Legal History,* Vol. 34, No. 4 (Oct., 1990): pp. 345-346, discussing *U.S. v. Holliday,* 70 U.S. (3 Wall.) 407 (1865); and *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1866).

illustrates the cultural permeability of legal traditions, thus challenging ideas of incompatibility between two otherwise disparate peoples.

The French presence in the region also highlights the ways in which the British and American successor states managed the colonial encounter. The search for legal order and political stability during the course of imperial conquest, territorial expansion, and state formation involved a variety of techniques, doctrines, and ideologies in relation to different subject polities. By rejecting the naturalist idea that a single, universally applicable law governed all peoples alike, early nineteenth-century legal positivists began to view international law as the exclusive domain of "civilized" societies. By stressing cultural differences between Indigenous peoples and those of European descent, leading jurists of the period relegated the former to a subordinate legal status.[52] In contrast, the French presented less of a cultural barrier to Indiana law and policy. Although legal conflicts certainly arose and many French had emigrated during the territorial period, the task of incorporating them into settler society proceeded rather efficiently when compared with the Indian tribes.

Chapter two, which commences with Indiana statehood in 1816, examines the transition of Indian-settler sovereignty from an inter-communal relationship based on the reciprocity of customary norms to a hierarchal legal order premised upon the idea of complete territorial jurisdiction. With an emphasis on the state expropriation of Indian lands, the discussion here entails a jurisdictionally focused analysis of larger national developments in American Indian law and policy. By the first quarter of the nineteenth century, American property law had undergone a radical transformation. Whereas the

[52] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2004, pp. 33, 52-53.

earlier natural law philosophy regarded property rights as inviolate, legal positivism vested an exclusive right in the state to regulate these matters. Within this paradigm shift, the notion that the tribes enjoyed full rights to the land they owned by virtue of occupancy or customary usage gave way to a new legal ideology, which ultimately failed to protect Indian title against the pre-emption claims of the settler state. In theory, the U.S. Constitution curtailed state authority over Indian affairs.[53] However, with the tacit acceptance of the federal government, the state extended its jurisdiction over the tribes; defined Indian legal status; regulated the sale, conveyance, and inheritance of Indian lands; and restricted Indians' ability to enter into enforceable contracts.

Chapter three, organized topically, explores the characteristic features of colonial culture in nineteenth-century Indiana. Within a global context of Indigenous-settler relations, the narrative here traces the ideas and practices that surfaced across the far reaches of colonial empire and into the local legal institutions of the settler state. Despite their structural differences in approach to governing the Indigenous population, British and American settler polities employed similar strategies and techniques—both juridical and empirical in nature—for containing the jurisdictional anomalies of colonial society. State practices included the ethnographic study Native culture and life ways; the implementation of official criteria for recognizing Native customary law; and the establishment of rules of evidence, such as those regulating testimony in court. Following an extended survey of these issues, the final part of this chapter explores,

[53] U.S. Constitution, art. 1, sec. 8 provides that "Congress shall have power to . . . regulate commerce with . . . the Indian tribes." The vague wording of this clause and the overall ambiguity in federal Indian policy led the states to claim jurisdiction for themselves. As historian Tim Alan Garrison notes, by the 1830s "the idea that states held jurisdiction over Indians within their borders became the majority rule in America." See Garrison, "Beyond Worcester," p. 450.

through case study analysis, how colonialism provided a doctrinal framework for the recognition of Indian marriage customs in Indiana.

Needless to say, the ways in which the settler state responded to and recognized the Indian presence varied considerably. Throughout each of these chapters, themes of reciprocity and accommodation mark the historical narrative. Despite the nineteenth-century ascendance of legal positivism, the transition to a state-centered legal order failed to immediately or entirely displace a common normative discourse. Indians and settlers alike exploited, shaped, and borrowed law, often bridging the cultural divide, not only for group interests or self-serving purposes but also to accommodate socially evolving ideas of justice.[54]

On the Moral Presence of Our Past: A Note on Legal-Historical Methodology

In common law jurisprudence, the purpose of the past is to derive rules and principles that contain normative force and moral resonance with which to resolve contemporary issues and problems.[55] Most academic historians consider this approach as subjective, Whiggish, or present-oriented, a distortion of historical representation in that modern values and anachronisms replace "objective" methods and "detached" interpretations of

[54] Bruce P. Smith, "Negotiating Law on the Frontier: Responses to Cross-Cultural Homicide in Illinois, 1810-1825," in Daniel P. Barr, ed., *The Boundaries Between Us: Native and Newcomers along the Frontiers of the Old Northwest Territory, 1750-1850,* Kent, Ohio: Kent State University Press, 2006, p. 163.

[55] Mark D. Walters, "Towards a 'Taxonomy' for the Common Law: Legal History and the Recognition of Aboriginal Customary Law," in Diane Kirkby and Catharine Coleborne, eds., *Law, History, Colonialism: The Reach of Empire,* Manchester, England: Manchester University Press, 2001, p. 126.

the past. Proper history, by contrast, deals "not with past events in relation to ourselves and to the habitableness of the world, but in respect of their independence of ourselves."[56]

While philosophers have long questioned the "purpose of the past," the issue has emerged in recent decades with renewed vigor as historians debate the merits of one methodological theory over another.[57] As a publicly oriented practice, history has broad implications on the ways in which moral discourse unfolds in today's society. Legal historians in particular have an important responsibility in portraying the law's past and its relationship to Indigenous peoples.[58] History plays a critical role in contemporary Native claims litigation, perhaps more than any other area of law. The legal status of today's Native peoples extends from a complex doctrinal history of international jurisprudence, treaties, statutes, constitutional principles, and customary practice spanning more than five centuries of interaction with settler society.[59] As an ongoing process of legal inquiry, the Indigenous past is "alive with normative potential."[60]

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[56] Michael Oakeshott, *Rationalism in Politics, and Other Essays,* London: Methuen & Co., 1962, p. 147, as quoted by P.G. McHugh, "The Common-Law Status of Colonies and Aboriginal 'Rights': How Lawyers and Historians Treat the Past," *Saskatchewan Law Review,* Vol. 61, No. 2 (1998): p. 394.

[57] See generally, the introduction in Gordon S. Wood, *The Purpose of the Past: Reflections on the Uses of History,* New York: Penguin Press, 2008, pp. 1-16. On the "objectivity question," the standard work is Peter Novick's *That Noble Dream: The "Objectivity Question" and the American Historical Profession,* Cambridge: Cambridge University Press, 1988.

[58] For a discussion on the influence of "revisionist" or "juridical" history on legal considerations of Indigenous land rights in Australia, see Bain Atwood, "*The Law of the Land* or the Law of the Land?: History, Law and Narrative in a Settler Society," *History Compass,* Vol. 2, No. 1 (Jan. 2004): pp. 1-30.

[59] On "why history matters" in American Indian law, see Felix S. Cohen, et al., *Cohen's Handbook of Federal Indian Law,* 2005 Edition, Newark, NJ: LexisNexis, 2005, pp. 6-10; also see, Gloria Valencia-Weber, "American Indian Law and History: Instructional Mirrors," *Journal of Legal Education,* Vol. 44, No. 2 (June 1994): pp. 251-266. Since the early 1990s, historians (as well as anthropologists, archaeologists, and other academics from the social sciences) have played a unique role in Native claims litigation. Legal and historical scholars often attribute this development to *Mabo v. Queensland* (175 CLR 1), a 1992 case in which the High Court of Australia rejected the colonial doctrine of *terra nullius* by recognizing Aboriginal title for the first time. Literature on the case is extensive; see for example, Christine Choo, "Historians and Native Title: The Question of Evidence," in Kirkby and Coleborne, *Law, History, Colonialism,* pp. 261-276. On the ethical standards for historians involved in the legal process, see Jonathan D. Martin, "Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts," *New York University Law Review,* Vol. 78, No. 4 (Oct., 2003): pp. 1532-1533; Douglas R. Littlefield, "The Forensic Historian: Clio in Court," *Western Historical Review,* Vol. 25, No. 4 (Winter,

This study is, admittedly, presentist in that my interest in the subject of Indian-settler legal relations extends, in part, from concerns over modern developments in law and policy. Yet the question remains: is subjectivity a bad thing? All historical research and writing involves selection, interpretation, analysis, and emphasis of particular sources, never leaving the process completely free of partiality. In looking to the past for normative guidance, historians need not sacrifice academic integrity or sound empirical research. Nor must our projection of modern, ideologically informed, moral and political values distort the past. To the contrary, such values may actually provide greater depth of understanding historical subject matter through different perspectives, while leaving room for evaluation, critique, and negotiation.[61]

Without ignoring the means by which settler societies used law as an instrument of Native dispossession, it remains important—if only for broadening our knowledge of

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1994): p. 507; and J. Morgan Kousser, "Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing," *Public Historian,* Vol. 6, No. 1 (Winter, 1984): pp. 5-19. Conversely, legal ethics regulating lawyers from engaging in what is often referred to as "law office history" is a subject of critical inquiry among many legal history scholars. The literature is large and diverse; see for example, Alfred Kelly, "Clio and the Court: An Illicit Love Affair," *Supreme Court Review,* Vol. 1965 (1965): pp. 119-158; Daniel A. Farber, "Adjudication of Things Past: Reflections on History as Evidence," *Hastings Law Journal,* Vol. 49, No. 4 (April 1998): 1009-1038; Martin S. Flaherty, "History 'Lite' in Modern American Constitutionalism," *Columbia Law Review,* Vol. 95, No. 3 (April 1995): 523-590; John Reid, "The Touch of History – The Historical Method of A Common Law Judge," *American Journal of Legal History,* Vol. 8, No. 2 (April 1964): 157-171; Neil M. Richards, "Clio and the Court: A Reassessment of the Supreme Court's Uses of History," *Journal of Law and Politics,* Vol. 13, No. 4 (Fall 1997): 809-891; Buckner F. Melton, Jr., "Clio at the Bar: A Guide to Historical Method for Legists and Jurists," *Minnesota Law Review,* Vol. 83, No. 2 (Dec. 1998): 377-472; Matthew J. Festa, "Applying a Usable Past: The Use of History in Law," *Seton Hall Law Review,* Vol. 38, No. 2 (2008): pp. 479-533; and Hon. Jack L. Landau, "A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation," *Valparaiso University Law Review*, Vol. 38, No. 2 (Spring 2004): 451-487.

[60] Mark D. Walters, "Histories of Colonialism, Legality, and Aboriginality," *University of Toronto Law Journal,* Vol. 57, No. 4 (Fall, 2007): pp. 819, 820.

[61] Ibid. p. 827; R.P. Boast, "Lawyers, Historians, Ethics, and the Judicial Process," *Victoria University of Wellington Law Review,* Vol. 28, No. 1 (March, 1998): p. 109; and F.R. Ankersmit, "In Praise of Subjectivity," in David Carr, Thomas R. Flynn, and Rudolf A. Makkreel, eds., *The Ethics of History,* Evanston, Ill.: Northwestern University Press., 2004, pp. 22, 24-25. According to Ankersmit, "[h]istorical writing is, so to speak, the experimental garden where we may try out different political and moral values and where the overarching aesthetic criteria of representational success will allow us to assess their respective merits and shortcomings."

the legal past—to explore how settler law often accommodated the "other." As several cases in this study illustrate, the courts dealt not only with legal questions, but also, and perhaps to a greater extent, with fundamental moral and structural questions over how to achieve sustainable justice across the cultural divide.[62] Stories such as these present a unique opportunity for historians to use the past in shaping an intercultural *modus vivendi* in modern public discourse. Given the culturally permeable boundaries of the region's legal traditions, the framework exists for an expanded and ongoing dialogue over the "narratives and counter-narratives of Indiana legal history," stories that edify our modern sense of tolerance, accommodation, and reciprocity of diverse community norms. The challenge for modern legal forums in culturally plural societies involves identifying the value, relevance, and legitimacy of particular versions of the past, especially those that confront the "triumphalist and historicist logic of conventional settler history."[63]

Literature Review

This study draws on an extensive literature. However, select works deserve attention for their influential sources, subject matter, historical theory, and method. Moreover, significant gaps in the scholarship warrant further consideration.

Indiana legal history is limited in temporal scope. The literature often begins with statehood or the late territorial period, imparting little discussion and analysis under British and French colonial rule.[64] The most relevant work is John Barnhart and Dorothy

[62] Also see, generally, Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*," *Sydney Law Review*, Vol. 17, No. 1 (March, 1995): pp. 5-28.
[63] Bain Attwood, "Settling Histories, Unsettling Pasts: Reconciliation and Historical Justice in a Settler Society," in Manfred Berg and Bernd Schaefer, eds., *Historical Justice in International Perspective: How Societies Are Trying to Right the Wrongs of the Past*, Cambridge: Cambridge University Press, p. 219.
[64] Early Indiana histories that discuss the French and British during the colonial period largely dismiss them for providing ineffective models of frontier law and government. Jacob P. Dunn, Jr., for example, admonished the French for having "had no conception of the modern ideas of civil liberty and political rights." Rather, he insisted "[t]hey regarded self-government as an imposition on the people" and that

Riker's *Indiana to 1816: The Colonial Period,* an excellent foundational study of the region under the French, British, and early American rule. Yet while the authors provide a thorough analysis of local and regional socio-economic developments, Indian-settler relations, and the politics of state succession, there is little discussion of the territory's legal history.[65] By and large, this work and others fail to consider the customary practices, community norms, and inter-cultural reciprocity that sustained an informal measure of law and "frontier justice" prior to statehood.

Early nineteenth-century Indian-state affairs reveal critical aspects in the historical development of American Indian law and policy. However, the literature often overshadows this relationship by focusing instead on the role of the federal government. Deborah Rosen's *American Indians and State Law,* a work that addresses issues such as tribal sovereignty, racial discrimination, and Indian citizenship under state jurisdiction, is a rare exception.[66] Rosen provides a broad survey and analysis of civil and criminal court cases to illustrate the extent to which states assumed authority. Although national in scope, she introduces a state-level study unparalleled in the literature.[67]

"[t]hey did not wish to make any laws." "An honest commandment and the customs of the country were sufficient for their wants." See Dunn, *Indiana: A Redemption from Slavery,* Boston: Houghton, Mifflin & Co., 1888, p. 271.

[65] John Barnhart and Dorothy Riker, *Indiana to 1816: The Colonial Period,* Indianapolis: Indiana Historical Bureau, 1971.

[66] Deborah Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880,* Lincoln: University of Nebraska Press, 2007.

[67] For other studies that address the topic of Indian-state relations indirectly or in limited extent, see Rosen's historiography in the preface to her book. Additionally, Sidney Harring's *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century,* New York: Cambridge University Press, 1994, is an equally useful study, albeit one with greater emphasis on the history of state criminal jurisdiction over American Indians. At the Indiana and Midwestern regional level, Bruce P. Smith and R. David Edmunds present unique, though short, narratives on Indians in the law based on local archives and county court records; see Smith, "Negotiating Law," pp. 161-177; and Edmunds, "Justice on a Changing Frontier: Deer Lick Creek, 1824-1825," *Indiana Magazine of History,* Vol. 93, No. 1 (March, 1997): pp. 48-52.

A fascinating niche literature on the "clash" of legal traditions in American frontier societies provides valuable insight into the nation's mixed legal heritage and making of modern legal cultures.[68] However, Indiana and other states formed from the Northwest Territory generally fall outside the scope of these studies. In addition, the emphasis in this scholarship on legal conflict and cultural disparity downplays the significance of accommodation and reciprocity.[69] Exceptions to this gap in legal scholarship include H. Patrick Glenn, whose work has been described as "an effective antidote to the clash of civilizations."[70] By emphasizing a common normative discourse or cross-cultural *modus vivendi* between disparate groups of people, Glenn posits that all legal traditions—both in principle and in practice—"are externally open and internally accommodating."[71]

The "middle ground" perspective offered by Glenn and other legal academics builds upon the foundational scholarship of historian Richard White.[72] In his study of

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[68] See, for example, David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846,* Norman: University of Oklahoma Press, 1987; George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions,* Cambridge, Mass.: Harvard University Press, 1975; Arnold S. Morris, *Unequal Laws Unto a Savage Race: European Legal Traditions in Arkansas, 1686-1836,* Fayetteville, Ark.: University of Arkansas Press, 1985; Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut,* Chapel Hill: University of North Carolina Press, 1987; María E. Montoya, *Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840-1900,* Berkeley: University of California Press, 2002; Stuart Banner, "Written Law and Unwritten Norms in Colonial St. Louis," *Law and History Review,* Vol. 14, No. 1 (Spring, 1996): pp. 33-80; and Stuart Banner, *Legal Systems in Conflict: Property and Sovereignty in Missouri, 1750–1860*, Norman: University of Oklahoma Press, 2000.

[69] However, conflict itself involves a certain degree of accommodation and normative exchange. Conflicts necessarily arise from encounter and "even violent debate contains within it the possibility of toleration, since by implication the other is worth arguing with." Moreover, "the (slightest) contact with another tradition implies a variation in the information base of the initial tradition." See Glenn, *Legal Traditions,* p. 36.

[70] As quoted in Nicholas H.D. Foster, et al., "A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's *Legal Traditions of the World*, 2nd edition," *Journal of Comparative Law*, Vol. 1, No. 1 (2006): p. 107.

[71] H. Patrick Glenn, "Are Legal Traditions Incommensurable?" *American Journal of Comparative Law,* Vol. 49, No. 1 (Winter, 2001): p. 142.

[72] In her essay on American Indian studies, Mary E. Young describes the "middle ground" perspective, which emerged during the 1990s, as an "intellectual exchange" formed by an inter-disciplinary framework

Indian-settler relations in the Great Lakes region between 1650 and 1815, White focuses on the complex, historical processes of cultural mediation and exchange rather than conflict and subjugation. Although certainly not the first to consider the historical existence of negotiated social orders maintained under conditions of inequality, White's work has had a profound influence on theory and method across a broad range of scholarly disciplines.[73] Taking a "middle ground" approach to the past does not suggest overlooking the course of dispossession; however, this study attempts to find greater balance in an otherwise disproportionate body of scholarship.

Because of its extra-legal nature, customary law receives broad treatment from many academic disciplines.[74] By and large, however, scholars examine custom as a monistic source of authority within a particular legal tradition such as the English

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of demography, archaeology, ecology, anthropology and "new" social history. Drawing upon a range of scholarship, Young identifies this work as focusing on the "complexities of inter-cultural exchange" emphasizing the "egalitarian character of relations . . . between ethnocultural groups of the colonial period, and tend[s] to treat the gradual disappearance of this middle ground as decline rather than progress." See Young, "The Dark and Bloody but Endlessly Inventive Middle Ground of Indian Frontier Historiography," *Journal of the Early Republic,* Vol. 13, No. 2 (Summer, 1993): pp. 195-196.

[73] On the historiographical influence of White, see Catherine Desbarats, "Following *The Middle Ground,*" *William and Mary Quarterly,* 3rd series, Vol. 63, No. 1 (Jan., 2006): pp. 81-96. James Pritchard of Queen's University, flatly rejects the "middle ground" thesis, arguing simply that " [the] Natives . . . governed themselves largely independent of French law, and the French sought continuously to conciliate them." See Pritchard, *In Search of Empire: The French in the Americas, 1670-1730,* Cambridge: Cambridge University Press, 2004, p. 103, note 148. For earlier historiographical contributions, see for example, Mechal Sobel, *The World They Made Together: Black and White Values in Eighteenth-Century Virginia,* Princeton, N.J.: Princeton University Press, 1987. For other examples of the "middle ground" theory in law, see Jeremy Webber, "Relations of Force, Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples," *Osgoode Hall Law Journal,* Vol. 33, No. 4 (Winter, 1995): p. 638; and Sally Hadden, "New Directions in the Study of Legal Cultures," *Cambrian Law Review*, Vol. 33, p. 13.

[74] For a legal analysis with a cross-disciplinary perspective, see Bederman, *Custom*. For an excellent collection of cross-disciplinary essays, see Amanda Perreau-Saussine and James Bernard Murphy, eds., *The Nature of Customary Law: Legal, Historical, and Philosophical Perspectives,* Cambridge: Cambridge University Press, 2007. Also see E.P. Thompson, *Customs in Common,* New York: New Press, 1993 (History); Karl Llewellyn and and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence,* Norman: University of Oklahoma Press, 1941 (Anthropology); H.L.A. Hart, *The Concept of Law,* Oxford: Clarendon Press, 1961 (Legal Philosophy); Burton M. Leiser, *Custom, Law, and Morality: Conflict and Continuity in Social Behavior,* New York: Anchor Books, 1969 (social philosophy); and Renteln and Dundes, *Folk Law* (Folk Studies).

common law or tribal legal system.[75] Very few studies discuss the relational, inter-systemic, or dialogical qualities of customary law in legally plural societies. Notable scholars include Katherine Hermes, Ann Marie Plane, Peter Karsten, Paul McHugh, Mark Walters, and Brian Slattery, whose writings provide valuable insight into the legal recognition of Native laws and customs in French and British colonial America (and other parts of the British Diaspora).[76] However, the extent of post-colonial analysis in these works focuses largely on the loss of tribal sovereignty and the decline of legal pluralism rather than the structural continuities of customary law during the early national period.

[75] On the role of custom in English common law, see Pocock, *Ancient Constitution;* on the role of custom in American Indian societies, see Elizabeth E. Joh, "Custom, Tribal Court Practice, and Popular Justice," *American Indian Law Review,* Vol. 25, No. 1 (2000/2001): pp. 117-132; Robert D. Cooter and Wolfgang Fikentscher, "Indian Common Law: The Role of Custom in American Indian Tribal Courts," Pts. 1 and 2, *American Journal of Comparative Law*. Vol. 46, No. 2 (Spring 1998), pp. 287-337; Vol. 46, No. 3 (Summer 1998), pp. 509-580.

[76] See bibliography for respective works.

CHAPTER 1: A COMMON GROUND DIVIDED: INDIAN-SETTLER SOVEREIGNTY, COMMUNITY NORMS, AND THE CYCLES OF STATE SUCCESSION

The modern Indiana landscape possesses a territorial history of shifting geo-political borders and overlapping claims to sovereign jurisdiction.[77] As a contested site of imperial possession, the geographical realities of empire provided the region's inhabitants with greater space to negotiate the terms of social and cultural interaction as well as the rules and norms that upheld these relationships.[78] The lack of clearly defined political borders throughout most of the eighteenth century created a culturally porous frontier that blurred the boundaries of disparate legal traditions and customs.[79] Within this popular *ius commune,* historical actors perceived themselves as "members of more than one legal community," without a formal, uniform, or binding system of laws in place.[80] As groups, agents, or subject polities negotiated the scope of their autonomy, colonial society qualified the imperial exercise of complete territorial jurisdiction.[81]

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[77] For an overview of British and American jurisdictional claims encompassing modern-day Indiana, see "Introduction: Sovereignty and Legislative Authority over Indiana," in John G. Rauch and Nellie C. Armstrong, eds., *A Bibliography of the Laws of Indiana, 1788-1927: Beginning with the Northwest Territory,* Indianapolis: Historical Bureau of the Indiana Library and Historical Dept., 1928, pp. xiii-xxxix. Until France's cession of its North American colonies to England under the 1763 Treaty of Paris, both nations held extensive (and often overlapping) territorial claims to the interior region. English charters granted to various colonies during the seventeenth and eighteenth centuries—including those to Virginia, Massachusetts, Connecticut, and New York—coincided with actual French possession and settlement.

[78] Leslie Choquette, "Center and Periphery in French North America," in Christine Daniels and Michael V. Kennedy, eds., *Negotiated Empires: Centers and Peripheries in the Americas, 1500-1820,* New York: Routledge, 2002, p. 194.

[79] On the permeability and accommodative nature of "legal traditions," see H. Patrick Glenn, "A Concept of Legal Tradition," *Queen's Law Journal,* Vol. 34, No. 1 (Fall, 2008): pp. 427-445. On political boundaries and cultural frontiers see Jeremy Adelman and Stephen Aron, "From Borderlands to Borders: Empires, Nation-States, and the Peoples in between in North American History," *American Historical Review,* Vol. 104, No. 3 (June 1999): pp. 815-816.

[80] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900,* New York: Cambridge University Press, 2002, p. 14; also see generally, H. Patrick Glenn, "Transnational Common Laws," *Fordham International Law Journal,* Vol. 29, No. 3 (Feb., 2006): pp. 457-471.

[81] Lauren Benton, "Empires of Exception: History, Law, and the Problem of Imperial Sovereignty," *Quaderni di Relazioni Internazionali,* No. 6 (Dec., 2007): pp. 54-55; Lisa Ford, "Empire and Order on the Colonial Frontiers of Georgia and New South Wales," *Itinerario,* Vol. 30, No. 3 (Nov., 2006): p. 96.

For the French colonists—particularly those settling in the Illinois Country, Wabash, and Great Lakes regions after 1717—there was a greater flexibility in concepts of jurisdiction despite the claims of colonial and metropolitan authorities.[82] The construction of colonial polities in the continental interior rested largely with the settlers themselves. In negotiating their place within this newly fabricated society, settlers crafted an independent jurisdictional order through economic relations, community politics, household structures, inter-personal mediation, and a spectrum of customary practices.[83] By recognizing the economic, political, and social advantages of usufruct land tenure (the collective rights or individual privilege to exploit and benefit from, without squandering, another's property), intermarriage, and strategic military alliances against foreign encroachments, the French were inclined to negotiate and concede jurisdictional boundaries to their Indian counterparts. In essence, personal and subject matter jurisdiction overrode territorial concerns.[84]

The transition of imperial authority in 1763 signaled little departure from this model of reciprocity. Rather than assert full territorial sovereignty, the British sought to expand their jurisdictional rights without displacing Native autonomy. However, by failing to establish an effective model of legal pluralism, the American colonies became sites of jurisdictional ambiguity and contest. The legal and political chaos of British North America fueled the Revolutionary radicals' demands for change, eventually

[82] Hermes, "Jurisdiction in the Colonial Northeast," p. 58.
[83] Jack P. Greene, "The Cultural Dimensions of Political Transfers: An Aspect of the European Occupation of the Americas," *Early American Studies*, Vol. 6, No. 1 (Spring 2008): p. 15.
[84] Hermes, "Jurisdiction in the Colonial Northeast," p. 58.

leading them to understand complete territorial authority as a logical prerequisite of settler sovereignty.[85]

Even as the region acquired key strategic importance during the eighteenth-century struggle for empire, it effectively remained an Indigenous controlled territory. During the French occupation of the *Pays d'en Haut*, Indians continued to manage their affairs internally; not only were the tribes necessary for colonial economic and political stability but also the shifting confederation of Algonquian tribes had no formal empire for the French to acquire and dominate. The sparse and loosely regulated trading and military outposts of the French regime represented only a meager and tenuous claim to sovereignty.[86] British possession of the continental interior in 1763 signaled a greater centralization of authority. However, the Crown's failure to reconcile Indian-settler conflict through a sustainable means of cross-cultural justice generated a common British enemy among the French and Indian inhabitants to the west and the American revolutionaries to the east. The collective failure of both colonial regimes to control the region reflected not only significant economic constraints and inherent political tensions but also the influence, adaptability, and enduring power wielded by the North American Indian tribes.[87]

This chapter examines the community foundations of a cross-cultural, custom-based law throughout the Illinois and Wabash countries and Great Lakes Region; geographic intersections of the continental interior that would later form the Territory and State of

[85] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836,* Cambridge, Mass: Harvard University Press, 2010, pp. 3, 21.
[86] Choquette, "Center and Periphery," pp. 198, 200.
[87] Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673-1800,* Cambridge: Cambridge University Press, 1997, pp. xii-xiii.

Indiana. Through informal yet often highly disciplined practices, law was integral to sustaining Indian-settler sovereignty. The historical portrait that unfolds depicts a crucible of jurisdictional and jurisprudential experimentation, a "testing grounds" of modern colonial empire.[88] Cycles of conquest and capitulation—under tribal, French and British occupation—introduced an array of common laws and customs, some of which survived the political transition under state succession, others that did not. The inherent tensions between colonial policy and settler norms, Indigenous customs and imperial discourse, and religious doctrine and secular authority, precipitated a crisis in American legal culture as the frontier receded and the newly-formed western states took shape.

The geography and territorial jurisdiction that came into focus following more than two centuries of conquest and "discovery," treaty provisions, and land ordinances, gradually distinguished the cultural divide, the hierarchies of which fell increasingly within the scope of a centralized, state-centered legal authority.[89] With each shift in imperial authority came a new set of legislative prerogatives, legal systems, and cultural values. What followed was a gradual erosion of the middle ground between Natives and newcomers and the eventual dissolution of a community-based law in the Indiana territory.

Perhaps this transition was inevitable considering the existing population's size, density, and limited capacity for cultural resistance to the onslaught of American settlers.[90] A closer examination of the historical record, however, challenges such presumptions. In

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[88] Ibid. p. xiii. Phrase quoted from Christoph Strobel, *The Testing Grounds of Modern Empire: The Making of Colonial Racial Order in the American Ohio Country and the South African Eastern Cape, 1770s-1850s,* New York: Peter Lang, 2008.
[89] Adelman and Aron, "Borderlands," p. 817.
[90] In addition to other political preconditions, Jack Greene identifies these variables as determinative of an existing polity's degree of retained sovereignty as a conquered state; see Greene, "Cultural Dimensions," p. 3.

considering the small but diverse and commercially active presence of American Indian and European communities in the west, post-Revolutionary statesmen expressed an initial preference for community-based law—reinforced in the republican spirit of the Ordinance of 1784—in the new American territory. Such principles persisted in western legal culture during the first two decades of the nineteenth century. The diverse sources of law upon which western jurists relied, as well as the vigorous debates over their intrinsic merits, displace modern assumptions of the English common law as the traditional and unequivocally recognized legal transplant in western jurisprudence by way of periodic "reception" statutes. Rather, lawmaking reflected an ongoing process of normative inquiry, which superseded the need for definitive enactment of binding, uniform law. Greater tolerance toward local customs and foreign sources of law emphasized the mixed character of Indiana's foundational jurisprudence.[91]

By the early-nineteenth century, however, legal discord had become particularly acute as settlers flooded the trans-Appalachian west. Rather than adapting to the "custom of the country," most American settlers followed their own social practices; transformed economic and household structures; introduced new systems of land tenure and concepts of property; and imposed the laws that they brought with them.[92] The conflict of legal traditions in the Indiana territory illustrates a struggle between, what Peter Karsten identifies as, "high" and "low" legal cultures.[93] The small but self-sustaining communities long established in the region had little room to negotiate with an aggressive

[91] H. Patrick Glenn, "Persuasive Authority," *McGill Law Journal,* Vol. 32, No. 2 (March, 1987): pp. 267, 268.
[92] See Greene, "Cultural Dimensions," pp. 3, 15; and Karsten, *Law and Custom*, p. 118.
[93] Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora—The United States, Canada, Australia, and New Zealand, 1600-1900,* Cambridge: Cambridge University Press, 2002.

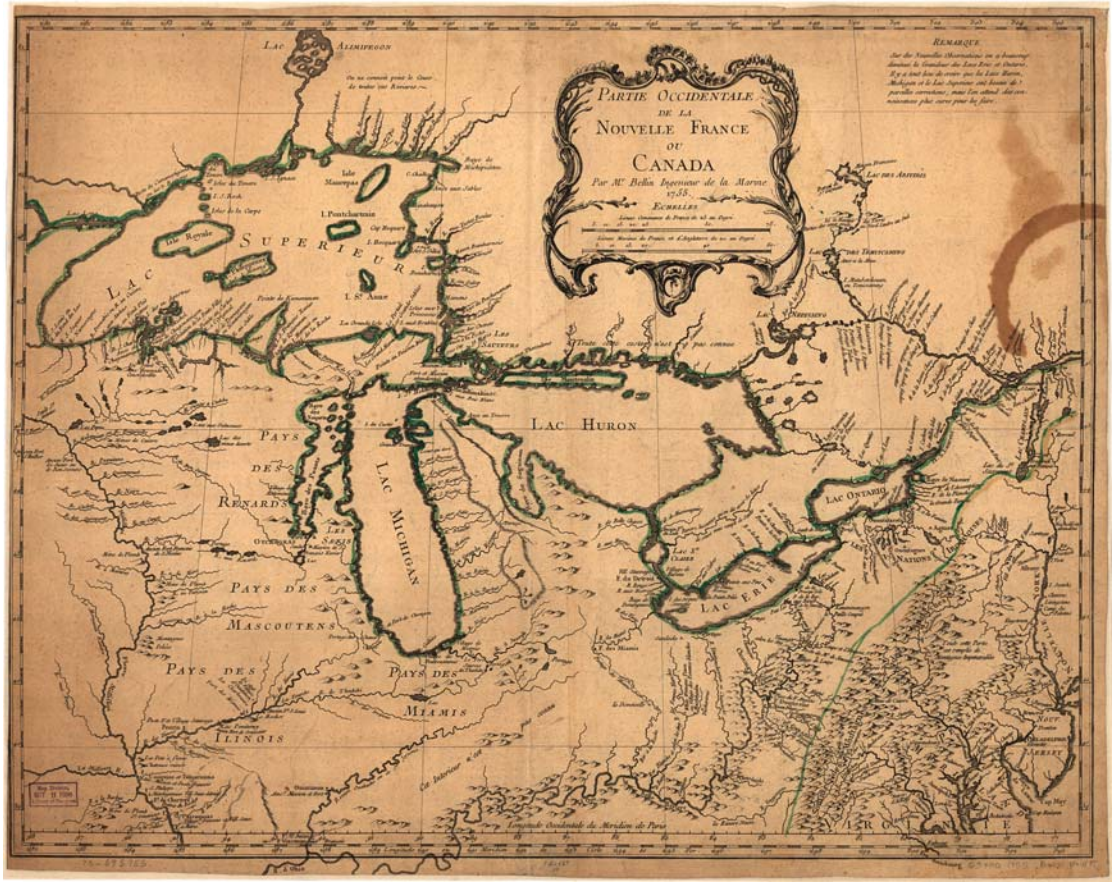
common law culture that viewed informal, customary-based legal systems with contempt and misunderstanding.[94] In the long struggle for sovereignty, the region's history of colonization, state succession, and territorial expansion proved ill-fated not only for the Indians but for the early French settlers as well.

Inter-cultural Encounters and *La Coutume à la Façon du Pays:* Indian-Settler Relations and Community Norms During the French Colonial Period, 1717-1763

The social world of the *Pays d'en Haut* was in a constant state of flux and volatility at the turn of the eighteenth century. The Algonquian-speaking peoples (including the Mahican, Delaware, Munsee, and Shawnee tribes) of the Great Lakes region, Ohio Valley, and Illinois Country had taken refuge there during the latter half of the seventeenth century. Their forced migration westward followed the devastating epidemics introduced by European settlers along the Atlantic seaboard and the ensuing conflicts with the Iroquois tribes around eastern Lake Ontario. Other groups, including the Potawatomi, Miami, Piankeshaw, Wea, and Huron tribes had maintained a much longer presence in the *Pays d'en Haut*.[95] This concentration of culturally diverse (and sometimes discordant) tribes coincided with an increasing presence of French traders, explorers, and Jesuit missionaries in the region. The moment and means of contact between the early European explorers and Indian tribes in what now constitutes the State of Indiana eludes the historical record. In 1679, French *voyageur* Sieur de La Salle and

[94] Richard P. Cole, "Law and Community in the New Nation: Three Visions for Michigan, 1788-1831," *Southern California Interdisciplinary Law Journal,* Vol. 4, No. 2 (Winter, 1995): p. 165; and Hinderaker, *Elusive Empires,* p. 2.
[95] See White, *Middle Ground,* pp. 1-3 and John Barnhart and Dorothy Riker, *Indiana to 1816: The Colonial Period,* Indianapolis: Indiana Historical Bureau, 1971, pp. 59-60, 65.

his men penetrated the area during their exploration of the Illinois and Wabash Countries.[96] Permanent occupation and settlement, however, did not take place



Map 1. *Partie Occidentale de la Nouvelle France ou Canada,* by Jacques Nicolas Bellin, 1755, from Library of Congress, Geography and Map Division (Digital Collections).

[96] Barnhart and Riker, *Indiana to 1816,* p. 62. Brian Slattery discusses the legal dimensions of French imperial expansion prior to colonization and settlement. The French Crown issued what is considered the first commission proper to explore the New World to Jacques Cartier on 17 October 1540. The commission made no assertions to French territorial rights nor did it authorize Cartier to acquire lands whether by treaty or by force. A commission granted to Jean François de Law Rocque, Sieur de Roberval on 15 January 1541 shifted the expeditionary goal to that of conquest and acquisition. The Royal instrument again made no assertion of pre-existing French rights; however, several provisions imposed French laws over the inhabitants, and the establishment of settlements, forts, and missions; see Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America," in John McLaren, A.R. Buck and Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies,* Vancouver: University of British Columbia Press, 2005, pp. 56-65.

for another forty years. Although the French occupied posts and missions throughout the region during the mid- to late-seventeenth century, strict regulation of the colonial fur trade by French metropolitan authorities delayed western expansion.[97]

Despite these restrictions, hundreds of fur trading Frenchmen, known as *coureurs de bois* (literally "forest runners"), traded freely beyond the territorial confines of colonial jurisdiction. During their expeditions into the *Pays d'en Haut* the *coureurs de bois* relied upon Indigenous knowledge, languages, and services.[98] To continue their self-regulating enterprise and remain securely in the west despite an official trading ban, the *coureurs de bois* used intermarriage as a means to build personal connections with the Indians.[99] These frontiersmen and their Indian contemporaries served as critical intermediaries between two otherwise disparate worlds, creating models of social exchange that would become integral to sustaining a middle ground when the pace of colonization and settlement grew.

In 1715, French metropolitan authorities lifted the trading ban and official expansion of the western posts began.[100] Two years later, French Canada annexed the recently-formed colony of Louisiana.[101] The tactical importance of the Illinois-Wabash Country—both in its commercial facility to the northern and southern colonies and as a line of defense against British encroachments—compelled the French to establish several

[97] In 1696, King Louis XIV issued a Royal Decree revoking the *congé* (or licensing) system of trade in the Indian country, prohibiting travel and settlement in the western provinces; see Barnhart and Riker, *Indiana to 1816,* p. 63; Saliha Belmessous, "Assimilation and Racialism in Seventeenth and Eighteenth-Century French Colonial Policy," *American Historical Review,* Vol. 110, No. 2 (April, 2005): p. 338; and Winstanley Briggs, "Le Pays des Illinois," *William and Mary Quarterly,* Vol. 47, No. 1 (Jan., 1990): p. 32.
[98] Choquette, "Center and Periphery," p. 197. For a brief historical etymology, see R.M. Saunders, "Coureur De Bois: A Definition," *Canadian Historical Review,* Vol. 21, No. 2 (1940): pp. 123-131.
[99] Belmessous, "Assimilation," p. 339.
[100] Barnhart and Riker, *Indiana to 1816,* pp. 70-71.
[101] France founded the colony of Louisiana in 1699 and in 1718 the Illinois Country formally became part of the Province of Quebec; see Choquette, "Center and Periphery," p. 199.

strategic forts and trading posts within the region. To further their economic and military interests, the French often built their posts adjacent to Indian villages. The construction of Post Ouiatanon (located near present-day Lafayette, Indiana) in 1717 commenced French expansionist efforts. Four years later, French officials reported the completion of Fort St. Phillippe near the Miami village of Kekionga (present day Ft. Wayne).[102] To secure their economic and military control over the region, the French recognized the need for a fortified position on the lower Wabash and Ohio Rivers.[103] After considerable delay, François-Marie Bissot, Sieur de Vincennes, founded "du Fort de Ouabache"—otherwise known by its namesake—near the Piankeshaw Indian village in 1733.[104]

French and Indian village boundaries remained distinct after initial settlement phases; however, social interaction became increasingly fluid and cultural exchange was commonplace. By the mid-eighteenth century, several trading posts throughout the greater Illinois Country, or *Pays des Illinois*, had developed a dynamic social and civic life. Post Vincennes formed a thriving community where village life adapted to the unique social conditions of the frontier. Records indicate that, as early as 1702, several French families had settled on or near the village site.[105] Although accounts vary, over seven hundred French *habitants* resided throughout the Illinois Country in 1722 and, by

[102] Barnhart and Riker, *Indiana to 1816,* p. 75; also see Andrew R.L. Cayton, *Frontier Indiana,* Bloomington: Indiana University Press, 1996, p. 5.
[103] Barnhart and Riker, *Indiana to 1816,* p. 76.
[104] There is uncertainty over the exact date of Ft. Vincennes' completion. Correspondence indicates, however, that foundations for the Fort were laid in late 1732 or early 1733; see Paul C. Phillips, "Vincennes in its Relation to French Colonial Policy," *Indiana Magazine of History,* Vol. 17, No. 4 (Dec., 1921): p. 323.
[105] Paul Phillips notes a 1772 French memorial to British General Thomas Gage stating "Notre Etablissement est de soixante et dix années [our establishment is sixty and ten years]," thus indicating French settlement at the village site as early as 1702; see Ibid.

1765, approximately ninety families had established themselves at Vincennes, having developed extensive trade relations and kinship networks with neighboring tribes.[106]

These early encounters constructed an intercultural village world, a tenuous one perhaps, but one with a flexible sense of community nonetheless. As historian Richard White portrays it, the French-Indian alliance endured "because two peoples created an elaborate network of economic, political, cultural, and social ties to meet the demands of a particular historical situation."[107] What began as an exercise in ad hoc, pragmatic accommodation, evolved into a new social order based on extended interaction and experience. With little authority extending beyond the village, groups formed connections at the local level.[108] Despite the self-interests that gave life to the middle ground, community norms evolved by processes of tolerance and accommodation. "Cultural conventions," White argues, "do not have to be true to be effective any more than legal precedents do . . . they have only to be accepted."[109]

The primary thrust of social regulation came from village rules, either written or oral in form. Post commandants typically responded to local affairs only upon request or petition; in fact, the village community often relegated them to overseeing administrative matters such as promoting trade, taking censuses, or maintaining diplomacy with the

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[106] Natalia Maree Belting, *Kaskaskia under the French Regime,* New Orleans: Polyanthos, 1975, p. 13; and John B. Dillon, *A History of Indiana from its Earliest Exploration by Europeans to the Close of the Territorial Government in1816: Comprehending a History of the Discovery, Settlement, and Civil and Military Affairs of the Territory of the U.S. Northwest of the River Ohio, and a General View of the Progress of Public Affairs in Indiana from 1816 to 1856*, Indianapolis: Bingham & Doughty, 1859, p. 84.
[107] White, *Middle Ground,* p. 33. As Jeremy Webber remarks, "[t]his sense of community is more flexible than many competing definitions, more tolerant of internal disagreement and debate, more willing to recognize the presence of multiple allegiances, while nevertheless capturing the distinctiveness—the sense of separateness and cohesion—of communities." See Jeremy Webber, "Relations of Force, Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples," *Osgoode Hall Law Journal,* Vol. 33, No. 4 (Winter, 1995): pp. 627-628.
[108] White, *Middle Ground,* pp. 16, 17.
[109] Ibid. pp. 53, 54. Also see generally, Clara Sue Kidwell, "Indian Women as Cultural Mediators," *Ethnohistory,* Vol. 39, No. 2 (Spring, 1992): pp. 97-107.

local Indian tribes.[110] The village parish served as a central forum for civic life. Rather than acting as mere ecclesiastical authorities on behalf of the colonial bishop, the local clergy served principally to promote the interests of the village community.[111] Historian Winstanley Briggs portrays the normative essence of village life in the Illinois Country quite succinctly:

> Socially and politically, French Illinois demonstrated that successful creation of a self-generated, self-regulated, participatory early modern village society did not require Puritan Calvinism or the English common law or even homogeneity of background. Rather, the key element seems to have been the manorial village experience. . . . The point is the resilience and durability of this view of society, as created and accepted by its members, in the face of conditions that are commonly supposed to cause fundamental change. . . . French Illinois changed over its . . . history, but change was always made to fit under the umbrella of traditional village mores and methods because that was what the people of le Pays des Illinois insisted on.[112]

Within this self-regulated polity, the capacity for sustaining intercultural norms often exceeded that found under more formalized legal structures. The practice of marrying *à la façon du pays* (by custom of the country) emerged from the social and economic needs of fur trade society. These marriages evolved under both Indian and French customs and—while not always permanent and by no means contractual—did not necessarily reflect promiscuous encounters.[113] Rather, marriage and sex served as vital links in sustaining the middle ground. Despite culturally conflicting ideas of marriage, divorce, and sexual activity, the appeal of domestic companionship reconciled French and Indian practices to form a new customary relation, according to the terms of which

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[110] Briggs, "Le Pays des Illinois," p. 43 and Belting, *Kaskaskia* pp. 17-18. Belting notes the shift in the commandant's responsibilities at Kaskaskia by the 1730s, during which time the judicial duties of the provincial council functioned only irregularly; see Belting, *Kaskaskia* p. 17.
[111] Briggs, "Le Pays des Illinois," p. 42, referring to the village Kaskaskia.
[112] Ibid. p. 56.
[113] Susan Sleeper-Smith, "Women, Kin, and Catholicism: New Perspectives on the Fur Trade," *Ethnohistory,* Vol. 47, No. 2 (Spring, 2000): p. 443, note 4.

Indians (and Indian women in particular) possessed considerable influence and freedom to negotiate.[114] Like the French, many Indians recognized the socio-economic benefits of intermarriage. Moreover, both sides valued these conjugal relations as a form of diplomatic alliance, which—because of its larger political implications—encouraged even greater permanency.[115]

In addition to the fur trade, the Illinois settlers participated in agriculture and domestic husbandry. Under the semi-feudal seigneurial system that France introduced to its Canadian colony in 1627, the *habitants,* as individual tenants, occupied contiguous strips of land collectively adjacent to a common field, typically along a river or other waterway.[116] However, the small size of the inhabitant's land and the taxing annual dues left him with little financial independence.[117] French-Canadian settlers who migrated to the *Pays des Illinois* carried this land tenure system with them but abandoned the vassalage system of paying tribute to the *seigneur*. With administrative responsibilities vested in the local commandant, the inhabitants continued exercising their usufruct rights on common pasturelands. At Vincennes, for example, most settlers—in addition to owning outright a half-acre lot upon which they built their farmhouses—received a strip of land, or "longlot," along the banks of the Wabash, for collective farming and common pasturage. With strategic access to the Mississippi and the growing market demand for

[114] White, *Middle Ground,* p. 65.
[115] Ibid. p. 69.
[116] See generally Jacques Mathieu, "Seigneurial System," in James H. Marsh, ed., *The Canadian Encyclopedia: Year 2000 Edition,* Toronto: McClelland & Stewart, 1999, pp. 2136-2137.
[117] Briggs, "Le Pays des Illinois," p. 37.

food at New Orleans, Vincennes became an agriculturally self-sustaining economy by the mid-eighteenth century.[118]

Because there was little competition for land in the Illinois Country, usufruct land tenure presented a less exclusive form of boundary maintenance. Given the small population and ample land available, the settlers' greatest problem was labor shortage. Under such conditions, women played an invaluable role, which their enhanced social and economic status certainly reflected.[119] Moreover, the diverse economy of trade and agriculture presented fewer impediments to the integration of French and Indians in village life. As agricultural historian, Paul Salstrom, observes, "[t]he community first practices of the Midwest's early French were not so different from those of the region's Native Americans; [b]oth shared the idea that land uses should be regulated by membership groups which had the power to sanction or dispossess individuals whose practices broke social norms."[120]

Unlike the "lawless frontier" so often depicted by early American historians, French legal culture in the interior region consisted not only of informal customs to guide social behavior but also of an elaborate body of laws, judicial orders, executive decrees, and colonial regulations.[121] The official law of New France was the *Coutume de Paris*

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[118] Paul Salstrom, *From Pioneering to Preserving: Family Farming in Indiana to 1880,* West Lafayette, Ind.: Purdue University Press, 2007, pp. 30, 31.
[119] Briggs, "Le Pays des Illinois," pp. 49, 53.
[120] Salstrom, *Pioneering to Preserving,* p. 34. On the similarities between French and Indian systems of land tenure and the less exclusive nature of boundary maintenance, also see Hermes, "Jurisdiction in the Colonial Northeast," p. 58.
[121] With few exceptions, historians of today's Midwest region have poorly articulated the subject of law governing civilian life throughout the eighteenth-century Illinois Country. For example, see Henry S. Cauthorn, *A History of the City of Vincennes, Indiana from 1702 to 1901,* Vincennes, Ind.: M. C. Cauthorn, 1902, p. 46; George Packard, "The Administration of Justice in the Lake Michigan Wilderness," *Michigan Law Review,* Vol. 17, No. 5 (March, 1919): pp. 382-383; and George Alexander Dupuy, "The Earliest Courts of the Illinois Country," *Illinois Law Review,* Vol. 1, No. 2 (June, 1906): pp. 81-93. Dupuy's article begins with the establishment of the Cahokia court under the Act of Virginia in 1778. On views of the early Indiana French having no concept of liberty and self government, see Jacob Piatt Dunn, Jr., *Indiana:*

(Custom of Paris), a written body of civil laws first codified in France during the late fourteenth century.[122] The *Coutume* consisted only of civil law, focusing primarily on land tenure, tenant rights, property and sales, family law, and inheritance. Comparatively, the *Coutume de Paris* covered only a fraction of those customs found in other regional compilations. However, as H. Patrick Glenn suggests, "[t]he *Custom of Paris* was . . . taken to be a synthesis of many other customs, a type of ideal custom against which others could be measured, and it was often the object of choice of law clauses, from as far away as Toulouse."[123] In practice, French jurists employed a "common law of custom" reasoning in formulating a substantive body of jurisprudence. Because the original sources of unwritten law grew from a variety of local conventions,

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A Redemption from Slavery, New York: Houghton, Mifflin, 1888, p. 271. Most of these historians have relied on the biased accounts of British colonial and early American legal authorities who considered the French as "lawless," without representative government, and subject only to the arbitrary fiat of the local commandant. The most important historiographical exceptions include the works of Theodore Calvin Pease and Clarence Walworth Alvord, which are noted throughout this chapter and the bibliography.

[122] An influential source of late fourteenth-century private compilations was the *Grand Coutumier de France.* In 1498, the French Crown issued letters patent, which vested local assemblies with the authority to determine what was to be included in the written codes. By "collecting the customs," municipal and regional representatives committed local juridical principles to written form. By commission of Louis XII in 1510, French lawyers and magistrates began drafting articles for official enactment. The Crown took measures to ensure codification did not unalterably fix these customs. Through procedural inquiry, the *enquêtes par turbe* (local representative assemblies akin to the English common law grand jury) decided the final disposition of the law. In 1539, French jurist Charles Dumoulin began drafting a commentary on the *Coutume de Paris.* By expounding on basic principles of the *Coutume,* Dumoulin's commentaries served to append or interpret provisions as well as to resolve common conflicts of custom. The significance of Dumoulin's efforts (and those who built upon his work until the formation of the Napoleonic Code) exemplifies the *Coutume* as a living and adaptive corpus juris, not entirely unlike the English common law. At the turn of the seventeenth century, a sizeable compilation of the *pays de coutume* had been published and by the Revolutionary period, France had collected sixty-five regional customs and over three hundred local and town customs; see Jerah Johnson, "La Coutume de Paris: Louisiana's First Law," *Louisiana History,* Vol. 30, No. 2 (Spring, 1989): pp. 148-149; also see James Q. Whitman, "Why Did the Revolutionary Lawyers Confuse Custom and Reason," *University of Chicago Law Review,* Vol. 58, No. 4 (Fall 1991): pp. 1345-1346. Whitman critiques Dumoulin's and his contemporaries' methods as a response to the growing evidentiary crisis of custom in the seventeenth century. For French regional compilations, see Jean Caswell and Ivon Sipkov, eds., *The Coutumes of France in the Library of Congress: An Annotated Bibliography,* Washington: Library of Congress, 1978, p. 22; for an extended analysis of the "collection" and codification of regional French customs through the end of the eighteenth century, see John P. Dawson, "The Codification of the French Customs," *Michigan Law Review,* Vol. 38, No. 6 (April, 1940): pp. 765-800.

[123] H. Patrick Glenn, "The Common Laws of Europe and Louisiana," *Tulane Law Review,* Vol. 79, No. 4 (March, 2005): p. 1052.

the *Coutume de Paris*—embodying the spirit of French customary law—was far more intricate and adaptive than many scholars have admitted. The brevity and even silence of the *Coutume* on several legal issues illustrated its flexibility not only in local matters but also throughout the French realm, rendering it equally adaptive as a colonial transplant.[124]

On 14 September 1712, Louis XIV declared the *Coutume de Paris* as the official law of the Louisiana colony.[125] By extension of the Royal Charter of 1 January1718, the *Coutume* governed the vast Illinois Country, which was under the jurisdiction of the Company of the Indies.[126] In order to "put justice, with greater ease, within the reach of the colonists," the French Crown, in 1721, made provisions for the establishment and maintenance of a civil government in each of Louisiana's eight regional districts.[127] Kaskaskia (and adjacent Fort des Chartres) served as the primary seat of administration in

[124] Johnson, "La Coutume," pp. 150-151.
[125] Charles E. Hoffhaus, "The Coutume de Paris and the Jus Civile in Mid-America," *University of Missouri at Kansas City Law Review,* Vol. 33, No. 2 (Summer, 1965): p. 227. Prior to this decree, French settlers typically followed the regional customs they were most familiar with, practices which may have also influenced how the *Coutume de Paris* took shape in the several colonial districts throughout North America. For example, during the early 1600s, Champlain drew his will following the custom of Saintonge, his native province in France; see Glenn, "Common Laws of Europe," p. 1056. Francis Philbrick suggests that French-Canadian settlers in the Illinois Country likely followed the Custom of Normandy, from "whence came a very large portion of the population." See Francis S. Philbrick, ed., *Laws of Indiana Territory, 1801-1809,* Collections of the Illinois State Historical Library, v. 21, Springfield, Ill: Trustees of the Illinois State Historical Library, 1930, p. ccxv, n. 2.
[126] Natalia Maree Belting, *Kaskaskia* p. 16; also see Barnhart and Riker, *Indiana to 1816,* pp. 75-76. France granted letters patent to the Western Company in August of 1717 (becoming the Company of the Indies in 1719) for "the advantage of both colonies [Canada and Louisiana]," and providing the Company "the exclusive right of trading in [the] province and government of Louisiana," and "to enjoy the same in full property, seigniory and jurisdiction." See B.F. French, *Historical Collections of Louisiana . . . Compiled with Historical and Biographical Notes, and an Introduction,* Vol. 3, New York: D. Appleton & Co., 1851, p. 50 (pp. 49-59 include the complete text of the letters patent). According to French, "[t]he plan of this company was not unlike that of the British East India Company, and possessed powers and privileges nearly equal." See B.F. French, *Historical Collections of Louisiana and Florida . . . With Numerous Historical and Biographical Notes,* New York: J. Sabin & Sons, 1869, p. 135, n. France granted the Company a complete monopoly on colonial commerce, full treaty-making powers with the Indian tribes, authority to grant lands, and the discretion to install and remove inferior judges and civil officers.
[127] Belting, *Kaskaskia,* p. 16; quote from Johnson, "La Coutume de Paris," p. 154. In addition to Illinois, Louisiana's other districts included New Orleans, New Biloxi, Mobile, Alibamous, Natchez, Yaqou, and Natchitoches.

the Illinois District.[128] By 1722, the provincial council at Kaskaskia presided over all cases involving criminal and civil matters. Jurisdiction extended east to the posts on the Wabash, and petitioners held entitlement of appeal to the Superior Council of Louisiana.[129]

From its introduction (or reception), the Custom of Paris—"representing the general, common law of the metropolitan territory"—served to moderate the diversity of French customs through legal uniformity; however, as Glenn posits, it "was not seen as a definitive code but as a resource, a complementary or relational source of law, which necessarily yielded to local regulation of a more imperative character."[130] Local notaries, district judges, and even the Superior Council of Louisiana exercised authority independent of the Crown and issued decisions interpretive of or modeled after the Custom of Paris.[131]

The presence of the *Coutume de Paris* in the Illinois Country reveals French concerns with regulating property and domestic relations. Provisions governing marriage, community (or jointly owned) property, and inheritance were especially relevant to French-Indian relations and Indian women's property rights in the region.

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[128] Belting, *Kaskaskia,* p. 16. The principle administrative and judicial body consisted of the commandant, chief clerk, captain of the military garrison, and several other officials. The composition of the courts may have varied from district to district and changed over time depending on the size of the population served and the administrative resources available. Historian Jerah Johnson suggests that "[e]ach local judge formed a court by appointing two citizens to sit with him when hearing civil cases and four when hearing criminal ones." See Johnson, "La Coutume," p. 154.

[129] Belting, *Kaskaskia,* pp. 16-17. According to Belting, after retrocession of the Illinois Country from the Company of the Indies to the French Crown in 1731, the framework of civil government continued much the same. In 1734, however, the judicial duties of the provincial council transferred to the *écrivain principal*, an official Louisiana delegate who presided over all disputes between the inhabitants. For an overview of the composition, jurisdictional capacity, and functions of the Superior Council, see James D. Hardy, Jr., "The Superior Council in Colonial Louisiana," in John Francis McDermott, ed., *Frenchmen and French Ways in the Mississippi Valley,* Urbana: University of Illinois Press, 1969, pp. 87-101.

[130] Glenn, "Common Laws," pp. 1056, 1057.

[131] Ibid; also see Earl Finbar Murphy, "Laws of Inheritance in Indiana Before 1816," *New York Law Forum,* Vol. 2, No. 3 (July, 1956): p. 256.

Although the *Coutume* limited the prerogative of all married women, it granted widows considerable discretion over their deceased husbands' estates.[132] Provisions were especially liberal when compared to the legal disabilities imposed by the English common law of coverture in other parts of contemporary colonial America as well as successor governments in the Northwest and Indiana Territories.[133] For example, the *Coutume* entitled all widows, French and Indian alike, to one-half of their husbands' estates with the remaining common property divided among their children. In the absence of children, the property went to the widow's legatees rather than her deceased husband's kin.[134] Women were equally free to dispose of their share of the community property by last will and testament.[135] French law also prohibited the husband from selling, exchanging, partitioning, or indebting his wife's personal property without her consent. In addition, a widow received a grant from her husband's personal property upon his death. Known as a *douaire,* this grant was obligatory and was intended to

[132] Jennifer M. Spear, "Colonial Intimacies: Legislating Sex in French Louisiana," *William and Mary Quarterly,* 3rd ser., Vol. 60, No. 1 (Jan., 2003): p. 89.
[133] For literature discussing the legal disabilities imposed upon women by coverture in colonial America, see Ariela R. Dubler, "In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State," *Yale Law Journal*, Vol. 112, No. 7 (May, 2003): pp. 1641-1715; Deborah A. Rosen, "Women and Property across Colonial America: A Comparison of Legal Systems in New Mexico and New York," *William and Mary Quarterly*, 3rd Series, Vol. 60, No. 2 (April, 2003): pp. 355-381; and Marylynn Salmon, "The Legal Status of Women in Early America: A Reappraisal**,"** *Law and History Review*, Vol. 1, No. 1 (Spring, 1983), pp. 129-151. For an overview of laws governing a widow's inheritance rights under the Northwest Territorial, Indiana Territorial, and Indiana State governments, see Charles H. Scribner, *A Treatise on the Law of Dower,* 2nd ed., Vol. 1, Philadelphia: T. & J.W. Johnson & Co., 1883, pp. 45-49; on the persistence of coverture in Indiana despite restrictions under the 1787 Ordinance, see Murphy, "Laws of Inheritance," p. 277.
[134] Jennifer M. Spear, "'They Need Wives': Métissage and the Regulation of Sexuality in French Louisiana, 1699-1730," in Martha Hodes, *Sex, Love, Race: Crossing Boundaries in North American History,* New York: New York University Press, 1999, p. 44.
[135] This and the following examples are taken from Vaughan Baker, Amos Simpson, and Mathé Allain, "*Le Mari Est Seigneur:* Marital Laws Governing Women in French Louisiana," in Edward F. Haas, *Louisiana's Legal Heritage,* Pensacola, Fla.: Perdido Bay Press, 1983, pp. 11, 13.

provide the widow with economic security and a means to live respectably.[136] That American Indian women enjoyed these benefits, at least initially, under the French legal regime is evident in the historical record.[137]

Inevitably, questions over identity, citizenship, and nationality entered French legal discourse.[138] Heeding several complaints among the Kaskaskia French that Indian widows were failing to reconcile debt obligations held against their husbands' estates, the Superior Council of Louisiana responded with stricter regulations. By decree of 18 December 1728, the Council ordered that estates going to Indian widows were to be administered by an appointed *cure,* often a Frenchman.[139] The directive entitled an Indian widow to only one-third of her husband's estate in annuities and the ownership of all real property transferred to the Company of the Indies. Pensions were to "cease forthwith if she . . . return[ed] among the natives to live according to their manners."[140] To deter intermarriage, the Council restricted "all French and other white subjects of the King to contract marriages with Savage women" and threatened those it considered complicit with "the loss of all civil dispositions."[141] In a reiteration of policy seven years later, the Council published an edict on 8 October 1735 prohibiting all French-Indian marriages without the consent of the governor, intendant, or commandant of the Illinois

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[136] It is important to note that the wife became eligible for the *douaire* and other benefits under the *Coutume* only upon receiving marital blessing; see Ibid. p. 13. What constituted marital blessing, however, was relative not only to the royal code, but to community standards as well.
[137] For several examples, see appendix of marriage records between 1723 and 1763 in Belting, *Kaskaskia,* pp. 80-85.
[138] Spear, "They Need Wives," p. 44.
[139] See Belting, *Kaskaskia,* pp. 74-75, Spear, "Colonial Intimacies," p. 89, and Guillaume Aubert, "'The Blood of France': Race and Purity of Blood in the French Atlantic World," *William and Mary Quarterly,* Vol. 61, No. 3 (July, 2004): pp. 470-471. Belting mistakenly attributes the decree to the Canadian Superior Council.
[140] Spear, "Colonial Intimacies," p. 89 quoting decree.
[141] Apparently, the case reached French metropolitan authorities as Versailles ratified the Superior Council's decision; see Aubert, "Blood of France," p. 471.

posts.[142] In 1750, Governor Pierre François de Rigaud, Marquis de Vaudreuil wrote the Illinois commandant that the prevention of intimate relations among the French and Indians was an "essential aspect" of his duties.[143]

These developments emerged not from isolated incidents at the village level but rather from larger tensions within the French colonial empire that had evolved over the course of several decades. During the latter half of the seventeenth century, the general approach of colonial policy toward North American Indians emphasized assimilation to French religion and culture.[144] New France submitted its Indigenous population to French laws, conferred citizenship status, encouraged their adoption of French language and customs, and initially promoted mixing and intermarriage with French settlers. Colonial officials fully intended to capitalize upon French-Indian marriages as a strategic means of social and economic cohesion for the fur trade.[145] By the 1680s, however, serious doubts had grown among colonial authorities over the effectiveness of assimilation policy. With the expansion of the fur trade and the reopening of the western posts during the early eighteenth century, intermarriage grew precipitously, drawing increasing opposition from colonial authorities.[146]

Intermarriage often placed religious and secular authorities at odds. French clergy in North America had initially supported colonial assimilation policies; however, by the mid-seventeenth-century, they sought greater cultural compromise between Christian

[142] Belting, *Kaskaskia,* p. 75.
[143] Aubert, " Blood of France," p. 472.
[144] Belmessous, "Assimilation," p. 330.
[145] Ibid. pp. 330-331.
[146] Ibid. p. 339.

doctrine and Indian customs in their attempts at religious conversion.[147] Although French colonial policy shifted away from miscegenation, local priests and missionaries invariably sanctioned such unions, believing the practice to help fight moral disorder.[148]

In responding to the Superior Council's 1728 edict, Father Jean Antoine Le Boullenger of Kaskaskia protested that French colonial policy in fact tolerated inter-marriage, provided that the Indian bride had been converted to the Catholic faith.[149] At issue for Le Boullenger was not the legitimacy of these marriages but rather the question of whether Indian widows were French subjects and entitled to succession under French law.[150] Father René Tartarin, a contemporary of Le Boullanger's at Kaskaskia, argued that only by sanctioning intermarriage could mixed children effectively assimilate through legitimate inheritance from their French fathers.[151] As early as 1708, Henry Roulleaux de La Vente, vicar-general of the bishop of Quebec in Louisiana, admitted that French-Indian marriages were acceptable in the Illinois Country where "[Indian] women are whiter, more laborious, cleverer, neater in the household work, and more docile than

[147] Ibid. p. 335. For an extended treatment of conversion efforts in colonial North America, see Luca Codignola, "The Holy See and the Conversion of the Indians in French and British North America, 1486-1760," in Karen Ordahl Kupperman, ed., *America in European Consciousness, 1493-1750,* Chapel Hill: University of North Carolina Press, 1995, pp. 195-242.
[148] Belmessous, "Assimilation," p. 343. Solemnizing intermarriages did not, however, suggest that the clerical order advocated such nuptials. While local missionaries or parish priests continued to accommodate community norms, the hierarchy of the French Jesuit order officially demanded the bishop's consent in addition to that of the colonial governor and groom's family before acknowledging civil matrimony; see Cornelius J. Jaenen, *The Role of the Church in New France,* Toronto: McGraw-Hill Ryerson, 1976, p. 29. Consequently, local clergy occasionally appealed to higher religious authorities to sanction mixed unions. As early as 1648, for example, Jesuit priest Pierre de Sesmaison sought a papal dispensation permitting Frenchmen to marry Native girls who had yet to be baptized; see Jaenen, *Friend and Foe: Aspects of French-Amerindian Cultural Contact in the Sixteenth and Seventeenth Centuries,* New York: Columbia University Press, 1976, p. 164.
[149] See Belting, *Kaskaskia,* p. 74 and Aubert, "Blood of France," p. 471.
[150] Aubert, "Blood of France," p. 471.
[151] Belting, *Kaskaskia,* p. 75. For brief biographical sketches of Frs. Le Boullenger and Tartarin, see August Reyling, *Historical Kaskaskia,* St. Louis, Mo.: Reyling, 1963, pp. 45, 53.

those of the South."[152] In contrast, Commissary Jean-Baptiste Dubois Duclos argued in 1715 that Indian wives, "especially in the Illinois, have changed nothing or at the very least very little in their manner of living, [and] very often leave their [French] husbands."[153] Duclos added that only those French "liv[ing] in the manner of Savages would be willing to take such wives."[154]

Rhetoric such as Duclos's did not always correspond to the reality of social life in the Illinois Country. Nor did the Superior Council of Louisiana unilaterally reject French and Indian marriage as illegitimate or its incidental rights as unfounded. On 2 April 1745, Sieur Louis Auguste de la Louere Flaucourt, district judge of the Illinois Country, issued a ruling in a lawsuit involving the allocation and distribution of community property from the estate of an Indian woman named Francoise Missoury.[155] Missoury's first husband, Francois Dubois, was a French military officer with whom she had several children, including a daughter named Francoise Dubois. Following the death of Francois, according to the statement of facts, Missoury "took possession, as was her right, of all the effects without . . . making an inventory."[156] Sometime in 1730, Missoury married Louis Marin de la Marque (with whom she also had children) "without either making an inventory or drawing a marriage contract."[157] Subsequent to Missoury's death (which appears to have occurred sometime in 1739), Francoise and her siblings "had an

[152] Letter of Le Vente dated 4 July 1708, quoted in Aubert, "Blood of France," p. 469.
[153] Letter of Duclos dated 25 December 1715, quoted in Ibid. p. 470.
[154] Ibid.
[155] *Louis Thibierge v. Louis Marin de la Marque* (1745), in Henry P. Dart, ed., "Decision Day, Superior Council of Louisiana," *Louisiana Historical Quarterly,* Vol. 21 (1938): p. 1003.
[156] Ibid. p. 1018. Neither the year of their marriage nor the date of Francois Dubois' death are known.
[157] Ibid. According to Marin, Missoury made a "declaration" (rather than an inventory) of her property on 28 July 1730, thus indicating (but not confirming) the year of their marriage. Article 220 of the Custom of Paris, "[c]oncerning the property that enters into the community and the time when the community begins," held that "[m]en and women united by marriage own in common all movable property acquired during their uninterrupted marriage" and "the community begins from the day of the marriage and nuptial benediction."

inventory made claiming their right to the community."[158] Louis Thibierge, the plaintiff and husband to Francoise Dubois (the latter having died sometime during the course of litigation), filed a petition with the Illinois Court for the division of community property. The issue involved Thibierge's claim, on behalf of his minor children, to a share in the community property that had existed between Missoury and Marin, the defendant in the case. Thibierge contended, by authority of the Custom of Paris, that Missoury had failed to inventory the community existing between her and Sieur Dubois, the effects of which—to the benefit of Francoise and her successors in interest—mingled with Marin's property following the second marriage.[159] Marin, on the other hand, insisted that Missoury had made a declaration, in lieu of an inventory, "although he admit[ted] that it [was] not dressed in the form required by articles 240 and 241 of the Custom of Paris."[160]

[158] The year of Missoury's death, as noted above, is attributed to an inventory dated "February 3, 1739, produced by Thieberge," having been "made after the death of said (widow) Dubois [Missoury]." The inventory was then "received by Barrois, Notary in Illinois, and considered closed and concluded without date, and considering the Act of division of February 4, 1739." See ibid. p. 1014. The court records refer to another inventory dated 28 March 1733, but it is unclear whether this accounting was prepared during Missoury and Marin's marriage or if it was transcribed in error. There are several inconsistencies in the record relating to dates attributed to the various documents in question. The 1733 inventory may have been taken following the death of Sieur Dubois; however, this indicates that he would have died sometime in late 1732 or early 1733, which conflicts with other dates and statements made in the record. Article 241 of the Custom of Paris stipulated that "the inventory shall be closed within three months after its shall have been made . . . [a]nd to confirm the dissolution of the community, it is necessary that the said inventory be made and perfected, and the surviving spouse shall cause it to be closed within three months after it shall have been made; in the event that the surviving spouse fails so to do, the community shall continue, if the children think fit." Article 229, which regulated the "division of the community," provided that "[a]fter the death of one of the said spouses the community property is divided as follows: the surviving spouse takes one half, and the heirs of the deceased spouse take the other half."

[159] Ibid. pp. 1003-1004; Article 240 of the Custom of Paris, regulating the "continuation of the community in default of a valid inventory," stipulated that "when one of the spouses dies and leaves minor children of the marriage, if the surviving spouse does not cause an inventory to be made contradictorily, with some one capable of acting for the minors, of all the property, both movable and acquired immovable property, which was common during the marriage, and at the time of the said death, the surviving child or children, should he or they think fit, shall have the right to claim that all the property of the surviving spouse . . . be considered community property, in the event that the surviving spouse remarries."

[160] Ibid. p. 1018.

Following extended litigation and a failed attempt at arbitration, the Illinois Court ordered that Marin's (Missoury's) "inventory of July 28, 1730 . . . be maintained."[161] However, Judge Flaucourt reserved his decision on the legal issues at bar for consideration and remand by the Superior Council. On 5 June 1745, Thieberge filed a petition "to pursue his requests and to anticipate . . . Marin's act of appeal before the Supreme Court of this Province," which the Illinois Court granted.[162] "May it please the Court," Thieberge prayed in his appeal to the Superior Council of Louisiana, "to declare null the judgment rendered on April 2, 1745, in the jurisdiction of Illinois . . . between the appellant and the appellee; to declare null and void the would-be declaration, produced in lieu of inventory, made by Marin's wife, and to sentence said Marin . . . to pay past and future costs of the lawsuit."[163] Marin's petition, in turn, sought summary judgment on the case, "asking that it please the Council to decide on the validity or invalidity of the Inventory signed."[164] As persuasive authority, Marin's counsel relied on a decree of 1601, which "declare[d] force and effect of dissolution of community notwithstanding some nullities in the inventory."[165]

Having considered the appeals and weighed the evidence presented, the Superior Council sided with Thieberge. "[W]ith no signature affixed by any person entitled to the capacity of Judge or Notary," the Council rejected Marin's declaration as "defective both

[161] *Thibierge v. Marin,* in Heloise H. Cruzat, ed., "Records of the Superior Council of Louisiana," *Louisiana Historical Quarterly,* Vol. 14 (1931): p. 591.
[162] *Thibierge v. Marin,* "Decision Day," pp. 1016-1017.
[163] Ibid. p. 1019.
[164] Ibid. p. 1017.
[165] Ibid. p. 1018.

in its substance and in its form."[166] In an expository opinion, the Council held that in Missoury's capacity as Dubois' widow but appearing under the name of Marin:

> it was impossible for her to dissolve a community that she had kept up through the second marriage, as it is the day of the celebration that renders man and wife common, all the more that the community stipulated in a marriage contract takes place only under this condition, even if it were not stipulated, unless there existed clauses to the contrary, agreed upon by the contracting parties.

"It is believed that these reasons," the Council concluded, "based on the Custom (of Paris), are sufficient to render said declaration null."[167] Having applied the legal framework to the case, the Council issued a decree on 4 December 1845, declaring without remand "that there is continuation of community up to the inventory made on [February] 3, 1739, . . . [and] that a new division be made of the belongings contained in said inventory, by thirds, viz: one third to the children of Dubois, one third to Marin, and the last third to be divided, in equal shares, between the children of Dubois and those of Marin."[168]

Although the case appears to have been an exceptional instance of legal action (considering the time and expense related to the trial and appeals process and the distance traveled to New Orleans), *Thibierge v. Marin* illustrates the validity given by the respective district and superior courts to French and Indian marriages, the incidental rights that the parties and their successors enjoyed, and the rule of law the courts followed under the interpretive principles of the Custom of Paris.

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[166] Ibid. pp. 1017, 1018.
[167] Ibid. p. 1019.
[168] Ibid. p. 1006. Article 242 of the Custom of Paris provided that "[i]f the surviving spouse remarries, the said community is continued between them by thirds, namely, the children take one third, the husband and wife each takes one third." Moreover, "if each of the spouses has children by former marriage, the said community is continued by fourths; and the said community is multiplied if there have been other marriages, and it is divided equally, so that the children of each marriage take one share in said community."

Contemporary marriage and baptismal records also provide an intimate picture of regional village life that colonial policy often failed to reflect. The activity at St. Francis Xavier Parish at Post Vincennes and the St. Joseph River Mission (located near present-day Niles, Michigan, a short distance north of South Bend, Indiana) followed characteristic patterns of social adaptation to frontier life. Personal relations among the inhabitants illustrate the inter-cultural makeup and sense of kinship that imbued village life.

French villagers often served as Godparents to many of the Indians baptized at the mission. At St. Joseph on 15 April 1752, Sieur Jacques du May and "the wife of Sieur Bolon" served as Godparents to "a panise by nation about thirty five years old who took the name of marguerite."[169] On other occasions the role was reversed. At St. Francis Xavier, "Marie [an] Indian woman [and] wife of la [F]ramboise" acted as Godmother to Louis Exepan and Marie Louise Pertuis.[170]

Parish records also document the community recognition of marriages between couples previously united *à la façon du pays* or in the absence of a religious or secular official. Moreover, local clerics observed marital union between French and Indian companions as well.[171] For example, according to the "Record of Marriages for the Savages of Post Vincennes," Jesuit priest S.L. Meurin "[c]onferred nuptial benediction on pierre giapichagane called le petit chis & Catherine mgkicge (already united in a natural

[169] George Pare and M.M. Quaife, "St. Joseph Baptismal Register," *Mississippi Valley Historical Review*, Vol. 13, No. 2 (Sep. 1926): pp. 223.
[170] Edwin J.P. Schmitt, ed., trans., "The Records of the Parish of St. Francis Xavier at Post Vincennes, Ind.: 1749-1773," *Records of the American Catholic Historical Society of Philadelphia,* Vol. 12 (1901): p. 209.
[171] This assertion is based on the explicit mention by priests of the participants' ethnic origin or tribal nationality. While names alone do not provide the discerning characteristics of the historical actors' identity, it is important to note that some of those with French names were likely to have been Métis peoples or Indians given Christian names by the local clergy.

marriage for a long time) the 26th of June, 1749."[172] On 10 August 1751, Meurin presided over public banns "bet[ween] joseph, a Paducah & Marie louise a Chickasaw."[173] The community sanction of vows such as these illustrate the permanence villagers attached to the idea of marriage. The importance of these records lies in their affirmation of community praxis. Village norms, rather than formal rules, determined the legitimacy of marriage practices. Following the transition to British imperial authority in 1763, these standards continued to regulate the frontier social order.

The cultural encounters and normative exchanges in the *Pays d'en Haut* demonstrate that—despite French colonial policies aimed at regulating these interactions—local communities often chose to exhibit tolerance toward social diversity and legal pluralism. Geographic distance and village isolation certainly played a large part in this community dynamic. Even as settlement and trade expanded in the region, the Illinois Country remained at the periphery of effective colonial governance. Within this remote jurisdiction of empire, the official *Coutume de Paris* garnered adherence among the French inhabitants but served more as a model or supplemental common law adaptive to the popular norms and pragmatic accommodations associated with frontier life rather than as a fixed, binding code subject only to imperial authority. Consequently, colonial authorities made little attempt to adjust the self-regulating legal landscape.[174] The inter-systemic dynamics of French and Indian customary law remained elastic, negotiable, and adaptive, challenging not only the traditional conquest narrative in American history but also the idea that mediation between two otherwise disparate societies was unworkable.

[172] Schmitt, "St. Francis Xavier," p. 42.
[173] Ibid. p. 43.
[174] "Le Pays des Illinois," p. 33.

With the fall of the French colonial empire in North America, following what Canadians refer to as *La guerre de la Conquête,* these cultural dynamics shifted. A new legal regime supplanted (or attempted to supplant) the existing normative order. Over the course of the next two decades, the British reconfiguration of territorial jurisdiction and the official segregation of Indian tribes from European settlers marked the beginning of the end of the middle ground, thus destabilizing the foundations of a tenuous yet otherwise workable system of cross-cultural jurisprudence.

Imperial Transition and the Limits of Sovereignty: Legal Pluralism and the Failure of British Cross-Cultural Jurisprudence, 1763-1783

In matters of overseas empire, early modern British legal theory distinguished between "ceded" or "conquered" and "settled" territories. The latter designation referred to a colony where British subjects were supposedly the first to settle with a developed system of law. A ceded or conquered territory, on the other hand, continued to operate under the force of existing laws pending Royal prerogative to establish new instruments of governance.[175] Legal scholars often refer to this presumption of uninterrupted local authority as the principle, doctrine, or convention of continuity.[176]

"Classification of a territory is important," writes legal historian Kent McNeil, "for upon it depends both the law in force there and the power of the Crown to legislate." "However," he cautions, "though these general rules were well settled before the end of

[175] D.P. O'Connell, *State Succession in Municipal Law and International Law,* Vol. 1: *Internal Relations,* Cambridge: Cambridge University Press, 1967, pp. 36-37, 108; also see Greene, "Cultural Dimensions," p. 3. The rules governing England's imperial possessions derived not from English municipal law, but rather from "the several and distinct municipal laws" of the colonized dominion; see *Calvin's Case,* 77 Eng. Rep. 377, at p. 400, as quoted by Mark D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982," *McGill Law Journal,* Vol. 44, No. 3 (Nov., 1999): p. 715. The Crown's imperial powers continued in the colonies until succeeded by a representative assembly or with the introduction of English law; see Kent McNeil, *Common Law Aboriginal Title,* Oxford: Oxford University Press, 1989, p. 131.

[176] Walters, "Golden Thread," p. 715; also see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity,* Cambridge: Cambridge University Press, 1995, pp. 124-129.

the eighteenth century, their practical application sometimes proved awkward in view of the diverse nature of the vast colonial empire which Britain acquired."[177] "Of necessity," he adds:

> adjustments had to be made to accommodate local conditions. Thus, in conquered or ceded territories where local law was unsuitable for Europeans, the colonists were held to be subject to English law instead. Similarly, in settled territories containing indigenous populations the importation of English law by the settler community did not necessarily abrogate pre-existing customary law. The extent to which English law was introduced and local law retained was thus a variable depending on the circumstances of each particular colony.[178]

In practice, the British colonies used a variety of interpretive criteria—including the extent of cultivated lands, the local inhabitants' level of civilization, and the suitability of local laws and customs—for classifying colonial acquisitions.[179]

While the English Privy Council regulated colonial policy, the English courts decided the validity of local laws and customs. In what is widely acknowledged as the first case to address the issue of recognition, the Irish Court of King's Bench in 1608 ruled in the *Case of Tanistry* that local laws and customs survive British conquest if reasonable, certain, of immemorial usage, and compatible with Royal prerogative.[180] That same year, however, Sir Edward Coke, Chief Justice of England's Court of Common Pleas, ruled in *Calvin's Case* that while the laws of a conquered Christian nation survive, those of an "infidel" nation did not.[181] Once subjected by conquest,

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[177] McNeil, *Aboriginal Title,* pp. 113, 115, 164.
[178] Ibid. pp. 115-116.
[179] See generally, ibid. pp. 117-120.
[180] See James W. Zion and Robert Yazzie, "Indigenous Law in North America in the Wake of Conquest," *Boston College International and Comparative Law Review,* Vol. 20, No. 1 (Winter 1997): p. 65.
[181] *Calvin's Case,* 77 Eng. Rep. 377 (1608). The question over whether or not Coke intended for *Calvin's Case* to impart an imperialist thesis in common law jurisprudence remains a subject of debate. Daniel Hulsebosch argues that Coke may have intended for the case to apply to English jurisdiction (the issue concerning the rights and obligations of allegiance of a Scottish subject following the union of England and Scotland in 1604) rather than serve as exportable common law jurisprudence in the British colonies; See

"there *ipso facto* the laws of the infidel are abrogated, for that they be . . . against Christianity [and] the law of God and of nature."[182] While Coke's opinion enjoyed a brief period of influence in North America,[183] subsequent English jurists uniformly rejected its authority in Imperial common law.[184]

The "celebrated question" over whether America was acquired by conquest/cession or discovery/settlement remains open to debate.[185] From the sixteenth century until the British Crown relinquished her authority, European imperial policies in

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generally Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review,* Vol. 21, No. 3 (Autumn, 2003): pp. 439-482.

[182] *Calvin's Case,* p. 397; also see Williams, *American Indian,* p. 200. Citing the work of sixteenth-century theologians Francisco de Vitoria and Bartolomé de las Casas, legal historian Shaunnagh Dorsett notes that "Indigenous peoples had by this time long been equated with the infidel, although not specifically by the English common law." See Dorsett, "Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs in New Zealand in the 1840s," *Journal of Legal History,* Vol. 30, No. 2 (Aug., 2009): pp. 186-187.

[183] One of the first legal proceedings in British colonial America to test Lord Coke's presumption that English conquest abrogated "infidel" laws and customs was *Barkham's Case*, decided in 1622. The issue involved Barkham's (a colonist) petition to the Virginia Company for confirmation of a deed from Governor George Yeardly, which granted certain lands lying outside of the Jamestown settlement. Prior to the case, sometime in 1620 or 1621, Yeardley—in an effort to mollify the concerns of the Powhatan Confederacy over growing settler encroachments—had agreed that all future grants to lands claimed by the tribes were to be approved by Chief Opechanacanough. Opechanacanough consented to Barkham's grant; however, the transaction clearly violated contemporary English colonizing principles. Exercising jurisdictional authority vested by the Crown, the Virginia Company ruled that "this grant of Barkham's was held to be very dishonorable and prejudicial" in that it "was limited with a Proviso to compound Opachankano, whereby a sovereignty in that heathen infidel was acknowledged, and the Company's title thereby much infringed." Although the Company's decision invalidated the grant, the colonial government, Robert Williams notes, "had repeatedly failed to bring the king's perpetual infidel enemies . . . under subjection," effectively unsettling Lord Coke's "Crusading-era-derived feudal paradigm of infidel conquest." See Williams, *American Indian,* pp. 214-216; also see Susan Myra Kingsbury, ed., *Records of the Virginia Co. of London,* Vol. II, Washington: Gov't Printing Office, 1906, pp. 94-96.

[184] In *Blankard v. Galdy* (1693) Lord Chief Justice Holt held "that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God." A similar rule in the *Case of Anonymous* (1722) held that the laws of infidel countries remain in force except for those "contrary of our religion" or "*malum in se*." In 1774, the Court of King's Bench discarded any distinction between Christian and infidel countries. Lord Mansfield's opinion in *Campbell v. Hall* (98 Eng. Rep. 1045) preserved the basic principles of *Calvin's Case,* with the "absurd exception as to pagans." For a discussion of these cases in the context of American Revolutionary legal theory and the formation of American Indian law, see Williams, *American Indian*, pp. 300-303; and Ford, *Settler Sovereignty,* pp. 13-17. In colonial Australia, see Dorsett, "Sworn on the Dirt of Graves," p. 183.

[185] "There is [a] celebrated question, to which the discovery of the New World has principally given rise," Emerich de Vattell set forth in his late eighteenth-century international legal treatise: "It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole?" See Emerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns,* London: G.G. and J. Robinson, 1797, p. 100.

North America were not only diverse but often contradictory in colonial practice. The historical record reveals little consistency concerning such matters as the effectiveness of ritual or symbolic acts of discovery and appropriation, the status of Indigenous peoples and their lands, the character and purpose of treaties entered into with the tribes, and the force of Native customary laws.[186]

The English colonists settled North America by virtue of letters patent. By these imperial instruments, the Crown professed to grant territorial and governmental rights to the settlers without the consent of the Indians or making any pretense of conquest or cession. Early on, the idea of America as a "settled," rather than a "conquered," colony resonated strongly with most colonists. However, this view did not necessarily suggest any impairment to the rights, status, or laws of the Native peoples; rather it was a response to the fact that no pre-existing legal system suited the particular needs of the colonists.[187]

By and large, the parallel existence of Native and settler polities stood on a model of continuity, collaboration, and consent—recognized through treaties and other forms of diplomatic and normative dialogue—where personal and subject matter jurisdiction

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[186] Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, Saskatoon: University of Sastatchewan Native Law Centre, 1983, p. 4; Mark D. Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," *Osgoode Hall Law Journal,* Vol. 33, No. 4 (Winter, 1995): p. 792.

[187] As Paul McHugh suggests, "the [conquered/ceded/settled] distinction was never regarded as having any bearing on the status or rights of the Indigenous peoples of the colony . . . but was a response to the situation of the Crown's non-native subjects." In "settled" territories, "this classification was not so much a denial of the Aboriginal presence as a realization that there was no pre-existing legal system suitably applicable to English people." See P.G. McHugh, "The Common-Law Status of Colonies and Aboriginal 'Rights': How Lawyers and Historians Treat the Past," *Saskatchewan Law Review,* Vol. 61, No. 2 (1998): pp. 402-403, 421; also see Marete Falck Borch, *Conciliation, Compulsion, Conversion: British Attitudes Towards Indigenous Peoples, 1763-1814,* New York: Rodopi, 2004, p. 220. For a succinct overview of diverging scholarly opinions on the relevance of colonial classification to the common law rights of Indigenous peoples, see Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia,*" *Queen's Law Journal,* Vol. 17, No. 2 (Summer, 1992): p. 366, n. 44 and accompanying text.

supplanted unilateral assertions of territorial sovereignty.[188] Imperial policy held as a general rule that the British colonists were not to intervene in Native affairs. However, when disputes arose, colonial governors were often instructed "to take care that they [the Indians] be allowed the same measure of justice in matters relating to the English . . . as by law is due and belonging unto them."[189] Because many colonists considered the tribes as a "separate and distinct people" with "a polity of their own," and whose "policy, customs, and manners differ[ed] widely from those of the English," British officials often sought a "law equal to both parties," guided in principle by "the law of nature and nations."[190] In short, recognition of Indian laws and customs served a practical rather than a doctrinal purpose, a means to accommodate a peaceful co-existence between Native and settler polities rather than to incorporate Indian norms into the municipal law of settler society.[191]

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[188] Tully, *Strange Multiplicity,* pp. 124-130; P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination,* Oxford: Oxford University Press, 2004, pp. 65-70, 95, 102-103; and Mark D. Walters, "Histories of Colonialism, Legality, and Aboriginality," *University of Toronto Law Journal,* Vol. 57, No. 4 (Fall, 2007): p. 823 (reviewing McHugh's book).

[189] Royal Instructions to Virginia Governor Thomas Culpeper issued 1679, as quoted in Leonard Woods Labaree, ed., *Royal Instructions to British Colonial Governors, 1670-1776,* Vol. 2, New York: Octagon Books, 1967, p. 471. Similarly, in 1681, the colony of Connecticut entered into a treaty with the Mohegan Tribe, assuring "Equal Justice" to them "as our own people." As quoted in McHugh, *Aboriginal Societies,* p. 102. On 14 October 1670, the General Court of Colonial Virginia "*ordered* that *Thomas Carter* deliver unto Capt. *Pipscoe*[,] an Indian[,] his horse bridle and Saddle and retorne him Thirty good deere Skynns & pay costs." On 4 April 1674, "[u]pon Petićon of the *Notoway* Indians," the General Court "ordered that the *English* that have Seated within the bounds of the Said Indians [sic] Land . . . Come offe, and Noe Surveyor . . . to Survey any more Land." See *Minutes of the Council and General Court of Colonial Virginia, 1622-1632, 1670-1676,* ed. H.R.McIlwaine, Richmond: The Colonial Press, Everett Waddey Co., 1924, pp. 230, 365.

[190] David W.Conroy, "The Defense of Indian Land Rights: William Bollan and the Mohegan Case in 1743," *Proceedings of the American Antiquarian Society,* Vol. 103, No. 2 (1994): pp. 414, 420, quoting attorney William Bollan and Commissioner Daniel Horsmanden. In a 1717 case in the Superior Court of Judicature at Plymouth, Jacob Seeknout, a sachem of Chappaquiddick Island, defended his inheritance rights "according to [Indian] tradition and ye Course of ye Common Law." See Ann Marie Plane, "Colonizing the Family: Marriage, Household and Racial Boundaries in Southeastern New England to 1730," Ph. D. Diss., Brandeis University, 1995, pp. 166-167.

[191] Yasuhide Kawashima, "The Indian Tradition in Early American Law," *American Indian Law Review,* Vol. 17, No. 1 (1992): pp. 104-105, 108. While the imperial common law of continuity established the rule of recognition in principle, the individual colonies determined the scope and character of recognition in practice. Some colonies provided for the establishment and maintenance of Native courts, in which the

By 1763, the British were assuming control not only over the vast western territory with an extensive tribal presence but also over one that had been formally ceded by existing European sovereigns. With this cultural plurality of polities, the paradigm of colonial imperialism shifted. How British colonizing theory evolved in the region, the extent to which England conceded jurisdiction by recognizing those laws and customs in place, and the cultural dimensions of political transfer, decidedly reconfigured the terms of French and Indian sovereignty in the west.[192] Under provisions set forth under the Treaty of Peace signed at Paris on 10 February 1763, France ceded to England all of Canada and the colony of Louisiana east of the Mississippi River apart from New Orleans.[193] Four critical issues immediately framed the colonial debate for Great Britain's new territorial acquisition: (1) the establishment of law and government; (2) the organization, defense, and security of the new colonies; (3) the administration of Indian affairs; and (4) the location of a permanent boundary line between Indians and settlers.[194]

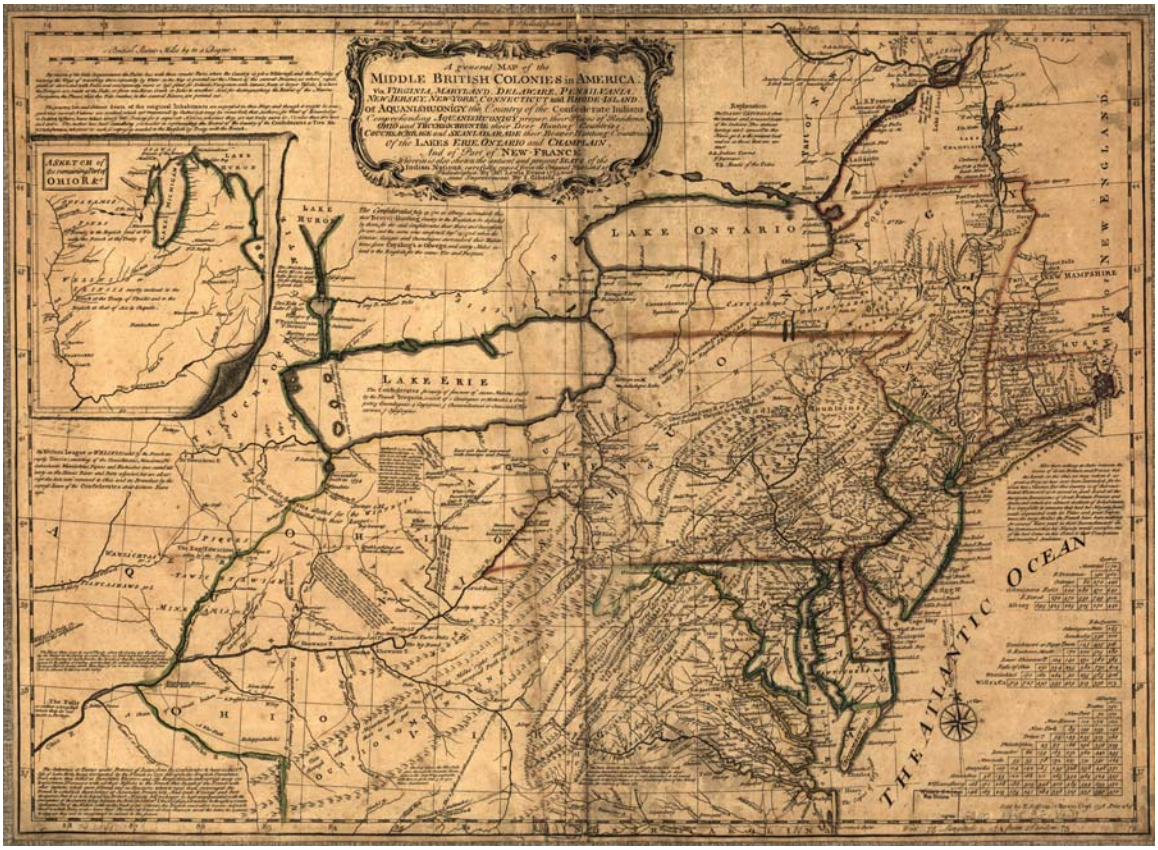
Indians—mostly those from the Christianized "praying towns"—appointed magistrates and other officials among themselves to administer justice in accordance with internal rules and norms. In 1647 and 1658, for example, the Massachusetts Bay Colony enacted legislation providing for the creation of Native courts. Tribal-appointed magistrates among the Natick, Ponkapaug, Mashpee, Chappaquiddick, and other Native communities presided over minor cases arising *inter se* with the advice and consent of British agents commissioned by the General Court; see Ives Goddard and Kathleen J. Bragdon, eds., *Native Writings in Massachusett,* Vol. 1, Philadelphia: American Philosophical Society, 1988, p. 5. In other colonies, the tribes or individual Indians appealed directly to the colonial courts—appearing on their own volition as attorneys, plaintiffs and defendants—to assist in resolving matters arising *inter se*. In a 1659 Rhode Island case, a local sachem hired an Indian attorney to litigate a dispute; see Hermes, "Justice Will Be Done Us," pp. 133-134, 140.

[192] Robert Williams summarily dismisses the French presence in the interior region, the British "having driven [them] out of the Old Northwest" after 1763; see Williams, *American Indian,* p. 233. Considering the emphasis Williams places on British and American colonizing theory in relation to the inhabitants' rights, his failure to at least footnote the French struggle is surprising.

[193] "Definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain," 10 February 1763, in Adam Shortt, and Arthur G. Doughty, eds., *Documents Relating to the Constitutional History of Canada* [hereinafter cited as *DRCHC*], *1759-1791,* Vol. 1, Ottawa: Printed by J. de L. Taché, 1918, pp. 113-126. Remaining portions of Louisiana were ceded to Spain in 1762 by the Treaty of Fontainebleau.

[194] Barnhart and Riker, *Indiana to 1816,* pp. 147-148.

The first attempt to formally resolve these issues materialized with the Royal Proclamation of 1763.[195] The resolution's approach (or lack thereof) to the interior



Map 2. *A General Map of the Middle British Colonies in America,* by Lewis Evans, 1755, from Library of Congress, Geography and Map Division (Digital Collections).

region of the continent would come to have not only a profound impact on French and Indian legal status but also on what the Anglo-American colonists considered to be a violation of their fundamental right to liberty and private property.

The imperial acquisition of the interior region immediately brought forth the issue of the inhabitants' customary law rights to land. The main controversy centered on whether or not the North American Indigenous peoples possessed title by occupancy

[195] Royal Proclamation, 7 October, 1763. For full text of Proclamation see, *DRCHC,* Vol. 1, pp. 163-168.

when the British Crown asserted its territorial sovereignty.[196] At the time of territorial cession, several British colonists advocated for expansion and settlement west of the Appalachian Mountains. The Crown could have conceded to the colonists without consideration of Indian title. However, a reluctant British ministry (largely due to the lack of knowledge of the newly-acquired territory) rejected a policy of imperial expansion and western settlement, thus treating the Indian nations as protected peoples under Crown sovereignty and presuming their customary rights to unceded lands.[197] Under this legal framework, the Proclamation of 1763 provided, in part, that:

> [I]t is just and reasonable, and essential to Our Interest and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.[198]

Royal instructions to the colonial governors on implementing the Proclamation underscored and elaborated upon these provisions. In order to "maintain a strict Friendship and good Correspondence" with the Indian tribes, the Crown requested Governor James Murray of Quebec to appoint persons "to assemble, and treat with the said Indians, promising and assuring them of Protection." Murray was to "take the most effectual Care" in restricting all British subjects "from making any Purchases or Settlements . . . or taking Possession of any of the Lands reserved to the several Nations of Indians."[199]

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[196] The British had very little idea at the time of the extent of French settlements scattered throughout interior region.
[197] See Slattery, *Ancestral Lands,* p. 6.
[198] Royal Proclamation, as quoted in *DRCHC,* Vol. 1, p. 166.
[199] Instructions to Governor Murray dated 7 December 1763, in *DRCHC,* Vol. 1, pp. 199, 200.

Initially, the imperial transition to British control over the *Pays d'en Haut* rejected the unofficial middle ground policy long adhered to by the region's inhabitants.[200] From the perspective of Jeffrey Amherst, Governor General of British North America, village politics carried little weight in matters of colonial empire. According to his imperialist logic, there was no room for conciliation; the British were conquerors and the Indians were their subjects. Amherst's contemporaries in the British Indian Department soon realized, however, the destructive force of these views. In March of 1762, Indian agent George Croghan wrote to Lt. Col. Henry Bouquet that "[t]he British and French Colonies since the first Settling [of] America . . . have adopted the Indian Customs and manners by indulging them in Treaties and renewing friendships [by] making them large Presents which I fear won't be so easey to break them of as the General may imagine."[201]

Croghan's concerns, and those of his superior Sir William Johnson, Superintendent of Indian Affairs, could not have been more perceptive: boundary disputes, aggressive squatters, and unfair trade practices plagued the frontier after the fall of New France in 1760. As tensions grew, frontier hostility seemed imminent. The events that transpired during the spring and summer of 1763 yielded this painful realization. An insurgence of Shawnee and Delaware tribes led to a series of violent confrontations throughout the Great Lakes region and Wabash country, culminating in an attack on British garrisons at Detroit. While the Indians' failed to expel the British, and the British failed to subjugate the "savage" tribes, Pontiac's Rebellion, as it came to be known, accelerated the need for a more definitive Indian policy in the region.[202]

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[200] See, generally, White, *Middle Ground,* pp. 256-268.
[201] Letter of Croghan to Bouquet dated 27 March 1762, as quoted by *White, Middle Ground,* p. 258.
[202] See White, *Middle Ground,* pp. 279, 283, 289.

Following Amherst's removal from service in November of 1763, the British left superintendents Johnson and Croghan to devise their own plans for Indian administration.[203] Leaving behind British claims of unconditional sovereignty over the Indians, the two agents restored the middle ground approach to which the Algonquian tribes had been accustomed. Beyond the politics of diplomacy, however, lay a greater need for an effective system of cross-cultural justice. Law and jurisdictional concession lay at the heart of this infrastructure. "The most superficial view of the nature and disposition of the Indians," Johnson's superiors at Whitehall wrote to him during the summer of 1764, "and of the manner in which they regulate their civil concerns will suffice to show that a steady and uniform attachment to, and love of Justice and Equity is one of their first principles of Government."[204]

Notwithstanding these views, the fundamental problem with mitigating Indian-settler conflict rested with the very purveyor of North American British law and justice itself: the colonial court system. Despite early colonial deference to tribal jurisdiction, by the mid-eighteenth century, the courts had not only assumed greater authority over Native affairs in the east, but had failed to consistently enforce laws designed to protect the Indians from settler incursions in the west, thus marginalizing any lingering tribal expectations of reciprocity or legal equity. The Ohio Indians, like many other tribes, mourned the loss of normative accommodation once vital to the middle ground:

> Before when accidents [murders] happened of this kind we made up by Condoling with each other, which is the antient Custom of all Our Nations in this Country, but you have broke tho. our old Customs and made New Ones which we are not well acquainted with; And you Can't

[203] Barnhart and Riker, *Indiana to 1816,* p. 147 and White, *Middle Ground,* p. 267.
[204] Lords of Trade to Sir William Johnson, dated 10 July 1764, in E.B. O'Callaghan and B. Fernow, eds., *Documents Relative to the Colonial History of New York* [hereinafter cited as *DRCHNY*], Vol. VII, Albany: Weed, Parsons and Co., 1856, p. 634.

> Expect, let us be ever so desirous of living in Peace, that we will Sit Still and See our People murdered by yours without having the Same Satisfaction from you that you Demand of Us.[205]

While Croghan and Johnson would remain "agreeable to antient Custom" at tribal council meetings, they also recognized the inherent problems with transplanting the English common law into Indian Country:

> [A] material defect, from which Indian affairs have met with great obstruction, arrives from the Laws, which tho' happily devised for our use are of little or none to the Indians, and many cases prove a bar to their getting justice. These Laws were most of them existing before the discovery of America, and since, there have been none made which are either effectual or salutary for this purpose. Admitting their case to have all the appearances of equity, yet the difficulties in which proceedings are involved, the particular proofs required, their sole want of written, and incapacity to give verbal evidence, and above all the not admitting any thing to affect the Title of a patent, prove insuperable bars.[206]

Despite his cultural preconceptions that Indians were unable to appreciate the "Nicetys of the Common Law," William Johnson realized the dire need to formulate a legal system to accommodate the Indians.[207] Yet procedural restrictions in most British courts imposed severe legal disabilities on American Indians. For example, the courts frequently barred American Indians from testifying. These evidentiary restrictions rested largely on racial prejudice, but British colonial legal culture also reflected the presumption that Indians, as non-Christians, lacked a fear of divine power. In the Anglo-American common law, this inherent deficiency effectively displaced any guarantee of truth that the oath was intended to disclose.[208] "The Courts of Law," William Johnson

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[205] As quoted by White, *Middle Ground,* p. 346.
[206] William Johnson, "Review of the Trade and Affairs in the Northern District of America," 22 September 1767, in *DRCHNY,* Vol. VII, p. 972; also see White, *Middle Ground,* p. 346.
[207] *DRCHNY,* Vol. VII, p. 972.
[208] Based largely on Lord Coke's early seventeenth-century views that Christian doctrine was fundamental to the English common law, the implication was that "infidels" could not be sworn and their testimony, therefore, was not admissible; see Reginald Good, "Admissibility of Testimony from Non-Christian Indians in the Colonial Municipal Courts of Upper Canada/Canada West," *Windsor Yearbook of Access to*

conceded with regret, "cannot admit of their evidence, nor is there any reason to expect it from many Jurys, the prejudices against Indians being too strong . . . if these insurmountable bars did not exist."[209]

The task of finding a mutually agreeable scheme for resolving disputes between the Indians and settlers in the interior region fell on William Johnson. The precipitous growth of violence, boundary disputes, and trade violations left the tribes with little recourse. Johnson's options were limited. Subjecting traders and illicit settlers in Indian Country to courts-martial would certainly inflame the colonists. Providing British officials with itinerant justice of the peace powers might be helpful in minor cases, but rights of appeal to the British courts would likely disfavor Indian claims. "Such differences," Johnson argued, "when they come to be litigated, frequently turning in favour of the White people, often thro' prejudice, but generally thro' the interested opposition of parties . . . renders [such] a course of Law equally tedious, uncertain, and expensive."[210] Johnson recognized the cultural incompatibility of litigating American Indian claims in Anglo-American courts. In seeking alternative means of dispute resolution, Johnson wished that "some method could be fallen upon . . . to determine in a summary way, such disputes relative to claims or titles, as could not be speedily or satisfactorily determined at Common Law."[211] Another problem came from the practical limitations of access to justice. Even if the Indians could overcome prejudicial barriers, the geographic distance to the eastern courts was an almost insurmountable obstacle for

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Justice, Vol. 23, No. 1 (2005): p. 57. For variation in legal approaches by seventeenth-century New England courts to American Indians, see Hermes, "Justice Will Be Done Us," pp. 131, 139.

[209] *DRCHNY,* Vol. VII, p. 968; also see Daniel K. Richter, "Native Americans, the Plan of 1764, and a British Empire That Never Was," in Robert Olwell and Alan Tully, eds. *Cultures and Identities in Colonial British America,* Baltimore: Johns Hopkins University Press, 2006, p. 284.

[210] Sir William Johnson to the Lords of Trade, [n.d.], *DRCHNY,* Vol. VII, p. 663.

[211] Ibid. pp. 662-663.

them. Alternatively, the establishment of a western colony with a complete system of law and justice presented less of a realistic solution if Britain was to protect the Indian country from land-hungry settlers.[212]

Johnson's answer to these problems found its way into his "Plan for the future management of Indian Affairs," a working document circulated between colonial and metropolitan authorities designed to elaborate upon the shortcomings of the 1763 Proclamation.[213] Introductory provisions under the Plan stipulated that "all laws now in force in the several Colonies for regulating Indian Affairs or Commerce [will] be repealed."[214] By dividing the interior region into Northern and Southern administrative districts, jurisdiction would fall not under the individual colonies but under the centralized authority of two appointed superintendents. Similar lines of authority would also extend to the tribal villages throughout Indian country. In both districts, to the greatest extent possible, each village would appoint a representative "to take care of the mutual interests both of Indians & Traders."[215] These representatives, in turn, were to "elect a Chief of the whole Tribe" to serve "as Guardian of the Indians and protector of Their Rights."[216]

In order to maintain a workable boundary system and prevent fraudulent land sales, the Plan required the superintendents to negotiate all transactions in open council

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[212] Richter, "Plan of 1764," p. 284.
[213] Richter provides the most comprehensive treatment of the Plan to date. For a briefer analysis, also see Williams, *American Indian,* pp. 238-241.
[214] Plan for the future Management of Indian Affairs, *DRCHNY,* Vol. VII, p. 637. Full text of the Plan can be found at pp. 637-641. Appended to the Plan are lists of North American tribes for the northern and southern districts respectively.
[215] Ibid. p. 638.
[216] Ibid. p. 638-639. As Richter comparatively observes, "[t]his system envisioned something vaguely similar to the form of indirect imperial government being worked out at the same time around the globe in South Asian." See Richter, "Plan of 1764," p. 285.

with "the principal Chiefs of each Tribe claiming a property in such lands."[217] British civil officers would enforce regulations in consultation with both traders and Indians. Commissaries would serve as justices of the peace with the "capacity to declare summary judgments in civil cases." Appeals would go to the superintendents only. Moreover, Indians were, "under proper regulations and restrictions[,] [to] be admitted in all criminal as well as civil causes that shall be tried and adjudged by the said Agents or Superintendents or by the said Commissaries and that their evidence be likewise admitted by the Courts of Justice in any of his Majestys Colonies or Plantations."[218] In elaboration of this proposal, Johnson remarked that all Indians "as are Christians[,] . . . shall produce a certificate of their Religious deportment and attendance on Divine Worship."[219] Johnson further stipulated that for those Indians "who (as yet) know not the nature of an oath, their evidence seems to require the opinion of those learned in the Law."[220] An elected Chief was to serve "as Guardian for the Indians and protector of their Rights with liberty . . . to be present at all meetings . . . hearings or trials relative to the Indians . . . and to give his opinion upon all matters under consideration at such meetings or hearings."[221] In a 1767 report, Johnson noted "[t]hat where Indians are proposed as Jurors, and are not known to be Christians . . . the Certificate of a Missionary (where such reside) in favour of such Indians, or the testimony of any reputable person, be the test by

[217] As quoted by Richter, "Plan of 1764," p. 286.
[218] *DRCHNY,* Vol. VII, p. 638.
[219] Ibid. p. 663.
[220] Ibid.
[221] Ibid. pp. 638-639.

which they are to be admitted."[222] Provisions concerning the subject of jury composition, however, never found their way into the Plan.[223]

Sir William Johnson's efforts reflected larger aspirations of peaceful co-existence. With hopes of returning to a middle ground, he had appealed to his contemporaries for greater tolerance toward Indian customary practices:

> Whilst the steps taken by many probably well meaning but gloomy people amongst us, to abolish at once their most innocent customs, Dances, and rejoicings at marriages ettc. & their premature proposals for bringing familys amongst them to instruct them in agriculture . . . alarm all Indians who hear of them with the apprehension, that it is done with design to wean them from their way of living, purely, that they may be the readier induced to part with their lands to the White people.[224]

In the end, however, Johnson's contemporaries failed to appreciate his ideology, which extolled the virtues of compatibility "through knowledge of [the Indians'] manners and disposition." Despite high expectations, the superintendents faced repeated frustrations in their attempts to implement sound policy regulating Indian-settler relations. "Had it been put into execution immediately," Johnson regretted in hindsight, "I am of opinion, it would have had all the effects expected from it."[225] Squatters and free traders, however, had doomed Johnson's Plan from the very beginning. The pre-Revolutionary chaos that plagued colonial administrators—extending in large part from the contempt American radicals held toward the Crown with the implementation of the Stamp Act—combined

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[222] Johnson, Review of the Trade and Affairs in the Northern District of America, 22 September 1767, in Ibid. p. 976.
[223] Occassionally, during the early colonial period, British courts appointed interpreters, Indian assessors (or customary law advisors), or mixed juries; see Kawashima, "Indian Tradition," p. 102. Also see discussion of British use of French-Canadian assessors at p. 82, infra. For the British use of assessors in other colonial jurisdictions see Leon Sheleff, *The Future of Tradition: Customary Law, Common Law, and Legal Pluralism*, London: Frank Cass, 1999, pp. 380-381; and J.H. Jearey, "Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories," Pts. 1-3, *Journal of African Law*. Vol. 4, No. 3 (Autumn 1960): pp. 133-146; Vol. 5, No. 1 (Spring 1961), pp. 36-47; and Vol. 5, No. 2 (Summer 1961), pp. 82-98.
[224] *DRCHNY,* Vol. VII, p. 970.
[225] As quoted by Richter, "Plan of 1764," p. 289.

with growing expenses related to the administration of Indian affairs, led the English Board of Trade in 1768 to reject the Plan. In addition, the Board curtailed Johnson and Croghan's authority to matters related to the "general interests of the Indians, independent of their connection with any particular Colony."[226] The superintendents newly-defined administrative and diplomatic duties included:

> the renewal of antient Compacts or Covenant-Chains . . .; the reconciling Differences and disputes between one body of Indians and another; the agreeing with them for the sale or surrender of Lands for public purposes . . .; and the holding interviews with them for these and a variety of other general purposes which are merely objects of Negotiation between your Majesty and the Indians.[227]

Without conceding to demands for territorial expansion, however, the only exception imperial authorities made involved the negotiation of Indian-settler boundary lines, fulfilled (in theory) by the Treaty of Ft. Stanwix executed on 5 November 1768.

Despite the reluctance among English imperial authorities, the ideological importance of Johnson's ill-fated Plan speaks volumes about unconventional British colonial theories of sovereignty and jurisdiction. The proposal suggested the importance of protecting a plurality of rights, laws, customs, and systems of government even when such recognition clashed with settler interests. In refuting claims that the Plan posed "a dangerous precedent," Johnson contended that "surely a defect in the Laws owing to the times in which they were made . . . cannot be produced as of sufficient weight agst reason, and moral equity."[228] Above all, the Plan's failure highlights the force of cultural

[226] Ibid. p. 290.
[227] Ibid.
[228] Sir William Johnson, Review of the Trade and Affairs in the Northern District of America, 22 September 1767, *DRCHNY,* Vol. VII, 967.

imperialism; after all, the settlers, traders, and colonial courts (rather than British imperial authorities) dictated the terms of its outcome.[229]

Beyond its dissolution in 1768, however, the Plan of 1764 would continue to serve as a model of colonial governance. The Plan's brief resurrection following passage of the 1774 Quebec Act would highlight not only the perpetual tensions stemming from the 1763 Royal Proclamation but also from the overarching concern with maintaining an effective system of cross-cultural justice to conciliate tribal grievances in the face of increasing settler encroachments.

In contrast to the territorial sovereignty accorded to the tribes of the North American interior, neither the Crown nor British metropolitan authorities made provisions for governing the region's French inhabitants during the first decade of occupation. In effect, the Proclamation of 1763 failed to recognize their existence outside of the Quebec colony and considered them trespassers in their own communities. Under the Proclamation's boundary lines, the geographic perimeters of the *Pays des Illinois* fell outside of British colonial jurisdiction.[230] By reserving the interior region for the American Indian inhabitants, the royal edict not only restricted Euro-Americans from settlement and private purchase of land, but also required those remaining "forthwith to remove themselves from such Settlements."

[229] See Richter, "Plan of 1764," p. 292.
[230] The Proclamation created three new colonies within the continental mainland; these included Quebec and East and West Florida. Formal stipulations provided for colonial authorities "to reserve under [British] Sovereignty, Protection, and Dominion, for the use of said Indians, all the Lands and Territories not included within the Limits of . . . said Three new Governments." See *DRCHC,* Vol. 1, p. 167. Because British policy concerning the fourth colony of Grenada falls outside of this study's geographic scope, I provide no further elaboration.

When conditions favored British exploration of the interior region, the large presence of French inhabitants perplexed colonial officials. At the time of surrender to British forces, approximately seventy families resided at or around Vincennes.[231] Believing most to be residing there illegally, British General Thomas Gage initially ordered their evacuation along with all other French settlements along the Wabash. Yet the inhabitants insisted that they possessed legal title to their lands either by grant of the French Crown or the local commandant. Reluctant to proceed with his original plans of removal, Gage issued a decree in 1764 provisionally granting the Illinois inhabitants the "same rights and privileges, security for persons and effects and liberty of trade as the old subjects," on the precondition of their taking an oath of allegiance to the British Crown.[232]

The question of law and civil administration in the Illinois Country remained a marginal one during the first decade of British occupation. Despite French petitions and summary proposals for the organization of civil government in the Illinois Country, the British accomplished little to placate French concerns. With little to no direction from colonial authorities, British post commanders reluctantly assumed civil duties in addition to their military obligations. In 1765, with little alternative recourse, Captain Thomas Stirling appointed Jean Baptiste Lagrange at Kaskaskia to "decide all disputes . . . [a]ccording to the Laws and Customs of the Country" with the right of appeal to the local commandant.[233] Such relief, however, proved insufficient and short lived.

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[231] Phillips, "Vincennes," p. 335.
[232] Louise Phelps Kellogg, "A Footnote to the Quebec Act," *Canadian Historical Review,* Vol. 13, No. 2 (1932): p. 148.
[233] Clarence Walworth Alvord, *Illinois Country, 1673-1818,* Centennial History of Illinois, Vol. 1, Springfield, Ill.: Illinois Centennial Commission, 1920. p. 265.

On 12 November 1768, Lieutenant Colonel John Wilkins issued a proclamation establishing a commission of judges "to form a Civil Court of Judicatory, with powers expressed in their Commissions to Hear and Try in a Summary way all Causes of Debt and Property . . . and to give their Judgement thereon according to the Laws of England to the Best of their Judgement and understanding."[234] On 4 March 1770, the commission extended its jurisdiction "to Hear, Try and Determine in the Summary Way" all criminal cases and "to impose and bring such Fine and Inflict such Corporale Punishment or commit Offenders to Jayle at the discretion of the said Court."[235] The court, however, "[d]id not admit of Tryals by Juries on account of its Small numbers of Inhabitants as Well as their Want of Knowledge of the Laws and Customs of England."[236] Again, such arrangements proved ephemeral. After 6 June 1770, there appears to be no further record of British-led court sessions.[237]

On 9 July 1771, two French representatives presented General Gage with a memorial of their grievances and an outline plan for a system of western government. Gage flatly rejected their proposition. The following year, a self-described "habitant des Kaskaskias" publicized the French dilemma in a pamphlet entitled "Invitation Serieuse aux Habitants des Illinois." In addition to urging political change for the region and economic independence among his fellow Frenchmen, the pamphlet's author conditionally pardoned the Crown's failure to extend civil government in the hopes of reconciling their predicament. The proposal failed to solicit British

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[234] Kaskaskia Manuscripts, court record 23, as quoted by Alvord, *Illinois Country*, p. 267.
[235] Ibid. p. 268
[236] Ibid. pp. 267-268.
[237] On this date, the British court petitioned Wilkins with a memorial, setting forth its grievances over the Lieutenant Colonel's recent order to hear all future cases at a different site. Wilkins responded by abolishing the tribunal; see Ibid. p. 268.

sympathies. Instead, as French-British relations deteriorated, British Secretary Lord Hillsborough instructed Gage to remove the region's village inhabitants. Those at Vincennes responded with indignation. In a memorial to Gage, the petitioners documented their long history at the village, describing themselves as "peaceful settlers, cultivating the land which His Most Christian Majesty granted us, or which we have purchased, and often watered with our blood."[238]

Fortunately, the French avoided displacement when Lord Hillsborough left his position as colonial secretary. His successor, Lord Dartmouth, sympathized with the French and considered the inhabitants as British subjects requiring the protection of the Crown and possessing full rights to their property and possessions.[239] "The State of Settlements at Post St. Vincent on the Ouabache will necessarily make a part of this consideration," Dartmouth wrote to Gage in 1773, "seeing that the Inhabitants there no longer appear a lawless vagabond Banditti, as they have been represented to be."[240]

Lacking any official form of civil government or legal forum in which to adjudicate their claims, the French of the Illinois Country resorted to their traditional methods of arbitration and dispute resolution. With little semblance of legal administration from British authorities, customary practices continued largely uninterrupted during this period. Internal means of self-government dictated the pace and character of normative change.

Assuming the inhabitants of the interior region had become British subjects following territorial accession, the imperial shift did not, however, imply any change to

[238] Memorial of 18 September 1772, as quoted in Barnhart and Riker, *Indiana to 1816,* p. 173.
[239] Alvord, *Illinois Country,* p. 294; Barnhart and Riker, *Indiana to 1816,* p. 173; and Phillips, "Vincennes," p. 337.
[240] Letter of Dartmouth to Gage, dated 3 March 1773, in Clarence E. Carter, ed., *The Correspondence of General Thomas Gage,* Vol. 2, New Haven: Yale University Press, 1931, p. 157.

the legal order governing the territory.[241] Despite the perfunctory existence of British courts at Kaskaskia between 1768 and 1770, imperial legislation (under the Royal Proclamation or otherwise) had made no pretense of creating or imposing a legal order over the territory.[242] Thus, prior to the passage of the Quebec Act of 1774, the French presumably held the autonomy to maintain their laws and customs because Crown prerogative had not forbidden it. Moreover, imperial common law afforded the region's inhabitants the means to create and maintain a legal order suitable to local needs and conditions. In *Calvin's Case,* Lord Coke held that Aristotle's *Politicorum:*

> proveth, that to command and to obey is of nature, and that magistracy is of nature: for whatsoever is necessary and profitable for the preservation of the society of man is due by the law of nature: but magistracy and government are necessary and profitable for the preservation of the society of man; therefore magistracy and government are of nature.[243]

In other words, the Crown's subjects—even those in the hinterlands of colonial empire—possessed not only a right but also a duty to establish and preserve social order. Having formed their communities beyond the effective control of the Crown, the law required the region's inhabitants to establish a legal system in the absence of a British one. Thus, the

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[241] As inhabitants of a conquered territory, the French would have become subjects of the Crown through the process of denizenship. Premised upon the doctrine of allegiance as outlined in *Calvin's Case* and affirmed in *Campbell v. Hall*, a correlative duty between ruler and ruled established a binding relationship of protection and obedience respectively. Prior to Lord Dartmouth's opinion in 1773, additional measures suggest that the British considered the French as subjects of the Crown. Following the 1764 decree of General Thomas Gage, which granted the Illinois inhabitants the "same rights and privileges, security for persons and effects and liberty of trade as the old subjects" upon their oath of allegiance to the British Crown, colonial administrators appointed James Rumsey in 1768 as judge advocate of the province for purposes of examining land titles and administering the oath; see Barnhart and Riker, *Indiana to 1816,* p. 166, n. 81.

[242] As Francis Philbrick writes, "[t]he British commandants of the [Illinois] country had assumed—though the Proclamation of 1763 gave them no explicit warrant for doing so—to introduce English law." See Philbrick, *Laws,* pp. ccxiv-ccxv.

[243] *Calvin's Case,* as quoted by Albert Peeling and Paul L.A.H. Chartrand, "Sovereignty, Liberty, and the Legal Order of the 'Freemen' (Otipahemsu'uk): Towards a Constitutional Theory of Métis Self-Government," *Saskatchewan Law Review,* Vol. 67, No. 1 (2004): p. 354.

laws and customs of the inhabitants possessed authority by the British Crown's *de facto* recognition.[244]

In contrast to their counterparts in the Illinois Country, the French in Quebec received formal British sanction for the continuity of their laws and customs. Under the 1763 Treaty of Paris, the British conceded to the *Canadiens* "the liberty of the Catholick religion," their legal rights to property, and continued use of the French language in official matters of the state. Rather than imposing a complete system of English law and political institutions, colonial authorities took a cautious approach by recognizing the entrenched cultural norms of the French inhabitants.[245]

The new system of government at Quebec, however, soon found itself mired in legal uncertainty. Whereas the lack of civil administration in the Illinois Country marginalized the French, the complexity of legal dualism in Canada frustrated British efforts to institute an effective form of inter-systemic justice. Moreover, the influx of British settlers (and the English common law they carried with them) began to displace French legal culture.[246]

The Proclamation of 1763 (issued a mere eight months following the signing of the Treaty) vested power in the Provincial governors, by advice and consent of the

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[244] Ibid. pp. 355, 357. Although Peeling and Chartrand's article discusses the historical context to the status of Métis rights of self-government under modern Canadian constitutional law, their analysis has particular relevance to the French inhabitants of the Illinois and Wabash Countries. However, considering the high level of inter-breeding following decades of French-Indian relations, the Métis, or mixed peoples, had a distinct presence in the region by the mid-eighteenth century. Having formed communities and identities independent of yet closely associated with French and Indian societies through trade and kinship, the Métis established for themselves distinct powers of political autonomy and self-government. During the early to mid-nineteenth century, the U.S. government recognized several of these tribes (including the Miami) as possessing special legal status. See chapter 2, part two, for overview and analysis of relevant treaties; for a brief discussion of the legal status of Métis peoples, see McHugh, *Aboriginal Societies,* pp. 236-237.
[245] Greene, "Cultural Dimensions," p. 13.
[246] Alvord, *Illinois Country,* p. 197.

Representative Councils, "to make, constitute, and ordain Laws, Statutes, and Ordinances" and to erect "Courts of Judicature and public Justice . . . for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England."[247] The potential for colonial prerogative legislation and English common law jurisdiction to extinguish the normative force of French customs soon threatened the culturally accommodative provisions of the Treaty of Paris. In response, the British metropolitan and colonial governments took several measures to appease French concerns.[248]

In matters of land tenure, the conflict between French and British customs became particularly acute. Under the Proclamation of 1763 the English law of real property applied to the North American colonies.[249] For the French *habitants*, however, British courts attempted to discover the laws and customs of the *ancien régime*. The problem lay in judicial notice by analogy to English land tenure rather than any systematic attempt at

[247] Royal Proclamation, in *DRCHC,* Vol. 1, p. 165.

[248] In a 1766 Attorney and Solicitor General's report, Charles Yorke and William de Grey identified "Two very principal sources of . . . Disorders in the province." The first of these was the "attempt to carry on the Administration of Justice without the aid of the natives, not merely in new forms, but totally in an unknown tongue, by which means the partys Understood Nothing of what was pleaded or determined having neither Canadian Advocates or Sollicitors to Conduct their Causes, nor Canadian jurors to give Verdicts, even in Causes between Canadians only, Nor Judges Conversant in the French Language to declare the Law, and to pronounce Judgement." The second source of conflict involved the Proclamation of 1763, under which the French inhabitants felt "[a]s if it were His Royal Intentions . . . to abolish all the usages and Customs of Canada, with the rough hand of a Conqueror rather than with the true Spirit of a Lawful Sovereign, and . . . to impose new, unnecessary and arbitrary Rules, especially in the Titles to Land, and in the modes of Descent[,] Alienation and Settlement." As a remedy, the Report recommended "an Ordinance for admitting Canadian Jurors, . . . Advocates, Attorneys, and Proctors." Other suggested measures included the establishment of a "Court of Chancery" and civil case proceedings to be governed by "French usages and Customs." See "Report of the Attorney and Solicitor General Regarding the Civil Government of Quebec," dated 14 April 1766, in Ibid. pp. 251-257.

[249] "[W]ith the advice of [the] Privy Council," the Proclamation gave ". . . unto the Governors and Councils . . . full Power and Authority to settle and agree with the Inhabitants . . . for such Lands[,] Tenements and Hereditaments" and "grant[ed] to any such Person or Persons . . . under such moderate Quit-Rents, Services and Acknowledgements . . . under such . . . Conditions as . . . necessary and expedient for the Advantage of the Grantees, and the Improvement and settlement of [the] Colonies."

ascertaining local Canadian laws.[250] In England, laws of copyhold tenure governed tenant rights to land held in common.[251] Under the French-Canadian system, local *habitants* paid annual tributes to the governing seigneur for use of lands held *en censive* (under title of the French Crown). By applying English common law principles to the Canadian system of land tenure, British judges sought to "discover" the "customs" of the seigneury in deciding property cases. However, the English common law recognized copyhold tenure by judicial notice of local manorial custom, whereas the French-Canadian *censitaire* possessed a formal, written deed explicitly defining those dues and services to the seigneurial grantor.[252]

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[250] William Bennett Munro, *The Seigniorial System in Canada: A Study in French Colonial Policy,* Cambridge, Mass.: Harvard University Press, 1907, p. 205.

[251] Largely abolished by the nineteenth century, copyhold refers to an English feudal system of land tenure, which required tenants to provide specific services to the landholder based on customary arrangements.

[252] See Munro, *Documents Relating to the Seigniorial Tenure in Canada, 1598-1854,* Toronto: The Champlain Society, 1908, p. ciii; and Munro, *Seigniorial System,* p. 206. Munro attributes the underlying conflict to the judicial misinterpretation of the *Coutume de Paris.* "The rights and responsibilities of seignior and habitant respectively," Munro argues, "were regulated not by any local seigniorial custom, but by the Custom of Paris, which applied throughout the colony." "The Custom of Paris," he adds, "was not unwritten law, like the customary law of the English manors; it was, like the other French *coutumes,* a written code, systematically drawn up and enacted by authority." This explanation is not entirely sufficient. While the *Coutume de Paris* existed largely as a written code, it was still an adaptive body of law that adjusted to the peculiar needs and conditions of the colony. Moreover, in certain cases where no deed existed, customary obligations dictated the terms of the inhabitant's rights to land held *en censive,* so long as they were not considered repugnant to the *Coutume* (conditions that Munro, himself, acknowledges; see *Documents,* p. ciii). English land tenure certainly had an effect on the decisions of British judges in Canada as well. In England, judicial notice of copyhold custom evolved under variable conditions in the political economy. During the early sixteenth century, rural England witnessed its first enclosure movement in response to the demands of a growing international market. Manorial lords sought to appropriate land otherwise held for communal use by the local inhabitants. Consequently, English courts began to assume greater jurisdiction over land disputes whereas authority had traditionally rested within the local village. By incorporating local customs into the common law, English judges gradually introduced rules by which to determine the legal force of local customary usages; for further discussion of these rules see, infra, p. 260; and Andrea C. Loux, "The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century," *Cornell Law Review,* Vol. 79, No. 1 (Nov., 1993): pp. 190-191. In the 1607 ruling in *Gateward's Case*, the court refused to recognize the right of common tenure vested in the local inhabitants based on the grounds that it would be "transitory and altogether uncertain, for it will follow the person, and for no certain time or estate, but during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance." See *Gateward's Case,* 77 Eng. Rep. at 344-345. While utilitarian considerations preserved some long-standing usages, by the eighteenth century, the English common law had become an instrument of dispossessing many customary rights to communal land use by finding them "unreasonable." The gradual dissolution of usufruct land rights in England is evident nearly two centuries later. In the 1793 case of *Bateson v. Green,*

Further complications arose from the chaotic mass of *registres* in the colonial archives at Quebec. French officials had either removed or thoroughly mismanaged their records so as to leave little semblance of a legal depository for the British, let alone provide them with any clear ethnographic knowledge of specific legal issues. Alternatively, British judges often sought the advice of interpreters, notaries, and other skilled professionals in French-Canadian law to assist them in the decisions. On at least one occasion, British judges went so far as to solicit the opinion of "three eminent lawyers of Paris" concerning the granting of deeds to seigneurial lands.[253]

The resulting legal chaos compelled acting Governor Guy Carleton to institute a form of inter-systemic compromise.[254] Through formal measures, Carleton sought to standardize the empirical methods by which British jurists attempted to resolve complex cases involving French claims. By his advice, the complete restoration of French law was to serve the court's decisions in all civil cases. The persistent problem, however, was the inaccessible maze of decrees, edicts, and ordinances that the French Crown had issued as supplements or modifications to the *Coutume de Paris*.[255] Consequently, Governor Carleton requested several "Canadian gentlemen well skilled in the laws of France" to compile the principal civil laws of the French period to make them more

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the court held "that the lord had a right to use [his] common as he pleased" even if "the commoners have been abridged of their enjoyment." See *Bateson v. Green,* 101 Eng. Rep. 230, 234; also see Loux, "Persistence," p. 198.

While the above does not suggest a complete arbitrariness of judicial decision making in England or the British colony of Quebec, the significance of contemporary English legal philosophy certainly had an impact on French-Canadian land tenure. This is especially evident in later British efforts to convert *en censive* grants to those held in "free and common socage" (land held in freehold or fee simple); see, for example, "Report of the Solicitor-General upon various Questions relating to the Seigniorial System," dated 5 October 1790, in Munro, *Documents,* pp. 250-266.

[253] See Munro, *Seigniorial System,* p. 204; and Munro, *Documents,* p. cii.

[254] Alvord, *The Illinois Country*, p. 198.

[255] Munro, *Seigniorial System,* p. 198.

accessible.[256] Work began on this ambitious project in 1766, culminating in the publication of four treatises between 1772 and 1775.[257] Each of these works consisted of sketches, abstracts, and commentaries on French-Canadian law based on selections from the *Coutume de Paris.*[258]

To further these codification efforts and help reinstate French legal tradition, Carleton submitted a draft ordinance to British metropolitan officials in 1767. The ordinance proposed to enact "all laws and customs which prevailed in this province . . . concerning the rights, privileges, and pre-eminences of tenures . . . inheritances . . . and

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[256] Ibid.

[257] Munro, *Seigniorial System,* pp. 198-199. The U.S. government used similar methods of collecting and publishing the laws of former governments during the course of nineteenth-century territorial expansion. See, for example, Joseph M. White, ed., *A New Collection of Laws, Charters and Local Ordinances of the Governments of Great Britain, France and Spain: Relating to the Concessions of Land in Their Respective Colonies, Together With the Laws of Mexico and Texas on the Same Subject,* 2 Vols., Philadelphia: T. & J.W. Johnson, 1839. Following the U.S.-Mexican War and the territorial accession of the American Southwest, the U.S. government faced the administrative complexities of recognizing and administering Hispanic land grants. Provisions established under article eight of the Treaty of Guadalupe Hidalgo protected the fee simple, or absolute tenure interests, of those who received land grants under the Spanish and Mexican governments and their successors in title in the annexed territory. Consequently, American jurists compiled and published select Spanish and Mexican laws to which they could refer in the flood of land claims cases that followed; see, for example, Matthew Reynolds, ed., *Spanish and Mexican Land Laws: New Spain and Mexico,* St. Louis, Mo.: Buxton and Skinner Stationery Co., 1895.

The problem with these published legal summaries was the failure to mention pre-existing customary practices, rules of evidence, or laws providing prescriptive rights to title based on continuous possession. Nevertheless, American courts adopted these biased "historical sketches" in adjudicating subsequent land claims cases; see Charles L. Briggs and John R. Van Ness, eds. *Land, Water, and Culture: New Perspectives on Hispanic Land Grants*, Albuquerque: University of New Mexico Press, 1987, pp. 44-45; and Malcolm Ebright, *Land Grants and Lawsuits in Northern New Mexico,* Albuquerque: University of New Mexico Press, 1994, pp. 133-135.

[258] Published titles included the following: 1. *An Abstract of those Parts of the Custom of the Viscounty and Provostship of Paris, which were received and practiced in the Province of Quebec in the time of the French Government;* 2. *The Sequel of the Abstract . . . containing the thirteen latter Titles of the said Abstract;* 3. *An Abstract of the Criminal Laws that were in force in the Province of Quebec in the time of the French Government;* and 4. *An Abstract of the several Royal Edicts, and Declarations, and Provincial Regulations and Ordinances, that were in force in the Province of Quebec in the time of the French Government, and of the Commissions of the several Governours-general and Intendants of the said Province, during the same Period.* For further discussion of these compilations, see Hilda M. Neatby, *The Administration of Justice under the Quebec Act,* Minneapolis: University of Minnesota Press, 1937, pp. 13-14.

power[s] of devising or bequeathing [real property] by a last will or testament."[259] The home authorities, however, took no immediate action on Carleton's proposal.

The British failure to accept Carleton's scheme for legal reform reflected not so much a rejection of the Governor's efforts as a signaling of greater sea change in colonial politics. The growing tensions among the French of the interior region finally compelled the British to respond. By the summer of 1773, authorities had yet to decide upon what legal grounds French land claims stood. In any case, British officials were disinclined to remove the French inhabitants from their settlements. By year's end, Prime Minister Lord North and Colonial Secretary Lord Dartmouth had decided to grant a civil government to those French inhabitants residing north and west of the Ohio River.[260]

Having expressed considerable misgivings on the "justice and Propriety of restraining the Colony to the narrow Limits" prescribed by the Proclamation of 1763, the British government set out a new administrative agenda for the interior region of the continent.[261] On 1 December 1773, Lord Dartmouth wrote to Hector Cramahé, Lieutenant Governor of Quebec (serving temporarily in Carleton's absence), that the affairs of the northern colony were "under the immediate Consideration of His Majesty's Servants."[262] With mounting pressure for British reinforcements on the eastern seaboard (colonists were brewing tea in the Boston Harbor only two weeks after Dartmouth's letter to Cramahé) and the pressing need for an effective system of civil administration for the interior's French inhabitants, political change had become paramount. With the passage

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[259] Letter of Carleton to Earl of Shelburne, British Secretary of State for the Southern Department, dated 24 December 1767, as quoted by Munro, *Seigniorial System,* p. 200.
[260] Jack M. Sosin, *Whitehall and the Wilderness: The Middle West in British Colonial Policy, 1760-1775,* Lincoln: University of Nebraska Press, 1961, pp. 235-236.
[261] Letter of Dartmouth to Lt. Gov. Cramahé dated 1 December 1773, as quoted by Sosin, *Whitehall,* p. 238.
[262] Ibid. p. 237.

of the Quebec Act on 7 October 1774, the British hoped to thwart revolutionary crisis and secure imperial control over the colonies.

Under the Act, the colony's boundaries extended south to the Ohio River and west to the Mississippi to include what would come to be known as the Northwest Territory.[263] More importantly, the Act made similar provisions to those found under the 1763 Treaty of Peace. In concession to the disabilities imposed by the Royal Proclamation of 1763, the preamble to the Quebec Act recognized that "a very large Extent of Country, within which there were several Colonies and Settlements of the Subjects of France . . . was left without any Provision being made for the Administration of Civil Government therein." In matters of ecclesiastical jurisdiction, the British Crown granted its new subjects "the free Exercise of the Religion of the Church of Rome." With the exception of "the Criminal Law of England, and the Benefits and Advantages resulting from the Use of it," all other "Matters of Controversy, relative to Property and Civil Rights," were to proceed under the laws of the old regime.[264] Furthermore, all causes arising in the "Courts of Justice" were to "be determined agreeably to the said Laws and Customs of Canada" until altered or repealed by ordinance or legislative authority. In matters of personal property and inheritance, the Act stipulated a choice of law clause by according the colony's inhabitants "[the] Right to alienate . . . Lands, Goods, or Credits [and] to devise or bequeath the same . . . [under] any Law, Usage, or Custom . . . prevailing in the Province [by] such [Last] Will [and Testament] being executed either according to the Laws of

[263] An Act for Making More Effectual Provisions for the Government of the Province of Quebec in North America (1774), *Statutes at Large, from Magna Charta, to the Twenty-Fifth Year of the Reign of King George the Third, Inclusive,* Vol. 8, London: Printed by Charles Eyre and Andrew Strahan, 1786, pp. 405-407. For a concise legislative history of the Act, see Sosin, *Whitehall,* pp. 240-249.

[264] For a discussion of contemporary debates over whether to incorporate French, rather than English, criminal law and procedure into the national legal system prior to the passage of the Quebec Act, see J. Edwards, "The Advent of English (Not French) Criminal Law and Procedure into Canada—A Close Call in 1774," *Criminal Law Quarterly,* Vol. 26, No. 4 (Sept., 1984): pp. 464-482.

Canada, or according to the Forms prescribed by the Laws of England." With the intention of preventing further settlements in the region (but excluding direct reference to the Indian tribes) article seventeen provided that nothing within the Act should "extend, or be construed to extend, to repeal or make void . . . any Act or Acts of the [British] Parliament . . . made for prohibiting, restraining, or regulating, the Trade or Commerce of [the] . . . Colonies."

The latter of these provisions had become particularly pressing. Despite settlement restrictions under the Proclamation of 1763, western land speculation had grown precipitously since British territorial occupation.[265] With subsidies from London financial firms, political backing from parliamentary lobbyists, and a public anxious to invest, numerous land companies had launched their business ventures into the great territorial expanse west of the Alleghany Mountains.[266] The problem for speculators was the British imperial government's persistent reluctance to adopt a policy of territorial expansion and thus open the floodgates to western settlement, a course of development the Royal Proclamation had been designed to restrain.

To overcome this obstacle, land speculators needed a tangible endorsement of their activity. They found this authority in a 1757 legal opinion written by two prominent British lawyers. "In respect to such places, as have been or shall be acquired by Treaty or

[265] Alvord, *Illinois Country,* p. 286. Advertisements began circulating throughout the United Kingdom only a few months after England signed the Treaty of Peace. A pamphlet entitled "Expediency of Securing our American Colonies by Settling the Country adjoining the River Mississippi, and the Country upon the Ohio, Considered," appeared in Edinburgh during the fall of 1763.

[266] The Mississippi Land Company was one of the first Anglo-American enterprises to plan colonization and settlement in the west and certainly one of the most well known at the time. Among other prominent businessmen, George Washington served on the board of directors. Early corporate records reveal the extent of their plans and their influence among investors in London. The Company's proposed colony consisted of two and a half million acres that covered parts of present-day Illinois, Indiana, and Kentucky. See Clarence E. Carter, "Documents relating to the Mississippi Land Company," *American Historical Review,* Vol. 16, No. 2 (Jan., 1911): p. 311.

Grant from any of the Indian Princes or Government[,]" Charles Pratt and Charles Yorke wrote, "your Magisties Letters Patent are not necessary, the property of the Soil, Vesting in the Grantee by the Indian Grants."[267] In distinctively paradoxical fashion, colonial expansionists and western land speculators quickly became zealous advocates of Indian sovereignty. Their *laissez-faire* attitude, however, reflected less of a concern with preserving Indian laws and customs than a self-serving interest in free market enterprise. By natural law, speculators argued, Indians could sell their land to anyone they pleased.[268] After the opinion surfaced in North America sometime in 1773, the Illinois Land Company (later the Illinois and Wabash Land Company) quickly referred to its authority as endorsing the private acquisition of Indian lands. On 5 July 1773, following negotiations "with several tribes of the Illinois Nations of Indians at [the] Kaskaskias village," the Company purchased two large tracts of land, one on the Illinois River, the other situated between the Ohio and Mississippi Rivers.[269]

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[267] The document later became known as the Camden-Yorke opinion after Pratt became Lord Chancellor Camden in 1766. By the time the Camden-Yorke opinion surfaced in North America, it had undergone several revisions. The original version, prepared for the Privy Council in 1757, related to the rights of the British East India Company over its acquisition of Native lands in India. Compare American and Indian versions of opinion in Williams, *American Indian,* pp. 276-277. Extended commentary and comparative analysis is provided by Sosin, *Whitehall,* pp. 229-232.

[268] Williams, *American Indian,* pp. 272-273. This reasoning, however, was a great source of debate between speculators from the "landed" and "landless" colonies, the difference resting on whether or not one possessed Royal charter claims to the west. Whereas the "landless" colonies, such as Pennsylvania and Maryland, urged direct purchase of land from the Indians, "landed" colonies such as Virginia and New York argued for the prohibition of private transactions without Crown sanction; see Williams, *American Indian,* p. 230.

[269] Account of Company Representative William Murray, as communicated in letter from Captain Hugh Lord to (then acting commander-in-chief) Frederick Halimand, quoted in Alvord, *Illinois Country,* pp. 301-302, 340. Two years later, the Wabash Land Company purchased two tracts along the Wabash River in present-day southern Indiana. Lois Viviat, a French agent with the Company, played a leading role in negotiating the purchases with the Piankeshaw Tribe. On 18 October 1775 Viviat secured a deed for the land from eleven of the Tribe's chiefs. Combined, the 1773 and 1775 purchases—which were followed by nearly fifty years of political lobbying and litigation for recognition of title—would come to define modern American property law in the case of *Johnson v. M'Intosh.* For boundary descriptions and the full-text of the 1775 deed of conveyance, see George R. Wilson, "The First Public Land Surveys in Indiana; Freeman's Lines," *Indiana Magazine of History,* Vol. 12, No. 1 (March, 1916): pp. 2-6.

By introducing the foreign complexities of French law into the continental interior under the Quebec Act, the British hoped to curb speculation in western lands. The measure was a calculated risk. However, in order to secure French allegiance, suppress insurrection in the east, and conciliate the western Indian tribes, British officials had few other options. On 3 January 1775, Lord Dartmouth forwarded instructions to Governor Carleton on implementing the "Act for making more effectual Provision for the Government of the Province of Quebec in North America." In outlining a tentative judicial system for the enlarged colony, Dartmouth's instructions provided for "an Inferior Court of Criminal and Civil Jurisdiction in each of the Districts of the Illinois, S[t] Vincenne, Detroit, Missilimakinac, and Gaspée, by the Names of the Court of King's Bench."[270] Each court was to "consist of one judge, being a natural-born Subject of Great Britain . . . and of one other Person, being a Canadian, by the name of Assistant or Assessor, to give advice to the Judge in any Matter."[271] Appointed officials were to administer fixed boundaries within each district to prevent settler encroachments on tribal lands or disruptions to trade regulation.[272] Governor Carleton appointed Edward Abbott as Lieutenant Governor of Vincennes. Abbott arrived at the village on 19 May 1777 to inaugurate the new administration "bearing His Majesty's commission."[273]

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[270] Instructions of Dartmouth to Carleton dated 3 January 1775, *DRCHC,* Vol. 2, pp. 600-601. Also see Neatby, *Administration of Justice,* pp. 20-21.
[271] *DRCHC,* Vol. 2, p. 601. This is one of the first instances of appointing "assessors" in matters of British colonial legal administration that would to serve as a model for England's expanding empire during the nineteenth and early twentieth centuries; see Leon Sheleff, *Future of Tradition,* p. 380.
[272] Sosin, *Whitehall,* p. 249.
[273] Lt. Gov. Edward Abbott to Governor Carleton, dated 26 May 1777, as quoted in Paul L. Stevens, "'To Keep the Indians of the Wabache in His Majesty's Interest': The Indian Diplomacy of Edward Abbott, British Lieutenant Governor of Vincennes, 1776-1778," *Indiana Magazine of History,* Vol. 83, No. 2 (June, 1987): p. 156. Abbott arrived at Vincennes with children and French-Canadian wife. Despite his intentions to "do the inhabitants justice," Abbott's tenure lasted only a few short weeks; see letter of Abbott to Carleton, dated 25 May 1777, in H.W. Beckwith, ed., *Collections of the Illinois State Historical Library,* Vol. 1, Springfield, Ill.: Illinois State Historical Library, 1903, p. 313. Also see Barnhart and Riker,

Dartmouth's correspondence to Carleton also included a supplementary enclosure to his instructions. In outlining proposed regulations for "the Peltry Trade of the Interior Country," article thirty-two of this document referred to "a Plan proposed by Our Commissioners for Trade and Plantations in 1764, a copy of which is hereunto annexed."[274] For all practical purposes, Dartmouth intended for the Plan of 1764 to "serve as a Guide in a variety of cases, in which it may be necessary to make provision by Law for that important Branch of American Commerce."[275] Whereas Sir William Johnson's scheme had failed six years before, its resurrection by the British government signaled a fleeting hope of returning to the middle ground.

Overall, the importance of the Quebec Act to the region's history lies in its multi-cultural provisions guaranteeing religious tolerance, linguistic diversity, dual systems of land tenure, a hybrid legal structure, and customary institutions of self-government. The Act explicitly acknowledged the British government's past failure to maintain peaceful relations with the western tribes and its neglect of the French inhabitants of the interior. By exercising jurisdiction through Quebec, the British hoped to rectify their strategic errors by reintegrating the convention of continuity into colonial policy and reconciling the constitutional association of Indian-settler inter-dependence and protection.[276]

Indiana to 1816, pp. 175-176, where the authors note, unfortunately, that very little if any of the court record at Vincennes has been preserved.

[274] *DRCHC,* Vol. 2, p. 607.

[275] Ibid; also see Sosin, *Whitehall,* p. 249; Barnhart and Riker, *Indiana to 1816,* p. 175, n. 112; and McHugh, *Aboriginal Societies,* p. 105, who notes that formal instructions issued to the Governor, Indian Superintendents, and other officials, "maintained the principles of the 'Plan of 1764.'" Prior to his departure for Vincennes, Edward Abbott received written instructions from Governor Carleton, containing "the form of Office on all occasions," which, as Paul Stevens notes, "outlined a lieutenant governor's responsibilities over his post's civil administration, fiscal accounts, and fur trade as contained in Carleton's own instructions from the home government." See Stevens, "His Majesty's Interest," p. 147.

[276] Tully, *Strange Multiplicity,* pp. 125, 126.

While the measure served as a concession to the French and Indians of the interior region, it signified a direct affront to the colonial expansionists of the east. As part of a "long train of abuses and usurpations," the revolutionary radicals discredited the measure as an act of injustice for "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."[277] Rather than submit themselves to the normative force of local, peculiar customs and usages, the colonists sought a single, unifying constitutional order under which "all men are created equal" and "endowed by their Creator with certain unalienable rights." By rejecting the convention of continuity, the revolutionaries could free themselves of the variegated patchwork of customary constitutions. The universal language of "consent," "uniform government," "equality," and "consanguinity," replaced a multi-national, multi-lingual, constitutional dialogue.[278]

The Quebec Act not only offended the sensibilities of Anglo-American legal and political culture, but it also obstructed settler interests in western land. The privatization of property—representing both a commodity and value system in American settler society—rested squarely on the colonial radicals' ideas of labor and self-sufficiency. John Locke's natural law philosophy that men "have a right to their own preservation"

[277] Declaration of Independence, 4 July 1776, in Charles C. Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States,* Washington: Gov't Printing Office, 1927, p. 24. For English political debate following the Act's passage, see Robin E. Close, "The Attempted Repeal of the Quebec Act: The State of Parliamentary Opposition in 1775," *Past Imperfect,* Vol. 1 (1992): pp. 77-91.
[278] Declaration of Independence; and Virginia Declaration of Rights, 12 June 1776, in William Hening, *Statutes at Large,* Vol. IX (1775-1778), p. 111. According to John Jay in the *Federalist Papers,* there was no need for multi-cultural dialogue, for "Providence has been pleased to give this one connected country to one united people — a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence." As quoted in Tully, *Strange Multiplicity,* p. 94.

[by as] much land as [one] tills, plants, improves, cultivates, and can use the product of," both personified and sustained the Americans' "common sense" view of government and their relation to the west.[279] Locke's theory facilitated the American settlers' appropriation of land from the Indians, as the right to acquire property was limitless, "at least where there is enough, and as good left in common for others." To be sure, "[i]f such a consent was necessary, man would have starved, despite God's plenty given him."[280] The Indian was not only "rich in land and poor in all the comforts of life," but also, perhaps most abhorrently, "want of improving it by labor."[281] In essence, the western wilderness of uncultivated "waste" lands lay ripe for the taking. For the colonial radicals, the British Crown's sovereign prerogative represented a tyrannical confiscation of their natural right to property and prosperity.

During the brief period of British colonial rule, the legal topography of the North American interior changed little from what it had been prior to imperial conquest. Rather than assert full territorial sovereignty, the Crown sought to expand its authority without displacing the inhabitants' land rights, laws, and customary forms of self-government. Ironically, however, by prescribing Indian-settler boundaries under the Proclamation of

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[279] John Locke, *Second Treatise on Civil Government,* as quoted by Williams, *American Indian,* pp. 247-248. "Common Sense" refers here to Thomas Paine's pamphlet published at Philadelphia in 1776 in which he espouses "freedom and property to all men." See Moncure Daniel Conway, ed., *The Writings of Thomas Paine,* Vol. 1: *1774-1779,* New York: G.P. Putnam's Sons, 1894, p. 98.

[280] Quoted in Williams, *American Indian,* p. 247.

[281] Ibid. p. 248. By replacing the inhabitants' unwritten customs and convoluted usufruct rights with a system of land tenure based on clear and systematically defined boundaries, parceled tracts, recorded deeds, and clear titles, settlers and speculators had a greater sense of security in their investments; see María E. Montoya, *Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840-1900,* Berkeley: University of California Press, 2002, pp. 4-5, 117. Montoya's study of the American southwest provides a useful comparative model of analysis by exploring the impact of territorial settlement on Native peoples living in peripheral, agriculture-based frontier societies. As Montoya observes, "method[s] of incorporation and land dispossession followed a similar path regardless of the time period or location."

1763, British policy began to marginalize the middle ground. The lack of an effective legal framework governing the French and the failure to adopt a coherent policy to mediate Indian-settler relations only deepened the cultural divide. Despite attempts at conciliation—beginning with Sir William Johnson's Plan of 1764 and culminating in the Quebec Act ten years later—the jurisdictional ambiguity that had become endemic to the region reflected England's failed imperial model of legal pluralism.

In other respects, the cross-cultural frontier endured. Independence from England would, by no means, ensure unfettered U.S. sovereignty. The greatest obstacle for the fledgling nation lay in the trans-Appalachian west, where geography, Indian resistance, and the ambiguous loyalties of Euro-American settlers threatened expansionist ambitions. For an effective political transition, the new American government would have to make concessions. By observing international law conventions of continuity and consent—notably through treaty-making practices and acquired rights provisions—the U.S. would recognize, albeit with the foresight of eventual unification, the integrity of multiple, customary-based jurisdictions. "The Revolution may have begun on the seaboard," Eric Hinderaker observes, "but it would be really tested in the west."[282]

Law, Community, and the Continuity of Custom: Regional Inhabitants under Virginia and Northwest Territorial Accession, 1778-1800

By commission of Virginia, the 1778 military expedition led by George Rogers Clark into the Illinois Country provisionally secured American interests over the southern

[282] Hinderaker, *Elusive Empires*, p. 227; also see François Furstenberg, "The Significance of the Trans-Appalachian Frontier in Atlantic History," *American Historical Review*, Vol. 113, No. 3 (June, 2008): p. 659.

portion of lands northwest of the Ohio River.[283] "This new territory," historian Clarence Alvord charts descriptively, "stretched from the Ohio to Illinois River and up the Wabash toward Detroit to an indefinite boundary." "Ouiatenon," he adds, "was certainly under the jurisdiction of Virginia, but beyond that post and the Illinois River, there is no proof that [Virginia] exercised jurisdiction."[284]

To formalize these otherwise imprecise claims, the Virginia General Assembly passed a law on 9 December 1778 entitled "An act for establishing the county of Ilinois [sic], and for the more effectual protection and defence thereof."[285] Virginia's brief jurisdictional tenure in general, and the Act's provisions in particular, show how the Commonwealth formed a temporary government suited to the unique circumstances of the region's inhabitants. By provisions of the Act, "all civil offices to which the . . . inhabitants have been accustomed, necessary for the preservation of peace and the administration of justice, shall be chosen by a majority of the citizens . . . [and all] civil officers, after taking the oaths . . . prescribed, shall exercise their several jurisdictions and conduct themselves agreeable to the laws, which the present settlers are now accustomed to."

On 12 December 1778, Virginia Governor Patrick Henry appointed John Todd as Illinois County Lieutenant. In his instructions to Todd, Henry wrote that "[a]ltho Great reliance is placed on your prudence in managing the people you are to reside amoung, yet consider'g you as unacquainted in some Degree with their Genius, usages, and maners, as

[283] Based on their interpretation of several royal charters dating back to 1606, officials of the Commonwealth of Virginia held title claims to an extensive yet indefinite portion of this territory; see Rauch and Armstrong, *Bibliography,* pp. xiv-xvii.
[284] Alvord, *Illinois Country,* p. 335.
[285] William Hening, *Statutes at Large,* Vol. IX (1775-1778), pp. 552-555. The full text of the Act is available in numerous publications and online. For a legislative history of the Act, see Virginia, *Journal of the House of Delegates of the Commonwealth of Virginia,* Richmond: Commonwealth of Virginia, Oct. Sess., 1778, pp. 48, 49, 51, 52, 53, 70-71.

well as the Geography of the C[o]untry, I recommend it to you to consult and advise with the most inteligable and upright persons who may fall in your way."[286] In recognizing both the necessity of flexible governance and the informal, unwritten laws and customs of the French inhabitants, Henry advised Todd "to act according to the best of y^{r} Judgement in cases where these Instructions are Silent and the laws have not Otherwise Directed."[287] For purposes of maintaining "prudence and Justice," Henry further instructed Todd to "Discountinence and punish every attempt to Violate the property of the Indians."[288] In compliance with these instructions, Todd held elections for the installation of judges at the newly-created courts at Kaskaskia, Cahokia, and Vincennes. With one exception, all twenty-five judicial officers elected were French.[289]

Despite Virginia's accommodative approach, the political transition highlighted significant cultural tensions in the administration of local government. Following Clark's departure, and with little executive oversight from Todd stationed at Kaskaskia, discord ensued between the French inhabitants and American military authorities installed at Vincennes. When Illinois County Lieutenant Governor Richard Winston charged several of Clark's men with criminal conduct in April of 1782, the officers simply imprisoned him by "tyrannic military force [and] without making any legal application to the civil magistrates."[290] With little internal recourse, the French inhabitants set forth their grievances in a memorial to Virginia on 30 June 1781. In their petition, several local

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[286] Instructions of Gov. Patrick Henry to John Todd, dated 12 December 1778, as quoted by Carl Evans Boyd, "The County of Illinois," *American Historical Review*, Vol. 4, No. 4 (July, 1899): p. 625.
[287] Ibid. p. 627.
[288] Ibid. p. 626.
[289] Ibid. p. 628. For an extended treatment of the French courts throughout the region, see Clarence Walworth Alvord, ed., *Collections of the Illinois State Historical Library,* Vol. II: *Virginia Series,* Vol. 1: *Cahokia Records, 1778-1790,* Springfield, Ill.: Illinois State Historical Library, 1907, pp. lvii-lxiii.
[290] William H. English, *Conquest of the Country Northwest of the River Ohio 1778-1783: And Life of Gen. George Rogers Clark,* Vol. 2, Indianapolis: Bowen-Merrill Co., 1895, p. 736.

citizens wrote that they were "unwilling longer to submit to the exactions incident to [the Americans'] lawless proceedings."[291]

Civil disorder evolved, in large part, from the clash of legal traditions that emerged soon after inauguration of the new government. In his original instructions to Todd, Governor Henry advised him "to inculcate in the people the value of liberty" by which "[a] free & equal representation may be expected by them in little Time, together with all the improvm[ts] in Jurisprudence . . . which the other parts of the State enjoy."[292] Other Americans expressed less optimism in their cultural arrogance. "The civil law has ruined them," Captain John Williams wrote to General Clark on 25 September 1779.[293]

With little regulatory oversight from Virginia after 1781, civil government at Vincennes floundered but nevertheless endured. Despite the ensuing years of neglect from the American government, the French courts of the Illinois and Wabash countries continued to administer estates, probate wills, resolve matters of inheritance, and arbitrate disputes.[294] While preserving their laws and customs in managing their civil affairs, the French also proved their willingness and adaptability to the incoming legal regime.[295]

Notwithstanding the cultural tensions, conflict of legal authority, and competing land claims, community norms and customary practices persisted.[296] Civil government

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[291] Ibid. p. 739. Statutory organization of the County expired in May of 1781. However, several officers retained their civil posts and government continued under temporary administration.
[292] Instructions of Henry to Todd, 12 December 1778, quoted in Boyd, "County of Illinois," p. 626.
[293] Boyd, "The County of Illinois," p. 634, n. 5.
[294] Murphy, "Laws of Inheritance," p. 258.
[295] For example, on 1 September 1788, the clerk of the Cahokia court received for probate the will of James Moore. The will was drafted in English, translated and registered in French, and applied various terms of American law; see Murphy, "Laws of Inheritance," p. 259.
[296] For a contemporary account of the confusion and conflict over competing land claims at Vincennes, see American inhabitants' petition to Congress dated 1 June 1786 in Leonard C. Helderman, ed., "Documents: Danger on the Wabash; Vincennes Letters of 1786," *Indiana Magazine of History,* Vol. 34, No. 4 (Dec., 1938): pp. 457-458. The several letters published in this edited collection illustrate the post-Revolutionary tension between the French, Indian, and American settlers at Vincennes.

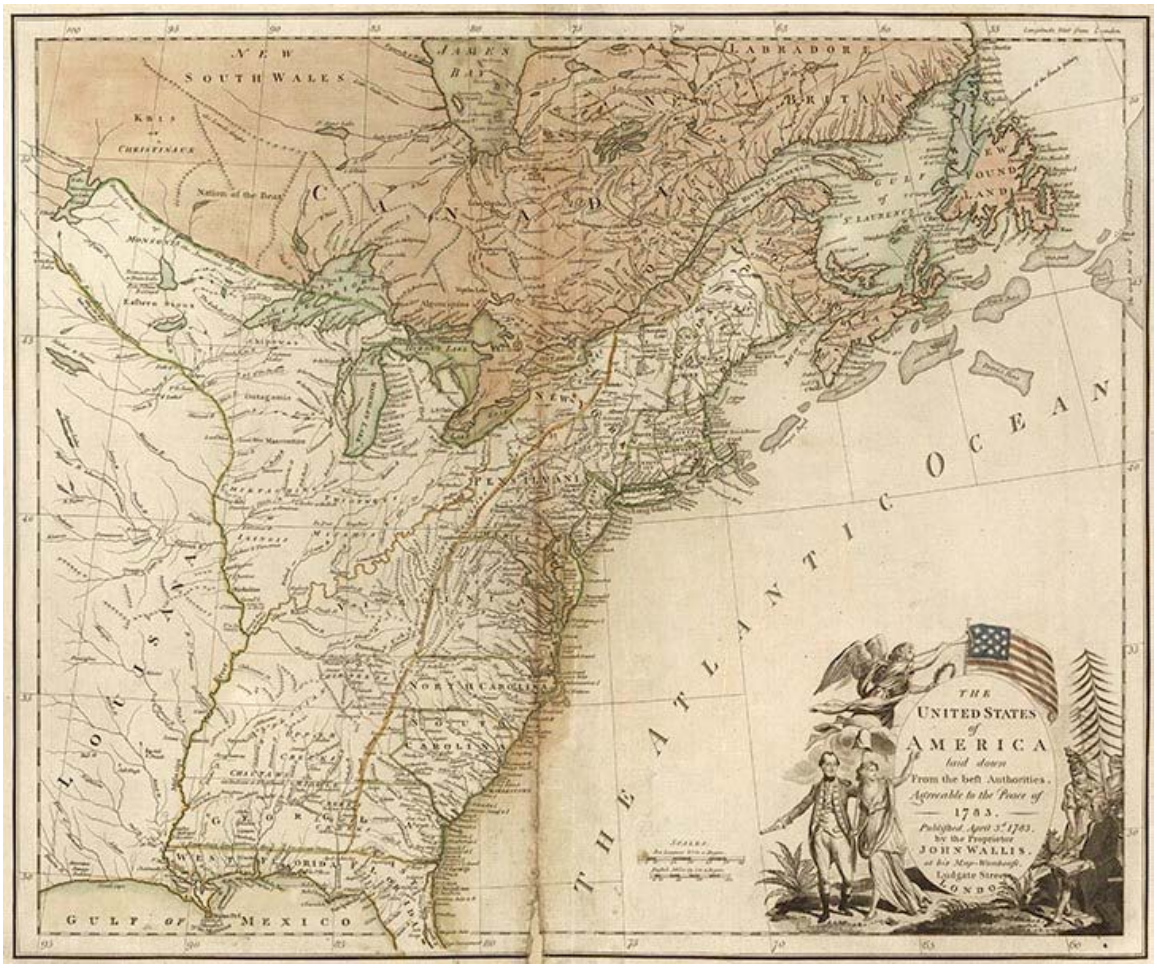
under Virginia was a conscientious effort, however imperfect, to institute a republican form of government based on the legal traditions of the French inhabitants. Following more than two decades of minimal British interference, French laws, customs, and language remained largely in tact. In turn, by preserving local laws and customs, not only was Virginia following international legal norms of state succession but also accommodating the convention of continuity in its relations with the French inhabitants and Indian tribes.

With independence tentatively secured under the 1783 Definitive Treaty of Peace, the new American government turned its attention to fulfilling its interests in national expansion.[297] Autonomy from the British, however, failed to resolve the protracted debates over western territorial claims. Despite outward appearances of consensus over colonizing the west, the colonies had clashed when it came to what law would govern their landed interests. Following independence, the internal crises of western expansion became as much of a threat to quashing American autonomy as the British loyalists had been in thwarting revolution. As historian Robert Berkhofer notes "[t]he change shifted concern from how to go about erecting new royal colonies, if any, in the West to whether there would and ought to be new governments in the West as well as what ought to be their nature."[298]

By Act of 20 December 1783, Virginia's cession of its northwestern territory to Congress resolved this crisis in part. The measure also specified certain terms and

[297] The Jay Treaty, signed in 1794, stipulated that the British were to evacuate all remaining occupied posts in the Northwest Territory and American Indians and American and Canadian citizens were allowed to travel and trade freely across the northern international border. However, not until 1814, with the signing of the Treaty of Ghent, did the U.S. secure full removal of British colonial interests in the United States.
[298] Robert F. Berkhofer, "Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System," *William and Mary Quarterly,* Vol. 29, No. 2 (April, 1972): p. 233.

conditions structuring the transition to U.S. jurisdiction and the formation of western territorial government. With respect to "the French and Canadian inhabitants, and



Map 3. *The United States of America Laid Down from the Best Authorities, Agreeable to the Peace of 1783,* by John Wallis, 1783, from Library of Congress, Geography and Map Division (Digital Collections).[299]

other settlers of the Kaskaskias, St. Vincents, and the neighboring villages who have professed themselves citizens of Virginia," all were to "have their possessions and titles

[299] "Published in London shortly after the signing of the Paris Peace Treaty, this map is one of the first published in Europe to recognize the new nation's independence and the first to incorporate the United States flag into the iconography of the map's cartouche. Also included in the cartouche are the likenesses of George Washington paired with a figure representing Liberty and Benjamin Franklin paired with the figures of Wisdom and Justice." See Library of Congress, "First Map to Display the United States Flag," *Creating the United States* [online exhibition], available at http://myloc.gov/Exhibitions/creatingtheus/, accessed 20 November 2011.

conferred to them, and be protected in the enjoyment of their rights and liberties." Other than a grant "not to exceed one hundred fifty thousand acres of land" to General Clark and his officers, all remaining "tracts of waste and uncultivated territory" were to be ceded by Virginia and other "landed" states "for the common benefit and support of the union."[300]

With the cession creating, for the first time, a national domain for the newly independent Union, Congress faced the formidable task of allocating and governing the newly-acquired territory.[301] On the day of Virginia's cession, the "committee appointed to prepare a plan for the temporary Government of the Western territory" read its report to Congress assembled. The timing of this report indicates that Congress had thoroughly considered western state making in the months prior to the cession.

On 19 and 22 September 1783, pursuant to recommendations proposed by General George Washington, the Committee on Indian Affairs issued a two-part report to Congress. In stressing the importance of "security against the . . . disorderly and dispersed settlements in those remote and wide extended territories," the report's second installment recommended "the speedy establishment of government and the regular administration of justice in such District thereof as shall be judged most convenient for

[300] Act of 20 December 1783, as quoted in Worthington C. Ford, ed., *Journals of the Continental Congress, 1774-1789,* Vol. 26: *1784,* Washington, D.C.: U.S. Gov't Printing Office, 1928, pp. 112-118. Congress formally accepted Virginia's deed of cession on 1 March 1784. Any mention of the Indian tribes or their rights and interests in land, however, were conspicuously absent from the document.

[301] Berkhofer, "Ordinance of 1784," p. 232. Berkhofer provides a valuable legislative history of the Ordinance of 1784. For a late nineteenth-century analysis, see Jay Barrett, *Evolution of the Ordinance of 1787, With an Account of the Earlier Plans for the Government of the Northwest Territory,* University of Nebraska, Dept. of History: Seminar Papers, no. 1, 1891, pp. 17-32. For a more thorough historical context, see Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance,* Bloomington: Indiana University Press, 1987, especially chapter three, "New States in the Expanding Union: The Territorial Government Ordinances," pp.44-66.

immediate settlement and cultivation."[302] To explore these proposals in depth, the report further suggested the creation of a "committee to devise a plan for the temporary government of the inhabitants . . . until their number and circumstances shall entitle them . . . to form a free constitution for themselves not incompatible with . . . republican principles."[303]

The Committee report included five principal matters for Congressional consideration: the delineation of proposed states, provisions for the formation of both temporary and permanent systems of government, the terms and conditions for admission to statehood, and a charter of compact to govern the newly-formed states.[304] Ensuing debates reveal deep tensions under which congressional lawmakers considered their charge. In particular, several proposed amendments illustrate the uncertainty over whether the settlers would have a role in creating a system of government or, on the other hand, if the process would be left to the authority of Congress alone.[305] With minor variations, these two alternatives divided the federal legislature.

Following several months of protracted debate, Congress (with the exception of New Hampshire) adopted a formal ordinance on 23 April 1784. In its final form, the provisions for settler autonomy read as follows:

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[302] Committee on Indian Affairs draft report, dated 22 September 1783, in Papers of the Continental Congress, National Archives, as quoted by Berkhofer, "Ordinance of 1784," p. 238.
[303] Berkhofer, " Ordinance of 1784," p. 238.
[304] Ibid. p. 248. Thomas Jefferson's geographical ideology for the west underscored his commitment to a republican form of government. In true Montesquieuian spirit, Jefferson and his colleagues initially "proposed to divide the country into fourteen new states." See letter of Elbridge Gerry (committee member from Massachusetts) to Jonathan Arnold dated 21 February 1784, in Julian P. Boyd, et al., eds., *The Papers of Thomas Jefferson,* Vol. 6, Princeton: Princeton University Press, 1952: p. 592 (see proposed Jefferson-Hartley map on p. 593). This proposal suggests the importance of keeping the new states small enough to instill republican principles and to preserve the interests and customs of each government's citizens; see Berkhofer, "Ordinance of 1784," p. 244.
[305] Based on Berkhofer's legislative history, the principal actors in this debate were Elbridge Gerry of Massachusetts and David Howell of Rhode Island. Berkhofer argues that Thomas Jefferson's contributions were, in fact, less significant than most scholars assume, despite his role as committee chairman.

> That the settlers on any territory so purchased and offered for sale, shall either on their own petition, or on the order of Congress, receive authority from them . . . within the limits of their state, to meet together, for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original states; so that such laws nevertheless shall be subject to alteration by their ordinary legislature; and to erect, subject to like alteration, counties, townships, or other divisions, for the election of members of their legislature.[306]

By vesting authority in the local community, the Ordinance of 1784 provided for its proposed western states a flexible system of settler governance. In essence, this compact embodied the spirit of community jurisprudence rooted in local institutions connected with settler norms and customs. Although the Ordinance gave Congress the power to take measures "necessary for the preservation of peace and good order among the settlers," this provision was much less invasive than alternative proposals.[307] As legal historian Richard Cole observes, "one of the remarkable aspects of the western ordinance that Congress adopted in 1784 was the degree of commitment to small and highly autonomous western communities."[308] By omitting express provisions for a western judicial system, the Ordinance of 1784 deferred to settler customs and values and provided communities with broad discretion in crafting their own legal order.[309]

Yet not long after the ink dried, the Ordinance's spirit of legal and political autonomy came under attack. The compact's opponents considered it an inadequate framework for sustaining western government.[310] They saw the persistent conflict between the Indians, French inhabitants, and American settlers as a failure to restore

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[306] Ford, *Journals,* Vol. 26: *1784,* p. 276.
[307] On 21 April 1784, Jacob Read of South Carolina proposed an amendment that would submit the settlers, during the temporary stages of government, to the authority of federally appointed magistrates as well as "such laws and regulations as the United States in Congress shall direct." The motion failed to pass by one state; see Ibid. pp. 259-260; also see Berkhofer, "Ordinance of 1784," p. 252.
[308] Richard P. Cole, "Community Justice and Formal Law: The Jurisprudence of the Western Ordinances," *Legal Studies Forum,* Vol. 16, No. 3 (1992): p. 267.
[309] Ibid. p. 268.
[310] Ibid. pp. 278-279.

frontier order as the congressional framers of western government had intended. Adding to this charge, powerful land companies and wealthy landowners lobbied Congress to protect their vested interests in private property. Others criticized the lack of provisions prohibiting slavery and the need to protect Indian lands from settler encroachment. In addition, congressional policymakers received several petitions from the French inhabitants expressing concerns over preserving their laws and customs and securing their acquired property rights.[311] Congress, in turn, asserted greater executive authority. "Despite their antipathy to imperial rule," historian Peter Onuf observes, "congressmen began to talk about the need to establish 'colonial' government in the West on a 'temporary' basis."[312]

In revising territorial policy, Congress considered in greater detail the administrative framework of a legally plural western government. For example, on 15 February 1785, Congress adopted a resolution recommending the appointment of a commissioner to the "Kaskaskie and Illenois [sic] Settlements" who, "in the exercise of his Authority and the administration of justice," was to "suppress those disorders and irregularities of which the said Inhabitants complain" and "pursue the mode which he may judge the best calculated to quiet the Minds of those people and secure their attachment to the federal government."[313] The following month, an appointed committee

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[311] See, for example, Memorial of François Carbonneaux, dated 8 December 1784, in Clarence Walworth Alvord, ed., *Collections of the Illinois State Historical Library,* Vol. V: *Virginia Series,* Vol. II: *Kaskaskia Records, 1778-1790,* Springfield, Ill.: Illinois State Historical Library, 1909, p. 369.
[312] Onuf, *Statehood and Union,* p. 45. On 20 April 1786, Congressional delegate James Monroe wrote to Secretary of Foreign Affairs, John Jay, that Congress was considering the establishment of Territorial government "upon Colonial principles" before the new states were to be "admitted to a vote in Congress with the common rights of the other States." Letter of James Monroe to John Jay, as quoted in Ibid. p. 49. "The territorial form of government," William Henry Harrison would later remark, "possesses some traits which are not altogether reconcilable with republican principles." See Philbrick, *Laws,* p. xxx.
[312] Northwest Ordinance of 1787, section 5.
[313] See Ford, *Journals,* Vol. 28: *1785,* pp. 67-68.

elaborated on these responsibilities. In addition to adjusting competing land claims among the inhabitants, the commissioner was to "mark out convenient districts, and summon the inhabitants of each to elect three or more magistrates . . . to hear and determine all civil Controversies not relative to the property in Lands, agreeable to the Laws, usages and customs that prevail in such districts." The committee further recommended the formation of "a court of criminal jurisdiction" over which the French magistrates were to preside.[314] In the administration of Native affairs—a matter that the Virginia act of cession failed to treat—the Commissioner was to "preserve peace with the Indian nations, not permitting any settlement upon their Lands, untill [sic] a previous purchase has been made from them with all due solemnity."[315]

The revisionary process formalized the law, first expressed in the Land Ordinance adopted by Congress on 20 May 1785. Designed to remove uncertainty over

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[314] See Report of the Committee of Congress on Powers of Commissioners to be Appointed, dated 14 March 1785, in ibid. p. 156. Policymakers also sought to acquire a better knowledge of existing French laws and customs, which, until expressly repealed, would continue in force in the territory under international laws of state succession. Having previously neglected to pursue these measures with due diligence, Congress made formal inquiries and received testimony from several French inhabitants. In July of 1786, for example, Jean Gabriel Cerré, a Canadian-born justice of the peace for the Kaskaskia District, testified before Congress at length. "The people of Illinois," Cerré stated, "were governed before the Conquest of Canada by the same laws as the people of Canada which were of the same nature with those of old France, adapted to the particular circumstances of the country." The "local customs," he added, "were equally binding as the laws." See Alvord, *Kaskaskia Records,* p. 383. For biographical details on Cerré, see H.W. Beckwith, ed., *Transactions of the Illinois State Historical Society,* Springfield, Ill.: Illinois State Historical Library, 1903, pp. 275-288. In May of 1787, Congress considered the "Report of Committee on Post St. Vincents and Illinois," which recommended provisions for the administration of civil government under French laws and customs and supplemental Virginia statutes relative to courts and legal procedure; see Philbrick, *Laws,* p. ccxv; and Ford, *Journals,* Vol. 32: *1787,* pp. 266-269. In the end, however, Congress failed to enact any law consistent with recommendations under the 1785 and 1787 reports.

[315] Committee Report of 14 March 1785, in Ford, *Journals,* Vol. 28: *1785,* p. 156. The lack of provisions protecting Indian property rights under the Virginia act of cession reflected contemporary views on the nature of Indian title. For a brief period of time following the American Revolution, the prevailing belief among many lawmakers held that all Indian lands transferred automatically to the U.S. by right of conquest. Federal Indian policy soon changed, however, when the U.S. began entering into treaties with the tribes during the mid-1780s (between October of 1784 and January of 1785, the U.S. signed the Treaties of Ft. Stanwix, Ft. McIntosh, and Hopewell). The Committee Report's stipulation on the sale of Indian lands certainly corresponded with these developments, foreshadowing the "good faith" clause adopted under the 1787 Northwest Ordinance. For further discussion of federal Indian policy during this period, see Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier,* Cambridge, Mass: Harvard University Press, 2005, especially pp. 121-140.

jurisdictional boundaries—a characteristic source of confusion for metropolitan authorities attempting to regulate the hinterlands of frontier settlement—the 1785 charter committed the west to a system of land tenure based on precise surveying methods and an orderly distribution of property. In turn, Congress adopted the Northwest Ordinance on 13 July 1787 "for the purposes of temporary government," underscoring what little confidence federal lawmakers had left in the original compact designed by Jefferson and his colleagues.[316]

With the founding charter in place, a centralized government—under the consolidated administration of a federally appointed governor and three judges—replaced local systems of authority.[317] For many, however, the important point was the "temporary" nature of this new regime. In exchange for government protection, settlers agreed, in theory, to the provisional suspension of their basic rights and privileges as U.S. citizens. As territorial judges Samuel Parsons and James Varnum would later remark, the

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[316] The French continued to express their concerns in the days leading to passage of the Northwest Ordinance. On 7 July 1787, several French magistrates of the Kaskaskia District petitioned Congress protesting the appointment of American judges "who do not understand the French language." Lacking a capable interpreter, the French complained of not being able to "communicate our thoughts [concerning the] litigations that are brought before us." This petition preceded a similar memorial from several other "citizens of Kaskaskia," who were "unanimously of the opinion that there should be only French magistrates just as the Court was established when it was erected by the late [John] Todd, [Illinois] County Lieutenant." Rather than admit American judges to administer their courts, the French inhabitants preferred to "follow the law to which we are accustomed which has been granted us by the General Assembly of Virginia." See Protest of Antoine Bauvais, St. Gemme Bauvais, and François Corset, dated 7 July 1787; and Agreement Among the Citizens of Kaskaskia, dated 8 July 1787, in Alvord, *Kaskaskia Records*, pp. 405-409.

[317] During the first stage of government, the governor and judges held absolute powers of administration. Not until the territory consisted of "five thousand free male inhabitants of full age," would the general populace be able to "elect a representative from their counties or townships to represent them in the general assembly." See Northwest Ordinance of 1787, section 9. To its credit, the Ordinance integrated certain provisions that embodied a spirit of community law. Section 7 provided for the appointment of "magistrates and other civil officers in each county or township . . . for the preservation of peace and good order[.]" Section 14, article 2 instituted the jury trial by which all "inhabitants shall always be entitled to the benefits of[.]" Under earlier drafts of the 1787 Ordinance, western lawmakers would have been restricted to a much greater extent in their judicial and legislative capacities. For example, under the third draft, the federally appointed judges were to "agree on the Criminal Law of some one State, in their Opinion the most perfect, which shall prevail in said district." See Cole, "Community Justice," p. 297, n. 82.

new Ordinance was viewed "in the light of a compact between the United States and all the settlers.[318]

In laying the foundations to a western jurisprudence, the post-Revolutionary debates reflected a period of considerable uncertainty. Amidst the normative chaos from which the nation emerged after the War, territorial lawmakers considered it necessary to develop a consistent, uniform, and homegrown body of legal principles. American independence from the imperial yoke, however, failed to produce an immediate or complete departure from the British colonial legal heritage. Rather, the new nation demonstrated a conservative disposition in its lawmaking capacity.[319] Legal historian Charles Cook identifies several reasons—both theoretical and practical in nature—for the post-Revolutionary preference for legal continuity. First, the American radicals did not identify the English legal system as a basis of their colonial agitation, nor did the revolutionary leaders ideologically dictate such changes. Second, the pragmatic difficulties of creating an entirely new system of law brought uncertainty and instability that threatened to undermine the independence that revolution had so tenuously achieved.[320] Paradoxically, the preservation of English law failed to provide a suitable resolution to governing the newly-acquired western territory. Instead, a growing dissatisfaction with the extant legal order led to amplified demands for change.

According to Cook, post-Revolutionary reformists criticized the existing law as ambiguous and inaccessible, needlessly complex and technical, and representative of an

[318] As quoted in Onuf, *Statehood and Union,* p. 73.
[319] Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform,* Westport, Conn.: Greenwood Press, 1981, p. 3.
[320] Ibid. p. 4.

alien or foreign identity incompatible with ideas of independence and nativism.[321] In particular, the sources of law presented the greatest conflict for the emerging western legal order. The Northwest Ordinance provided for the territorial court to "have common law jurisdiction," and charged the governor and his judicial colleagues to "adopt and publish . . . such laws of the original states . . . as may be necessary and best suited to the circumstances of the district."[322] Other than these provisions, however, the charter offered little direction on the sources of law. In practical terms, the great "void" of legal materials weighed most heavily on lawmakers' perceived obligations toward creating a new western jurisprudence.

Between July and December of 1788, Northwest Territorial Governor Arthur St. Clair and Judges Samuel Holden Parsons, James Mitchell Varnum, and John Cleve Symmes published ten statutes to implement the Ordinance and initiate civil government. These laws dealt with basic structural matters such as crime and punishment, the establishment of a territorial militia, the creation of courts, the regulation of marriage, and the transfer of property.[323] In 1790, however, having failed to enact supplementary measures, Judges Symmes and George Turner conceded that the original legislation proved "extremely inadequate to form a ground work for the full administration of justice."[324] St. Clair agreed that the territory lacked sufficient legal structure but went

[321] Ibid. p. 5.
[322] Northwest Ordinance of 1787, section 5. The first and third drafts to the Ordinance gave judges the jurisdiction and powers of English chancery courts with explicit reference to the English common law; see Cole, "Community Justice," pp. 284, 297, n. 83.
[323] Theodore Calvin Pease, ed., "The Laws of the Northwest Territory, 1788-1800," *Collections of the Illinois State Historical Library,* Vol. XVII, Springfield, Ill.: Illinois State Historical Library, 1925, pp. xxii, 1-26; also see William Wirt Blume, "Legislation on the American Frontier: Adoption of Laws by Governor and Judges—Northwest Territory 1788-1798; Indiana Territory 1800-1804; Michigan Territory 1805-1823," *Michigan Law Review,* Vol. 60, No. 3 (Jan., 1962): pp. 325-330.
[324] Letter of Judges Symmes and George Turner to Acting Governor Winthrop Sargent, dated 22 August 1790, as quoted in Blume, "Legislation," p. 331. Varnum and Parsons had both died in 1789.

further by suggesting that the "common law of England," which had "not been altered by statute previously to the late Revolution, or by laws of the Colonies before that period, or by laws of the States since," was "the common law of the land."[325]

The territorial judges, on the other hand, never fully acceded to this point of view. Samuel Parsons and James Varnum, for example, considered the adoption of the English common law among the original states to have "entered essentially into the principles of monarchial government," and the same jurisprudence could not, "with propriety," have applied in the territory.[326] The backcountry politics and fierce localism of the western settlers marked a strong distrust of centralized authority. Moreover, the French and Indian communities posed obstacles to the uniform, Anglo-centric legal culture that St. Clair had envisioned. The Northwest Ordinance expressly recognized the French and Indian presence and codified their rights accordingly, thus providing the territory with an intrinsic form of legal pluralism.[327] By the mid- to late-1780s, growing numbers of other European immigrants settled the western region, introducing their own legal traditions and exercising a considerable degree of autonomy in governing their diverse and scattered settlements despite the Governor's emphasis on legal uniformity.[328]

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[325] Letter of Governor St. Clair to Judges Parsons and Varnum, dated 7 August 1788, in William Henry Smith, *The St. Clair Papers: The Life and Public Services of Arthur St. Clair, Soldier of the Revolutionary War, President of the Continental Congress, and Governor of the North-Western Territory; With His Correspondence and Other Papers*, Vol. 2, Cincinnati, Ohio: Clarke, 1882, p. 76.

[326] As quoted in Blume, "Legislation," pp. 330-331.

[327] Pursuant to stipulations under the Virginia act of cession, section 2 of the Ordinance guaranteed "to the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents and the neighboring villages who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance, of property." Section 14, article 3 provided that "[t]he utmost good faith shall always be observed towards the Indians; their lands 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."

[328] Furstenberg, "Trans-Appalachian Frontier," p. 663; also see Andrew R.L. Cayton, "The Northwest Ordinance from the Perspective of the Frontier," in Robert M. Taylor, ed., *The Northwest Ordinance, 1787:*

The mix of migrant newcomers and established French inhabitants posed as much of a threat to the territorial authorities' vision of law and order as did the "savage" tribes throughout the region. After visiting the French settlements, General Josiah Harmar wrote to Secretary of War Henry Knox in 1787 that "all these people are entirely unacquainted with what Americans call liberty. Trial by jury, etc. they are strangers to. A commandant with a few troops to give them order is the best form of government for them; it is what they have been accustomed to."[329] When Governor St. Clair spoke at the

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A Bicentennial Handbook, Indianapolis: Indiana Historical Society, 1987, pp. 1-23. In addition to the long-established French communities, the increasing number of English, Scotch-Irish, and German immigrants had the greatest influence on the Old Northwest's demographic composition; see Robert P. Swierenga, "The Settlement of the Old Northwest: Ethnic Pluralism in a Featureless Plain," *Journal of the Early Republic,* Vol. 9, No. 1 (Spring, 1989): p. 80. In a 1789 letter to President George Washington, St. Clair described in detail the diversity of settlements in the Northwest Territory:

> Upon the Mississippi and Wabash Rivers a considerable Number of People, the remains of the ancient french Colony, who have been accustomed to be governed by the Laws of France, the Customs of Canada, and the arbitrary Edicts of the British Commandants, after they fell under the Power of Britain: —there are also some People there, who migrated from Virginia after the Cession of the country to the United States. A Settlement is begun between the great and little Miami composed of Emigrants from Virginia and New Jersey, but principally from the last. The Reservation, for the Virginia Officers, upon the Scioto Rover, has turned the Attention of many to that part of the Country, and a Settlement will be made there, so soon as it shall be laid open, by People from Virginia and the District of Kentucky where they have been used to the Laws & Customs of Virginia. —Higher up the Ohio comes the Country purchased by the Ohio Company, which be composed of Adventurers, chiefly, from Massachusetts, Connecticut and Rhode Island, the first Inhabitants are, and will be, from those States—Above that a gain are the Ranges of Townships parts of which have been sold, and as they are now the Property of Persons in New York, Jersey and Pennsylvania the Settlements will be made by People from those States—to the north of the last is the Connecticut Reservation, which that State is now disposing of—and to the north of the Ohio Company[']s Tract one of the Reservations for the late Army lays.

Letter of Governor Arthur St. Clair to President George Washington, dated [?] Aug. 1789, as quoted in Blume, "Legislation," p. 323.

[329] Letter of Brigadier-General Harmar to the Secretary of War dated 24 November 1787, in Smith, *St. Clair Papers,* Vol. 2, p. 32. Such views continued to evolve under measured yet nonetheless persistent legal prejudice. In 1790, Judge John Cleve Symmes expressed his disposition toward the French:

> "We have an arduous task before us to form the government & put the laws in operation here—from appearances the people will not relish a free government, they say our laws are too complex, not to be understood, and tedious in their operation—the command or order of the Military commandant is better law and spedier justice for them & what they prefer to all the legal systems found in Littleton and Blackstone. it is a language which they say they can understand, it is cheap and expeditious & they wish for no other—Indeed I am of opinion that the establishing of law in this extremity of the United States will be the means of driving to the Spanish government, multitudes of those who remain—very many already having gone. Indeed they went away because they had no government—and they will still go away because the government they now are like to have is not on the foot of an absolute Government like france."

As quoted in Philbrick, *Laws,* pp. ccxvi-ccxvii.

inauguration of territorial government at Marietta, Ohio on 15 July 1788, he urged those in attendance to "Cultivate a good Understanding" of the American Indians and treat them "with Kindness and the strictest Regard for Justice." He cautioned his audience, however, not to admit of "their Customs and Habits . . . but endeavor to induce them to adopt yours."[330]

In 1795, St. Clair and the judges took formal steps to fill the "void" of legal sources by publishing the "Maxwell Code," a compilation of statutes adopted from the original states, including Pennsylvania, New York, Massachusetts, and New Jersey. The code included a statute from Virginia entitled "a law declaring what laws shall be in force," which provided that

> The common law of England, all statutes or acts of the British parliament made in aid of the common law, prior to the fourth year of the reign of King James the first [1607] (and which are of a general nature, not local to that kingdom) and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority, or disapproved of by congress.[331]

The passage of the Northwest Territory's first English common law reception statute appears to have clarified and formalized St. Clair's vision of legal order. However, reception occurred as a matter of practical construction rather than a matter of principle. "With regret," Judges John Cleve Symmes and George Turner observed, "there are some laws in which the Territory is in great need, but which from locality, we despair of finding among those of the original states."[332] The English common law and British statutes helped fill this gap; however, these were of a general, non-binding nature and the

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[330] Arthur St. Clair, Address at Marietta upon receiving his commission as governor, 15 July 1788, in Clarence E. Carter, ed., *The Territorial Papers of the United States,* Vol. 2: *The Territory Northwest of the River Ohio, 1787-1803,* Washington: U. S. Gov't Printing Office, 1942, p. 265.
[331] Pease, "Laws of the Northwest Territory," pp. p. 253.
[332] Address of Judges Symmes and Turner to the territorial legislature, May, 1795, as quoted in Cole, "Law and Community," p. 185, n. 74.

idea of suitability became a test for adoption rather than a test for exclusion. Until lawmakers could examine, revise, or repeal the "rule of decision," custom and local circumstances continued to play a significant role in forming a western jurisprudence.[333]

Preservation of local law and custom ultimately depended upon the continuing vitality of community legal forums. The decentralized nature of the county court system facilitated this process by giving broad administrative powers to local justices of the peace. Provisions under the Northwest Ordinance directed the governor to appoint county magistrates and other civil officers "for the preservation of the peace and good order." By act of 23 January 1788, St. Clair and the judges established the General Courts of Quarter Sessions of the Peace, which vested authority in local judges to "hear, determine and sentence, according to the course of the common law, all crimes and misdemeanours, of whatever nature or kind." The measure also created the County Courts of Common Pleas, which the justices held bi-annually to hear "causes of a civil nature, real, personal and mixed, according to the constitution and laws of the territory."[334] Several French inhabitants received appointments as justices of the peace

[333] Glenn, "Persuasive Authority," pp. 276-277. On the introduction of the revisal-repeal method during the early national period, with particular reference to Thomas Jefferson's efforts at statutory revision in Virginia between 1776 and 1779, see Elizabeth Gaspar Brown and William Wirt Blume, eds., *British Statutes in American Law, 1776-1836,* Ann Arbor: University of Michigan Law School, 1964, pp. 34-39. For a concise treatment of the post-Revolutionary debates among leading American jurists over the authority of English common law, see Charles A. Warren, *A History of the American Bar,* Boston: Little, Brown, and Co., 1911, pp. 224-239.

[334] Act of 23 August 1788, in Pease, "Laws of the Northwest Territory," pp. 6, 7. Under the Maxwell Code, "A Law establishing Courts of Judicature" gave justices of the peace the "full power and authority to take all manner of recognizances and obligations . . . as any of the United States, may, can, or usually do" and to "hold special and private sessions . . . as often as occasion shall require." See Ibid. pp. 154-155. As federal appointees, however, justices of the peace did not always reflect local interests and their authority often clashed with popular community norms; see John R. Wunder, *Inferior Courts, Superior Justice: A History of the Justices of the Peace on the Northwest frontier, 1853-1889,* Westport, Conn.: Greenwood Press, 1979, p. 12. Moreover, St. Clair often held a low opinion of the justices. In 1795 he warned "of the consequences of all the litigated property being subjected to the arbitrary decisions of single justices," those of whom the governor considered "often entirely ignorant of the law and of the rules which ought to govern testimony." See Observations on Extending the Jurisdiction of a Single Magistrate in the Trial of Small

and as other administrative officials.[335] Throughout the late eighteenth and early nineteenth centuries, justices of the peace frequently administered estates according to the laws and customs of the French; county court records continued to reference the French *notaire* and the use of various arbitration tribunals; and marriage contracts often included choice-of-law clauses or citations to the *Coutume de Paris*.[336]

Despite these examples, St. Clair's advocacy for a uniform and centralized legal order gradually marginalized the region's French legal tradition. Although he had acknowledged French customs in the past, by the mid-1790s St. Clair had begun to cast doubts as to their continuing legal force. In 1791, the Governor wrote to the Secretary of State that

> [b]y the Ordinance for the Government of the Territory the Laws and Customs which had prevailed among the ancient Settlers are to be continued so far as respects Descent and Conveyance of real property – the mode of conveyance was an Act before a Notary, and filed in his Office, of which an attested Copy was delivered to the Party – to fulfill that part of the Ordinance it was necessary that Notaries public should be

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Causes, by Governor St. Clair, in the Legislature, dated 3 June 1795, in Smith, *St. Clair Papers,* Vol. 2, p. 368.

[335] With the organization of St. Clair County on 27 April 1790, Governor St. Clair appointed Jean Baptist Barbot, John Edgar, Antoine Gerardin, Philip Engel, and John de Moulin as judges of the court of common pleas; Bartholomew Tardavieu as judge of probate; Charles Le Ferre as coroner; and Joseph La Bussiere as notary public "for the purpose of taking due recognition of land titles among the French." In Knox County, organized on 20 June 1790, acting Governor Winthrop Sargent appointed Pierre Gamelin, Louis Edeline, and James Johnson as judges of the court of common pleas; Antoine Gamelin, Paul Gamelin, and Francis Bussero as justices of the court of quarter sessions; and Antoine Gamelin as judge of probate; see Smith, *St. Clair Papers,* Vol. 2, pp. 165-167.

[336] For the administration of Maria Edeline Perrot's estate according to French custom in the Knox County Court of Common Pleas, see Barnhart and Riker, *Indiana to 1816,* p. 275, n. 7. On late eighteenth-century French marriage contracts in Kaskaskia and Cahokia, see Hans W. Baade, "Marriage Contracts in French and Spanish Louisiana: A Study in 'Notarial' Jurisprudence," *Tulane Law Review,* Vol. 53, No. 1 (Dec., 1979): pp. 72-73. For an example of a French notarial marriage contract executed in St. Clair County in 1792, see Edward G. Mason, ed., *Chicago Historical Society's Collections,* Vol. 4, Chicago: Fergus Printing, 1890, pp. 162-165. For references to the French *notaire* and arbitration tribunals, see Cole, "Law and Community," p. 190, n. 91, discussing the Wayne County Court of Common Pleas. For a discussion of boundary disputes over Wayne County following Ohio's admission to statehood in 1802, see Blume, "Probate and Administration," pp. 220-221, n. 39.

> appointed, and one was commissioned at Kaskaskia, one at Prairie du Rocher, and one at Cahokia.[337]

However, in a letter written four years later to the probate judges of Randolph and St. Clair Counties, the Governor held a different view:

> Having been informed that the Notaries public take upon themselves to settle all testamentary affairs of the French Inhabitants and the Estates of such persons among them as happen to die intestate, I have been led attentively to consider the rights reserved to those Inhabitants by the Ordinance of Congress for the Government of the Territory, and it is very clear that the ancient mode of Conveying real Estates and the manner in which such Estates descend to Heirs by the french Laws are all that are reserved: but it is not so clear how long that reservation is to continue in force – that is – whether it was to continue a distinct right to them only until the Organization of the Government and the Adoption of Laws by the Governor and Judges . . . or until a Legislature by representation was formed – In either Case however, the Notaries have nothing to do with Testamentary affairs.[338]

During this period, the territorial government's legal relationship with the American Indians met with considerable uncertainty. St. Clair and the judges had conceded specific subject-matter jurisdiction to the French, but federal policy forced them to recognize the Indian tribes as possessing full territorial sovereignty (at least where Indian title had yet to be extinguished). Under the U.S. treaty system, the federal government formally recognized the tribes as self-governing nations with jurisdictional integrity.[339] The "good faith" clause under the Northwest Ordinance acknowledged

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[337] As quoted in William Wirt Blume, "Probate and Administration on the American Frontier: A Study of the Probate Records of Wayne County: Northwest Territory 1796-1803; Indiana Territory 1803-1805; Michigan Territory 1805-1816," *Michigan Law Review*, Vol. 58, No. 2 (Dec., 1959): p. 212.

[338] Ibid. pp. 212-213.

[339] Section 6 of the 1795 Treaty of Greenville provided, in part, that "[i]f any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit." "Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals," article 9 stipulated, in part, that "the United States, and the said Indian tribes agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but instead thereof, complaint shall be made by the party injured, to the other: By the said Indian tribes, or

Indian title to land and reserved to the federal government the sole right of purchase upon tribal consent. The American government's right to Indian soil, Thomas Jefferson conceded in 1792, was nothing more than

> [a] right to preemption of their lands; that is to say, the sole and exclusive right of purchasing from them whenever they should be willing to sell. . . . We consider it as established by the usage of different nations into a kind of *Jus gentium* for America, that a white nation settling down and declaring that such and such are their limits, makes an invasion of those limits by any other white nation an act of war, but gives no right of soil against the native possessors.[340]

However, conflict over land possession and the lack of distinct boundary lines between Indian Country and ceded territory left questions of law and jurisdiction largely unresolved.[341]

Territorial proximity to Indian Country presented several occasions for jurisdictional conflict. Taking into account the territorial boundaries contiguous to the "many savage tribes, with whom (the principles of religion and justice are out of the question)," St. Clair declared to the legislative assembly in 1800 that "it may be proper

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any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent or other person appointed by the President, to the principal chiefs of the said Indian tribes, or of the tribe to which the offender belongs; and such prudent measures shall then be pursued as shall be necessary to preserve the said peace and friendship unbroken, until the Legislature (or Great Council) of the United States, shall make other equitable provision in the case, to the satisfaction of both parties." See Charles Joseph Kappler, ed., *Indian Affairs: Laws and Treaties:* Vol. 2, "Treaties," Washington: Govt. Print. Office, 1903 [hereinafter Kappler, *Indian Affairs,* Vol. 2], pp. 42, 43.

[340] As quoted by Wilcomb E. Washburn, *Red Man's Land/White Man's Law: The Past and Present Status of the American Indian,* 2nd ed., Norman: University of Oklahoma Press, 1995, p. 56.

[341] In large part, these issues arose from the four-year delay in drawing boundary lines referred to in the Treaty of Greenville, which, as Francis Paul Prucha argues, "meant that there were only unmarked frontiers, and the settlers, perhaps often in innocence, settled on lands the Indians still claimed, and so the friction continued." See Prucha, *American Indian Policy in the Formative Years: The Trade and Intercourse Acts, 1790-1834,* Lincoln: University of Nebraska Press, 1962, pp. 105, 157. In addition, although the treaty provided for separate jurisdictions, specific terms permitted the United States to overstep these boundaries. For example, with respect to illegal settlements made in Indian Country, article 6 stipulated that "the United States shall be at liberty to break them up, and remove and punish the settlers as they shall think proper." Regular Indian-settler interactions also presented the opportunity for frequent conflict of authority. Under article 7, the Indians retained their hunting and fishing rights in those lands ceded and article eight provided for a system of open trade and intercourse. See Kappler, *Indian Affairs,* Vol. 2, p. 42.

that the general regulations that have been established with respect to them, should sometime, be aided by municipal laws."[342] Although lawmakers and other territorial officials often recognized the jurisdictional limits under which they exercised authority in relation to the tribes, once U.S. treaties extinguished Indian title, authorities made little to no distinction from territorial and other forms of personal and subject matter jurisdiction.

Despite the marginalization of a middle ground under the territorial government, local community forums helped to sustain cross-cultural relations. Vincennes, throughout the late eighteenth century, continued to illustrate the quintessential diversity of the *Pays d'en Haut.* "If the Algonquians and the Americans could have created a post-Revolutionary middle ground on the Ohio border," Richard White suggests, "this would have been the place."[343] Legal records and court transcripts reveal the extent to which Indians remained integral to the social framework of village life in Vincennes. For example, on 15 March 1795 Joseph Johnson filed a petition with the Knox County Probate Court on behalf of "Joyet [sp?] an Indian female minor" who had "Chosen Charls Langlois [as] her guardian[,]" desiring "that he may be Vested With powers as such."[344] In several instances, probate records list debts owed, payments made, or property distributed to various Indians in the administration of estates. For example, receipts from the estate of Moses Henry, filed with the Knox County Probate Court in 1792, indicate

[342] Address of Governor St. Clair to the Territorial Legislature, at the Opening of the Second Session, at Chillicothe, 5 November 1800, in Smith, *St. Clair Papers,* Vol. 2, p. 502. As legal historian William Wirt Blume notes "the legislators of the Northwest Territory understood they had the power to adopt laws which would have force in the Indian country within the Territory." See Blume, "Criminal Procedure on the American Frontier: A Study of the Statutes and Court Records of Michigan Territory 1805-1825," *Michigan Law Review,* Vol. 57, No. 2 (Dec., 1958): p. 211.
[343] White, *Middle Ground,* p. 422.
[344] Knox County, Indiana, Papers, 1769-1847, Indiana Historical Society.

payment of sixty livres "to Sepeehqua a Shawny [Shawnee] Indian."[345] The inventory of John Toulon's estate, filed with the Knox County Probate Court in 1797, lists several items "Supposed to belong to an Indian who used to lodge in the house."[346] In a 1799 case, John Duley filed charges of trover and conversion against Jonathan Purcell in the Knox County Court of Common Pleas.[347] Duley accused Purcell of "contriving & fraudulently intending" to keep a horse belonging to the plaintiff.[348] Judge Pierre Gamelin referred the case to arbitration, upon which the referees, "with Consent of [the] Parties[,]" agreed to have Purcell pay "Ten Gallons of whiskey as a reward to the [unnamed] Indian, bringing in the Said Horse."[349]

By the turn of the century, however, settler clashes, competing land claims, and the rise of the illicit liquor trade overwhelmed cultural tolerance and peaceful co-existence. Moreover, the regional influx of American and European settlers introduced new social and ethnic boundaries in the administration of law and justice. In 1796, French politician and philosopher Constantin François Volney toured the United States

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[345] *Estate of Moses Henry,* Northwest Territory, Knox County Probate Court (1792), Knox County Public Library, Wabash Valley Visions and Voices, available at http://visions.indstate.edu. Probate records from another estate indicate payment to "Chasso[,] an Indian for bringing in a lost horse." See *Estate of Lewis Chatellerault,* Northwest Territory, Knox County Probate Court (1797), available at Ibid.

[346] *Estate of John Toulon,* Northwest Territory, Knox County Probate Court (1797), available at Ibid.

[347] *Duley v. Purcell,* Northwest Territory, Knox County Court of Common Pleas (1799), available at Ibid.

[348] Complaint of John Duley, Ibid. "Trover" is a common law action for recovering damages sustained from the adverse possession of personal property; see definition in Bryan A. Garner, ed., *Black's Law Dictionary,* 8th ed., St. Paul, Minn.: West, 2009.

[349] Statement of referees, *Duley v. Purcell.* The problem of horse stealing had become so pervasive in the territory by the late eighteenth century, compelling Congress to include provisions in the trade and intercourse acts curbing traffic in this black market commodity. Under section 6 of the 1793 trade and intercourse act, "horses [were] not to be purchased of Indians without [a] license." See Act of 1 March 1793, 2nd Cong., 2nd sess., ch. 19, *Statutes at Large*: p. 330. While indictments against Indian perpetrators often led to their conviction, occasionally the parties resolved their disputes with little intervention from the courts. During the November term in 1797, the Knox County Court of Common Pleas issued a writ of replevin, summoning Grand Blue, an Indian, for stealing a "certain mare" belonging to Henry Pea. Having "appeared in their proper persons," the parties "amicably settled the dispute" and "the Court order . . . [was] dismissed." *Henry Pea v. Grand Blue,* in *Minutes of the Knox County Court of Common Pleas, 1796-1799,* Pt. 1, Indianapolis, Ind.: Indiana Historical Records Survey, 1941, p. 186.

and made his way to Vincennes that summer. Shortly after his arrival, Volney attended a court session of which he made the following remarks:

> On entering, I was surprised to observe the audience divided into races of men, in person and feature widely differing from each other. The fair . . . complexion . . . indicative of health and ease, of one set, were forcibly contrasted with the emaciated frame, and meagre tawny visage of the other . . . I soon discovered that the former were new settlers from the neighboring states, whose lands had been reclaimed five or six years before, while the latter were French, of sixty years standing in the district. The latter, three or four excepted, knew nothing of English, while the former were almost as ignorant of French.[350]

According to Volney's notes, the French often complained "that their rights were continually violated by the courts . . . [for] two judges only out of five were Frenchmen, who knew little of the laws or language of the English."[351] In turn, he wrote, "[t]hese statements were confirmed, for the most part, by the new settlers." According to Volney, the Americans believed that the French knew "nothing at all of civil or domestic affairs," nor were they able to "comprehend the nature of elective or municipal government."[352]

Volney's stay at Vincennes also "afforded [him] some knowledge of the Indians." His encounters with the tribes of the Wabash region, including the "Weeaws, Payories, Sawkies, Pyankishaws, and Miamis," proved to be "a new and most whimsical sight." Mishikinakwa, the Miami Chief also known as Little Turtle, along with William Wells, travelled with Volney throughout the region and acquainted him with a variety of tribal customs, those the Frenchman "put upon paper [were] what appeared . . . worth noting." Despite his attempt to clarify "a subject so much obscured by paradox and misrepresentation," the empiricism and cultural relativism with which Volney wrote

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[350] C.F. Volney, *A View of the Soil and Climate of the United States of America,* Philadelphia: J. Conrad & Co., 1804, p. 333.
[351] Ibid. p. 335.
[352] Ibid. pp. 336-337.

merely accentuated his subjectivity, Euro-centric bias, and personal disdain toward the "aborigines of North America."[353]

In Volney's analytical musings on tribal laws and customs, the subject of property arose frequently. "It is generally true that no right of property exists among the Indians, but," he conceded, "it is to be admitted with some exceptions."[354] Even "in the wildest and most vagabond tribes, each one has an exclusive right to his arms, clothes, trinkets, and other moveables."[355] However, by distinguishing this personal "species of property" from "real or landed property," Volney concluded the latter to be "entirely unknown among them." Such is the case "in relation to all the wandering and unsettled tribes" but not for "those whom a fertile soil, or any other circumstance, has rendered sedentary."[356]

Volney also elaborated upon tribal modes of inheritance and domestic governance. Extolling the virtues of private property and agriculture, Volney wrote that "in some tribes, where tillage is regularly pursued, children and kindred inherit these, and consequently the rights of real property are fully established."[357] "In other unsettled tribes," by contrast, "all is heaped together, after the last possessor's death, and divided among his neighbors, by lot or by some other rule."[358] "[O]n the women," he observed, "is laid the burthen of all household affairs" and they "have no share in their husbands' property." "Such is the custom of [the] tribe," he added, "and of many others: while living, each enjoys his arms, trinkets, and other moveables, but when dead, not even his

[353] Ibid. pp. 352-353, 358.
[354] Ibid. p. 395.
[355] Ibid. p. 396.
[356] Ibid. Using the "Creeks and Putewoatamies" as examples, Volney noted that "[t]hese tribes reside in villages . . . and in these dwellings the builder has an undisputed property . . ."
[357] Ibid.
[358] Ibid.

knife or pipe falls to his children."[359] By applying western legal models to his subjects, Volney—like many of his contemporary and successive nineteenth-century observers—denied Indian customs the normative force of laws that protected their rights and proprietary interests in land and other forms of property.

During the Northwest Territorial period, the consolidation of administrative powers under the governor and judges and the centralization of legal authority gradually displaced the community-based jurisprudence that had evolved over the course of the century to meet the socio-economic needs of a frontier society. However, by the late 1790s, the conflict between advocates for a community based law and those supporting a more centralized legal order had climaxed. On 29 October 1798, the Northwest Territory moved to its second phase of government, thereby instituting a representative legislature and limiting St. Clair and the judges' absolute powers of administration.[360] Federal officials retained their overarching authority and the governor held the unconditional veto power over the territorial legislature. By the turn of the century, however, the Northwest Territory had begun to fragment politically. Agitation for statehood had already gained momentum and the conflict between local and federal interests peaked with the Ohio secession movement in 1802.[361] Opponents of the territorial order rejected their continuing status as "subjects" within a "dependent colony" without representation in Congress.[362] While conceding to the temporary imposition of law and order during the early stages of government and frontier settlement, by 1800 the territory's population had exceeded forty

[359] Ibid. p. 373.
[360] The first general assembly met at Cincinnati on 24 September 1799.
[361] Onuf, *Statehood and Union*, pp. 67-68.
[362] Ibid. p. 71 quoting terms used by St. Clair in his criticism of dissenting rhetoric in 1795.

thousand and the institutions of civil government struggled to accommodate the growing settler polity.

The territorial government's failure to provide an adequate system of law and justice became a primary concern for many reformers. While most of the nine counties maintained justice of the peace courts, the three federal judges of the General Court lacked the practical ability to ride circuit and hear appeals throughout the vast territory.[363] William Henry Harrison, territorial delegate to Congress, proposed judicial reform by expanding the bench. Instead, Congress pursued administrative reorganization of the territory. On 7 May 1800, Congress passed "An act to divide the territory of the United States northwest of the Ohio, into two separate governments," creating the Indiana Territory.[364] In recognizing Harrison's leadership and successful track record in Congress, President John Adams appointed the former delegate as territorial governor of Indiana. With the seat of government at Vincennes, Harrison presided alongside federally appointed judges William Clark, Henry Vanderburgh, and John Griffin.[365]

With the new territorial government in place, Harrison and the judges officiated over a diversified jurisdiction of French inhabitants, American settlers, and other persons

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[363] Barnhart and Riker, *Indiana to 1816,* pp. 274-275, 309-310. The Northwest Territory encompassed more than 260,000 square miles. Knox County was the largest of the nine counties, extending south from the Ohio River, north to Lake Superior, encompassing most of present-day Indiana and large portions of Ohio, Illinois, Wisconsin, and Michigan; see George W. Knepper, *Ohio and Its People,* 3rd ed., Kent, Ohio: Kent State University Press, 2003, p. 68; and Logan Esarey, *A History of Indiana,* Vol. 1, B. F. Bowen & Co., 1918, p. 154.

[364] Act of 7 May 1800, 6th Cong., 1st sess. ch. 41, *Statutes at Large*: pp. 58-60. Territorial division was not well received by some of the inhabitants, the French in particular. Three months prior to the Act's passage, Governor St. Clair wrote to William Henry Harrison, enclosing a "petition from the people of St. Vincennes," outlining their concerns "that such a division . . . would throw them and the people of the Illinois country back into that kind of government from which the Territory at large ha[d] just emerged." See letter of Governor St. Clair to William Henry Harrison dated 17 February 1800, in Smith, *St. Clair Papers,* Vol. 2, p. 489.

[365] For a biographical sketch of the early bench and bar and historical overview of Indiana's territorial and early state court system, see W.W. Thornton, "The Supreme Court of Indiana," *Green Bag,* Vol. 4, No. 5 (May, 1892): pp. 207-234.

of European, Indian, African, and mixed descent. Moreover, with the exception of Clark's Grant, Post Vincennes, Fort Massac, and "all other places in possession of the French people and other white settlers among them, of which the Indian title ha[d] been extinguished [those lands ceded to the U.S. by the 1795 Treaty of Greenville]," the Indiana Territory remained under the control of the Indian tribes, principally the Miami, Pottawatomie, Sauk, Fox, Shawnee, and Piankeshaw.[366] The idea of a uniform legal order premised upon the sources of the English common law would face its most difficult hurdle in prevailing over this constitutional plurality of customs and self-governing polities.

Toward a State of Uncertainty: Mixed Jurisdictions and the Crisis of Custom in The Indiana Territory, 1800-1816

The administration of civil government changed little immediately following the territorial division.[367] In nearly all respects, the laws of the Northwest Territory continued operating in force in the Indiana Territory as Congress made no express act for their abrogation. Neither, on the other hand, did the Indiana Territorial government adopt, in whole, the laws of the Northwest Territory. Rather, as Daniel Wait Howe suggested in his late nineteenth-century writings, "these laws were regarded as continuing

[366] Barnhart and Riker, *Indiana to 1816,* p. 320; Kappler, *Indian Affairs,* Vol. 2, pp. 39-45. The Indiana Territory originally encompassed all land "northwest of the Ohio river, which lies to the westward of a line beginning at the Ohio, opposite to the mouth of Kentucky river, and running thence to Fort Recovery, and thence north until it shall intersect the territorial line between the United States and Canada." See Act of 7 May 1800, *Statutes at Large*: p. 58. For maps illustrating the evolution of the territory's size following the 1800 division, 1803 Ohio admission to statehood, 1805 division of Michigan Territory, and 1809 division of Illinois Territory, see Barnhart and Riker, *Indiana to 1816,* pp. 319, 353. For a map of Indiana land cessions between 1803 and 1809, see Ibid. p. 377.

[367] The Act provided for the temporary stages of territorial government "in all respects similar to that provided by the ordinance of Congress, passed on the thirteenth day of July one thousand seven hundred and eighty-seven." Moreover, the "officers for the said territory . . . shall respectively exercise the same powers [and] perform the same duties" as those outlined under the Northwest Ordinance. As for the territory's inhabitants, they were to "be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people" by the Northwest Ordinance; also see Barnhart and Riker, *Indiana to 1816,* p. 312.

in force upon a principle similar to that in the law of nations."[368] Thus, the laws then in force in the Indiana Territory consisted of the Quebec Act of 1774 and subsequent Canadian legislation, the common law of England and British statutes to 1607, laws adopted from the several states under the Maxwell Code, and the laws of the Northwest Territory's legislative assembly before 1800.[369] Yet these laws existed merely as a tentative expression of authority; their continuing validity and force would depend on the extent to which Indiana inhabitants recognized and adhered to them in the search for a homegrown jurisprudence.

During the first stage of Indiana territorial government, Governor William Henry Harrison and his judicial colleagues exercised full executive and legislative authority. Careful to avoid the reputation of arbitrary rule that made Governor Arthur St. Clair so unpopular, Harrison acknowledged the criticism of his opponents, encouraged the diffusion of public opinion, and made every effort for a smooth transition in territorial government.[370] During this period, land acquisition, slavery, and the administration of Indian affairs demanded most of the Governor's attention. The latter of these issues would become particularly challenging in perfecting settler sovereignty over the region.

Governor Harrison's executive powers expanded dramatically following U.S. acquisition of the vast Louisiana Territory in 1803. By Act of 26 March 1804, Congress vested authority in the Governor and judges of the Indiana Territory to "establish . . .

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[368] Daniel Wait Howe, "Laws and Courts of Northwest and Indiana Territories," in *Indiana Historical Society Publications,* Vol. 2, No. 1, Indianapolis: Bowen-Merrill Co., 1886, p. 15. Moreover, as Francis Philbrick states, "[d]ivision caused no break in the administration of justice or other machinery of government—as was true likewise when the Indiana Territory was later divided, and true of the other territories for which the Ordinance was the basic law. The code of the older territory persisted as the law of the newer." See Philbrick, *Laws,* pp. civ-cvi for a fuller discussion.

[369] See Arthur Belitz and Lyman Nash, eds., "Common and Statute Law in the Northwest Territories," in *Wisconsin Annotations,* Madison, Wisc.: State of Wisconsin, 1914, p. 1823.

[370] See Barnhart and Riker, *Indiana to 1816,* p. 323.

inferior courts, and prescribe their jurisdiction and duties, and to make all laws which they may deem conducive to the good government of the inhabitants [of the District of Louisiana]."[371] Although Congress intended for the Act to serve as a temporary administrative measure, the opportunity demonstrated for the first time the extent to which Indiana government acknowledged the legal pluralisms and diverse jurisdictions of the expanding Republic. For example, when Harrison planned to enact a complete code for the District in 1804, Secretary of State James Madison reminded him of the congressional statutory provisions under which the former Spanish and French laws continued in force "until altered, modified, or repealed by the Governor and judges of the Indiana Territory."[372]

Harrison's new authority also meant greater responsibility in the administration of Indian affairs. Maintaining peaceful relations with the powerful western tribes—including the Osage, Chickasaw, and Sauk and Foxes—proved especially challenging, as many of them viewed the U.S. as anxious to secure their lands. In October of 1804, Harrison travelled to St. Louis to organize the basic framework of civil government for the Louisiana District. During his stay, military affairs and treaty negotiations occupied much of his time. Relations with the Sauk and Foxes had recently deteriorated as a small hunting band had murdered four Americans trespassing on tribal lands that summer.

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[371] Act of 26 March 1804, 8th Cong., 1st sess. ch. 38, *Statutes at Large*, p. 287.

[372] Philbrick, *Laws,* p. cv, n. 1 quoting letter of Madison to Harrison, dated 14 June 1804 in Logan Esarey, ed., *Messages and Letters of William Henry Harrison:* Vol. 1: *1800-1811,* Indianapolis: Indiana Historical Commission, 1922, p. 96. The Indiana Territorial Government passed a code of laws in October of 1804, which outlined criminal jurisdiction, established a system of courts, created a militia, and regulated slavery. While there is no indication that Harrison and his colleagues repealed any laws of the District, the 1804 Code introduced the jury trial in all criminal cases as well as civil cases with the consent of both parties; and justices were "empowered to grant . . . replevins, writs or partition, [and] writs of view." References to the "common law" were general in nature, without mention of England, and the Code provided for arbitration in small claims courts; see *Laws for the Government of the District of Louisiana*, Vincennes, Indiana Territory: Printed for E. Stout, 1804, pp. 25, 94, 96.

Attempting to diffuse the situation, a delegation of Sauk chiefs led by Quashquame travelled to St. Louis to condemn the murders and compensate for the losses.[373] The "principal" offender, Major James Bruff wrote, "voluntarily surrendered himself [as] a peace offering for his nation."[374] In response, the Governor "offered to pardon the other murderers" if they testified at trial "agns[t] the one that . . . gave himself up."[375] Two of Harrison's colleagues, Indiana Territorial Judge John Griffin and District Commandant Amos Stoddard, objected to this proposal, arguing that, as non-Christians, the Indians could not "be admitted as witnesses." More importantly, they believed, "none of this party can be condemn'd" under U.S. jurisdiction on the grounds that "the crime was committed while the Spanish laws were in force."[376]

Governor Harrison met with Sauk and Fox chiefs on 3 November. In exchange for future protection against warring tribes, settler encroachments, and private retaliations, the chiefs agreed to cede nearly eighty thousand square miles of land along the upper Mississippi.[377] Although cognizant of the Spanish law that applied in the District, as Griffin and Stoddard had noted with respect to criminal jurisdiction over the murders, Harrison and his colleagues were either unaware or ignored the extensive legal framework of Indian rights and protections in place prior to U.S. territorial acquisition. A compilation of ordinances, decrees, and regulations first published by the Spanish Crown in 1680, the *Recopilación de Leyes de los Reynos de las Indias* acknowledged Indian

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[373] See Robert M. Owens, *Mr. Jefferson's Hammer: William Henry Harrison and the Origins of American Indian Policy,* Norman: University of Oklahoma Press, 2007, pp. 85-87.
[374] Letter of James Bruff to James Wilkinson, dated 5 November 1804, in Carter, *Territorial Papers,* Vol. 13: *The Territory of Louisiana-Missouri, 1803-1806,* 1948, p. 76.
[375] Ibid. p. 77.
[376] Ibid.
[377] "Treaty with the Sauk and Foxes," dated 3 November 1804, in Kappler, *Indian Affairs,* Vol. 2, pp. 74-77.

jurisdiction and rights to self-government.[378] Specific provisions under the law expressly recognized Indian title and strictly regulated the sale and transfer of Indian property. Neither Sauk and Fox protocols, which would have been binding on such transactions, nor provisions under the *Recopilación* had been met at the signing of the treaty on 3 November 1804.[379] Having been charged only with reconciling the murders and lacking the authority to cede tribal lands, Quashquame may have believed the treaty was a symbolic conveyance of ownership, a common practice under the Spanish colonial government.[380] Realizing their loss, Sauk and Fox chiefs sought further compensation from the U.S. at a council meeting in 1805, but to no avail. Although popular among

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[378] Donald Juneau, "The Light of Dead Stars," *American Indian Law Review,* Vol. 11, No. 1 (1983): pp. 13-19.

[379] Book VI, Title 1.27 of the *Recopilación* provided, in part:

> When the Indians sell their property, immovable and personal movable, according to what is permitted by them, it shall be proclaimed by public outcry and sold at public auction, in the presence of a judicial officer—the immovable property for a period of thirty days, and movable property for nine days; and whatever shall be sold in any other way shall be of no validity or effect; . . . And since the property which the Indians sell is ordinarily of small value and if in all such sales it was necessary to follow these formalities it would involve as much expense as the principal amounts to, we order that this law be observed and enforced, in regard to whatever exceeds thirty pesos of usual gold.

As quoted in Juneau, "Light of Dead Stars," pp. 15-16. As historian Robert Owens observes, "[t]here had been no official invitation to treat, no subsequent announcement to the nation as a whole, no tribal council to discuss the proposed cession, no ratification with wampum, and no opportunity for the women of the tribe to caucus and express their views." Moreover, the U.S. purchased the land ceded for $2,234.50 (with annuities of $1000), a grossly undervalued sum, but far exceeding that of thirty pesos; see Owens, *Jefferson's Hammer,* pp. 88, 90. The treaty contained an appended article, under which the parties "agreed that nothing . . . shall affect the claim of any individual or individuals who may have obtained grants of land from the Spanish government, and which are not included within the general boundary line laid down in this treaty, provided that such grant have at any time been made known to the said tribes and recognized by them." See Kappler, *Indian Affairs,* Vol. 2, p. 77.

[380] Although the treaty made no mention of compensation for the murders, Robert Owen's suggests that the parties agreed to an oral contract as American officials subsequently pardoned the Indian who had surrendered himself. Unfortunately, however, news of the pardon came too late to the prisoner, who was shot and killed while attempting to escape; see Ibid. pp. 89, 91. For late eighteenth- and early nineteenth-century Spanish colonial practices that protected the territorial integrity of the Indians' landholdings in exchange for Native recognition of Crown sovereignty, see Charles R. Cutter, *The Protector de Indios in Colonial New Mexico, 1659-1821,* Albuquerque: University of New Mexico Press, 1986, pp. 44-45, 58-59, 101.

settlers in the region, the treaty became a major source of discontent for the Sauk, leading the Tribe to side with the British during the War of 1812.[381]

On 5 December 1804, Indiana passed to its second phase of territorial government. During its first legislative session, which commenced on 29 July 1805, the General Assembly resolved to "reduce into one code" all laws then in force. Change came slowly. After nearly two years of "several alterations, additions, and amendments," legislative efforts culminated in the Revised Code of 1807. There is no indication, however, that this measure expressly abrogated the laws in force prior to the organization of the Indiana Territory, as Harrison and his judicial colleagues lacked such authority.[382] The Revised Code also included "An Act declaring what laws shall be in force," which reenacted the 1795 common law reception statute, albeit with minor variations:

> The Common Law of England, all statutes or acts of the British Parliament, made in aid of the Common Law, prior to the fourth year of the reign of King James the first . . . and which are of a general nature, not local to that kingdom and also the several laws in force in this territory, shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority.[383]

This measure, as with the Northwest Territorial statute, reflected a continuing search for constructive, model authority suitable to the conditions of a fledgling western

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[381] Lamenting the outcome of the treaty several years later, Sauk Chief Black Hawk remarked, "we were sorry to lose our Spanish father, who had always treated us with great friendship." Quoted at Ibid. p. 89.
[382] Francis Philbrick, on the other hand, states that "[a]ll other laws theretofore . . . were repealed, and the 'revisal' was declared to be of exclusive authority." See Philbrick, *Laws,* p. cxii. However, the only related statutory power Congress vested in the territorial government was a 1792 Act authorizing the governor and judges to "repeal their laws by them made." See Blume, "Legislation," p. 333. There is no indication Congress repealed this Act during Indiana's territorial period. Nevertheless, in an 1839 Indiana Supreme Court decision, Judge Isaac Blackford held that the Revised Code of 1807 "expressly repeal[ed] all laws not contained in itself" and that all provisions under the Ordinance of 1787 "ceased to be law after the passage of that code." See *Stevenson v. Cloud,* 5 Blackf. 92 (1839). In contrast, see *Reynolds v. Swain,* in which the Louisiana Supreme Court ruled the same year that "[t]he repeal spoken of in the [1825 Civil] code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal." See *Reynolds v. Swain,* 13 La. 193 (1839).
[383] Act of 17 Sept. 1807, in Philbrick, *Laws,* p. 323. The Act explicitly excluded three English statutes dealing with usury (interest rates) and recovery of costs in certain causes of action.

jurisprudence. During this period, a flexible system of lawmaking evolved where popular forms of community justice persisted absent the wholesale adoption of the English common law. Several measures illustrate the extent to which the Indiana Territorial government recognized these principles in practice.

Justice of the peace courts continued to sustain the informal, community-based process of lawmaking. As early as 1801, an Indiana Territorial law "establishing courts of judicature," provided that "[t]here shall be a competent number of justices in every county, nominated and authorised by the governor . . . [who] shall and may hold the said general sessions of the peace according to law."[384] Appointed justices were local inhabitants, often untrained in the formal law, with the power to declare summary judgment in cases other than capital crimes. Because of their intimate knowledge of the local populace, justices often conducted proceedings and rendered their decisions based on community norms and standards rather than adhere strictly to the forms, pleadings, writs, or complex procedural rules of the English common law. Yet the jurisdictional authority of these courts over local affairs appears to have been limited. In 1804, residents of the Indiana Territory petitioned Congress for expanded powers of the justice of the peace courts as a means to redress the often-inaccessible territorial courts.[385]

In addition to the authority of local courts, the historical-legal record reveals the vitality of arbitration tribunals and procedures. Under the Northwest Territorial government, a 1799 law provided for arbitration in certain causes.[386] In 1807, the Indiana Territory passed an "act authorising and regulating arbitrations," by which the parties

[384] Act of 23 January 1801, in Philbrick, *Laws,* p. 8.
[385] See Cole, "Law and Community," pp. 213, n. 175, 214.
[386] See Act of 15 November 1799 and Act of 2 December 1799, in Pease, "The Laws of the Northwest Territory, 1788-1800," pp. 354-356, 393.

were free to "agree to submit [their] controversy . . . to the umpirage . . . of any person or persons, to be by them, mutually chosen for that purpose."[387] Francis Philbrick refers to several examples of arbitration in practice during the territorial period, including an 1808 case from the Randolph County Court of Common Pleas.[388] However, while providing an alternative means of dispute resolution, the Act, by introducing highly technical rules of procedure, made the process less of a community-based legal remedy. For example, "[t]he award or final determination of the umpire or arbitrators [was to be] drawn up in writing" and "if either of the parties . . . refuse[d] or neglect[ed] to obey," the opposing party could appeal to the court of record. Moreover, the Act gave the courts a central role in the arbitration process. Specifically, judges were "to compel the attendance of witnesses," and "the award or report of such referees" was to be "approved of by the court, and entered upon the record or roll."[389]

The publication of laws in languages other than English provided the territory's ethnically diverse communities greater access to the legal process. During the first stage of Northwest Territorial government, little was done to make the laws known to the general populace. "Even the magistrates who are to carry them into execution are strangers to them," complained Governor St. Clair in 1791.[390] Because the laws "are in

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[387] Act of 17 September 1807, in Philbrick, *Laws,* p. 349. The arbitrator's judgment was to "have the same effect, and be deemed and taken to be as available in law, as a verdict given by twelve men."

[388] Philbrick argues, however, that while "[a]rbitration was very characteristic of procedure under the French law . . . [t]here is nothing whatever to indicate that the territorial statutes were a concession to French tradition[,]" but rather "were associated with the contemporary prejudice against lawyers." See Philbrick, *Laws,* pp. clxxxv-clxxxvi, n. 4.

[389] See Pease, "Laws of the Northwest Territory," pp. 350-351; also see generally, Bruce H. Mann, "The Formalization of Informal Law: Arbitration before the American Revolution," *New York University Law Review,* Vol. 59, No. 3 (June, 1984): pp. 443-481.

[390] Report of Governor St. Clair to the Secretary of State, dated 18 February 1791, in United States, Congress, *American State Papers: Documents, Legislative and Executive, of the Congress of the United States,* Vol. 1: *Public Lands,* Washington: Gales and Seaton, 1832, p. 20. Also see Philbrick, *Laws,* p. cxiii.

English, and the greatest part of the inhabitants do not understand a word of it; the translation of them . . . seems to be necessary, and that a sufficient number of them should be printed in both [French and English] languages."[391] During the Indiana territorial period, the historical record fails to reveal any provisions for the publication of French laws.[392] In 1805, several French inhabitants of Wayne County petitioned Congress for assistance in securing land titles they had acquired under the French and British governments. "[B]eing wholly unacquainted with the English language," the memorialists complained, a majority found "it difficult to transact their business in the land office, for want of knowledge of the law, &c."[393] As a proposed remedy, the French solicited Congress to "make provision for the appointment of a suitable person . . . to translate as well as interpret . . . all transactions, wherein they may be concerned on settlement of titles of land."[394] Congress failed to act.

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[391] In 1792, one of the St. Clair County courts "[o]rdered that Mr. [John Rice] Jones do translate the laws of the territory into French, for the use of the Judges, who do not understand English, and that he lodge the same with the clerk of this district." See Newton Bateman and Paul Selby, eds., *Historical Encyclopedia of Illinois and History of St. Clair County,* Vol. 2, Chicago: Munsell Publishing Co., 1907, p. 699. Also see Philbrick, *Laws,* p. xvii, n. 3. John Rice Jones was a well-known jurist throughout the Northwest and Indiana Territories. He was the principal architect for the Indiana Territory's Revised Code of 1807. Fluent in French, Jones was instrumental in translating many of the territorial laws; for a biographical sketch, see Philbrick, *Laws,* pp. ccxxxviii-ccxlii, n. 10.

[392] Ibid. p. cxiv. There may have been attempts to reconcile this linguistic gap in the published laws. A resolution of 26 October 1808 appointed John Rice Jones to a committee "to contract with such person . . . for printing, either here, or in Louisiana, or Kentucky, four hundred copies of the laws of the present session of the Legislature." See Resolution in Ibid. pp. 672-673. The Resolution provided no express funding for the translation of the laws; however, the option of printing in Louisiana and the appointment of Jones suggest the possibility of publishing the laws in French.

[393] Wayne County (Indiana Territory), and U.S. Congress, *Translation of a Memorial in the French Language, of Sundry Citizens of the County of Wayne, in the Indiana Territory: 17th of January 1805: Referred to the Committee Appointed the 7th Instant to "Enquire Whether Any, and If Any, What Alterations Are Necessary to Be Made in the Laws, for the Disposal of he Public Lands, North West of the Ohio,"* Washington City: Printed by William Duane & Son, 1805, p. 9. Less than a week prior, Congress divided a portion of the Indiana Territory and Wayne County became part of the newly created Michigan Territory; see Act of 11 January 1805, 8th Cong., 2nd sess. ch. 5, *Statutes at Large*: pp. 309-310.

[394] Ibid. Delegates to the 1850 Indiana Constitutional Convention debated provisions giving the legislature the option to publish laws in both French and German "for the benefit of those who cannot read English." Convention delegates approved the provision and referred it to the Committee on Revision, Arrangement, and Phraseology for further consideration. The Committee did not, however, include such a proviso in the state's new constitution; see Donald F. Carmony, *Indiana, 1816-1850: The Pioneer Era,* Indianapolis:

However, the common law jury system helped sustain a model of legal pluralism.[395] In particular, the use of mixed juries in both civil and criminal trials allowed courts to resolve disputes where diverse norms and customs conflicted. The question of jury composition, however, proved to be a vexing issue. References to the jury *de medietate linguae* (literally "of the half tongue") appear throughout the historical legal record. English courts, dating as far back as the mid-fourteenth century, used special juries for trials of aliens, clerics, or other foreign parties whose native language was not English.[396] As a North American colonial transplant, the British courts adopted the mixed jury system and the states eventually integrated the practice into their common law traditions.[397] In New England, early colonial courts occasionally used mixed juries

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Indiana Historical Bureau & Indiana Historical Society, 1998, pp. 416, 780, n. 37. In 1853, Indiana published its state laws in German; see Indiana, *Die Revidirten Gesetze des Staats Indiana: Erlassen in Der Sechsunddreissigsten Sitzung der General-Versammlung,* 2 vols., Indianapolis: Volfsblattes, 1853.

[395] Although Northwest and Indiana Territorial statutes contained clauses concerning jury service and composition, very few outlined specific criteria that determined who could or could not serve. Property ownership appeared as the most common prerequisite. For example, during the Northwest Territorial period, at least one statute required that jurors possess "freehold lands or tenements." See Act of 14 July 1795, in Pease, "Laws of the Northwest Territory," p. 247. This law appears to have continued in force after 1800 as the Indiana Territorial government made no express act for its repeal. There are occasional references in subsequent statutes by which the court was to "summon and empanel . . . freeholders" for jury service; see, for example, Act of 19 December 1811, in Louis B. Ewbank and Dorothy Lois Riker, eds., *The Laws of Indiana Territory, 1809-1816,* Indiana Historical Collections, v. 20. Indianapolis: Indiana Historical Bureau, 1934, p. 271.

[396] James C. Oldham, "The Origins of the Special Jury," *University of Chicago Law Review,* Vol. 50, No. 1 (Winter, 1983): p. 167. For an extended treatment of the special jury, also see Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge,* Chicago: University of Chicago Press, 1994.

[397] Following American independence, the trial *de medietate linguae* survived in several states despite the fact that delegates to the Constitutional Convention rejected its incorporation as fundamental law; see Deborah A. Ramirez, "The Mixed Jury and the Ancient Custom of Trial by Jury *de Medietate Linguae:* A History and a Proposal for Change," *Boston University Law Review,* Vol. 74, No. 5 (Nov., 1994): pp. 790, 791; and Charles M. Wiltse, "Thomas Jefferson on the Law of Nations," *American Journal of International Law,* Vol. 29, No. 1 (Jan., 1935): p. 72, n. 22. Reflecting contemporary debates, Thomas Jefferson wrote to James Madison on 31 July 1788, suggesting that "[i]n disputes between a foreigner and natives, a trial by jury may be improper." However, "if this exception cannot be agreed to, the remedy will be to model the jury, by giving the mediates lingua, in civil as well as criminal cases." See Ramirez, "Mixed Jury," p. 791. Ramirez also provides a brief survey of late eighteenth-century and early nineteenth-century mixed jury statutes in the North American colonies and states; see Ibid. p. 790, n. 85.

in cases involving distinct ethnicities, including American Indians, demonstrating the extent to which the institution adapted to settler experiences in the New World.[398]

Use of the mixed jury in the western territories generates interest not only because of its North American continental migration but also because of the ways in which "native" settler jurists applied it to cases involving "aliens" or "foreigners." An 1805 Michigan Territorial statute provided that the courts could utilize juries "de medietate linguae." However, like many jurisdictions, the law failed to specify what qualifications these special jurors were to possess.[399]

In the Indiana Territory, there appears to have been no specific legal provisions for the jury *de medietate linguae.*[400] Occasionally, however, parties specifically requested that the special jury be used in their cases. In September of 1804, Robert

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[398] Ramirez argues that while "the mixed jury may have been employed in the colonies as a way of ensuring substantive fairness," it was more likely "used to enhance the legitimacy of the verdict [which was] important to the colonists as the natives' perceptions of unfairness may have triggered bloody unrest or, at least, social tension." See Ramirez, "Mixed Jury," p. 791. For an account of a mixed Indian-Anglo jury in the seventeenth-century Plymouth colony, see "Notes on the Indian Wars of New England," *New England Historical and Genealogical Register,* Vol. 15 (1861): pp. 149-150.

[399] See Blume, "Criminal Procedure," pp. 237-238. In the 1821 murder trial of Ketaukah, the Michigan Territorial court overruled his motion for a jury *de medietate linguae.* Blume includes excerpts of a local newspaper report in which U.S. Attorney Solomon Sibley is quoted as arguing the following:

> Juries de med. Lin. Are given by the statute of Ed.—they were unknown at common law. There would be many difficulties if six Indians were on the jury—the residue of the jurors never could find out when they had agreed on a verdict it would be necessary to have an interpreter in the jury room. Again an Indian cannot be sworn, as he has no ideas of future rewards and punishments. On this and other accounts, they are not competent jurors.

In turn, Judge Woodward agreed, in part, with Sibley's opinion:

> Admitting for argument, that at common law an alien is entitled to a jury of that kind, yet the prisoner is not, for he is not an alien. He and his country are at least under the protection of the U.S.—it therefore cannot be allowed him. To permit an interpreter to be with the jury in their deliberations would vitiate the verdict—it is therefore inadmissible. I think however that an Indian may be sworn—instances Hindoos, &c.

[400] However, for several years following the transition to statehood, Indiana laws provided that "[i]n all actions, that may be tried in any court of record, each party shall have the right of peremptory challenge to three jurors, and *juries de medietate linguae,* may be empannelled whenever necessary [italics added]." See *Revised Laws of Indiana* (1824), p. 297 and *Revised Laws of Indiana* (1831), p. 408. In 1837, the Supreme Court of Indiana ruled that the statute "must be considered as embracing criminal prosecutions as well as civil cases." See *Wiley v. The State,* 4 Blackf. 458 (1837).

Slaughter stood trial before a jury "composed of five Frenchmen and five Americans."[401] On 6 June 1816, Pierre Andre appeared before the Knox County Court of Common Pleas as a defendant in a case of slander. "[U]pon motion . . . by his attorney for a French jury, [the Court] ordered that a Jury de Meda Tata Lingera [sic] be summoned in this cause to which opinion the Plaintiff[s] . . . tendered their Bill of Exceptions."[402] Aside from jury composition, a territorial act provided for interpreters to be sworn in court "when necessary."[403] Rules of evidence and testimony, however, restricted non-European litigants from enjoying the full benefits extended under this law.[404] The extent to which court interpreters provided their services is difficult to measure without an exhaustive analysis of the court record. In a selective survey of county court records, Francis Philbrick identifies only three French names among sixty-two in eleven lists from the Randolph County Court of Common Pleas and fifteen among thirty-one in three lists from St. Clair County.[405]

In contrast to the preceding examples, which related predominantly to the French, the Indiana Territorial government struggled to effectively address the cross-jurisdictional

[401] In this case, it appears that Slaughter objected to the half-French jury as his counsel argued that "the people of the county of Knox [were] prejudicial against the prisoner, and that an impartial jury could not be obtained." See "Slaughter's Trial—Continued," *Indiana Gazette* (Vincennes, Ind.) Tuesday, 23 October 1804; Issue 13; col. B.
[402] Indiana, *Minutes of the Knox County Court of Common Pleas, 1811-1817,* Vol. A, Pt. C, Indianapolis, Ind.: Indiana Historical Records Survey, 1940, pp. 403-404. The court records lists the names of seven jurors, only one of which appears to be French: Ephraim Jordan, William Adams, Sam Parr, Henry Merrick, James McClure, Robt Mc Dowal, Joseph Oneille.
[403] Act of 20 September 1803, in Philbrick, *Laws,* p. 39. In the Slaughter case, "Mr. Badollet . . . was sworn to interpret faithfully."
[404] Act of 20 September 1803, in Philbrick, *Laws,* p. 40. The statute also stipulated that "no negro, mulatto or Indian shall be a witness except in the pleas of the United States against negroes, mulattoes or Indians, or in civil pleas where negroes, mulattoes or Indians alone shall be parties." In 1824, Indiana law maintained these provisions, adding that "[e]very person other than a negro, having one fourth part or more of negro blood, or any of whose grandfathers or grandmothers shall have been a negro, shall be deemed a mulatto." See Indiana, *Revised Laws of Indiana*, 8th sess., 1824, p. 296.
[405] Philbrick, *Laws,* p. cxci, n. 6.

complexities involving tribal lands and the persistent Indian-settler conflicts that plagued the frontier. A fundamental problem with resolving these disputes was the conflict of interest presented by Harrison's roles as both territorial Governor and superintendent of Indian affairs.[406] Between 1803 and 1809, Harrison successfully negotiated a series of treaties with the western tribes, extinguishing Indian title to major portions of land in the territory and expanding the boundaries of the settler polity.[407] Having consolidated settler jurisdiction, the governor signed legislation that attempted to influence the character and extent of intercourse with the Indian tribes. These measures regulated trade, restricted the sale of "ardent spirits or spirituous liquors," and prohibited settlers from aiding "any chief, sachem or warrior of any Indian nation or tribe . . . in relation to any negociations [sic] or treaties, disputes or controversies with the United States or this territory."[408] In short, the importance Harrison placed on Indian law and policy reflected less of a concern with securing tribal sovereignty than with achieving "[t]he progress of a Country from a state of nature to that of Civilization and improvement."[409]

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[406] Among other administrative provisions, the Act of 7 May 1800 prescribed that "the duties and emoluments of superintendent of Indian affairs shall be united with those of governor." Prior to this Act, the Ordinance of 7 August 1786 had established a northern and southern district with respective superintendents—similar to the British Indian Department—for the administration of Indian affairs; see Prucha, *American Indian Policy*, pp. 36, 52.

[407] Barnhart and Riker, *Indiana to 1816,* p. 340; also see Cayton, *Frontier Indiana,* pp. 210-220.

[408] See Ewbank and Riker, *Laws,* p. 23 and corresponding statutes referenced in n. 4. The Indiana Territorial government appears to have wavered in its position on the issue of Indian trade. In 1803, William Henry Harrison and the territorial judges petitioned Congress "for leave to impose a reasonable tax . . . on all persons trading with the Indian tribes within this Territory." The congressional house committee conceded by replying "[t]hat as laws exist in some of the States laying a Tax on Merchants generally the Governor and Judges of Indiana, are authorized to adopt this provision . . . within their Territory . . . and consequently that there is *no need of the interposition of Congress* to effect the object of the Petition" [emphasis added]. In 1805, however, Governor Harrison vetoed "an Act Laying a tax on Indian Traders." His "objections to the Bill" stemmed from "the very principle upon which it [was] founded" in that the "Constitution of the United States gives to Congress the exclusive right of regulating Trade with the Indian Tribes." See Veto Message of the Governor, 22 August 1805 in Gayle Thornbrough and Dorothy Riker, eds., *Journals of the General Assembly of Indiana Territory, 1805-1815,* Indianapolis: Indiana Historical Bureau, 1950, pp. 97-98 and corresponding notes.

[409] Message of the Governor, 4 November 1806, in Ibid. p.110.

Still, the governor emphasized "the preservation of peace and friendship with our Indian neighbors." Expressing concerns similar to those of Sir William Johnson a generation earlier, Harrison corroborated Indian "complaints [of injustice and oppression as] far from being groundless."[410] Indeed, assuring protection to the Indians under the law was a problem equal to, if not greater than, what it had been under Johnson's tenure as superintendent. "The laws of the Territory," Harrison noted, "provide . . . the same punishment for offences committed against Indians as against white men." "Experience," however, "shews [sic] that there is a wide difference in the execution of those laws."[411] Calling for greater impartiality, Harrison called upon the General Assembly "to loose [sic] no opportunity of inculcating amongst your constituents an abhorrence of that unchristian and detestable doctrine which would make a distinction of guilt between the murder of a White man and an Indian."[412]

In his 1807 message to the General Assembly, Harrison expressed his indignation with the deteriorating state of Indian affairs. His benevolent paternalism, however, was all the more explicit:

> A powerful nation, rendering justice to a petty tribe of savages, is a sublime spectacle, worthy of a great republic; and of a people who have shewn themselves as valiant in war, as in peace moderate and forbearing. I do not know gentlemen, whether it will be in your power, to remedy the evil complained of, as the defects seems to be not so much in the laws, as in the execution. But if any means can be adopted which would insure the execution of justice in any cases in which the Indians are concerned; the measure would reflect honor on yourselves, and be of undoubted advantage to your country.[413]

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[410] Ibid. p. 112.
[411] Ibid. p. 113.
[412] Ibid. The authors note a letter to President Jefferson in which Gov. Harrison expressed the necessity of ensuring "to the Indians that protection which the laws promise indiscriminately to all persons of whatever color, nation, or religion." See Ibid. n. 6.
[413] Message of the Governor, 18 August 1807, in Ibid. p. 132.

Nevertheless, in light of these concerns, Harrison assumed the authority of territorial laws over those of Congress in regulating Indian affairs:

> Although the management of Indian affairs, in relation to their character as an independent people, and to the trade with them in their own country, is entirely and exclusively under the controul of the United States, it has been determined that the regulations for the government of the latter are of no force in our settlements. . . . Should you think proper to pass a law either prohibiting the trade of Indians within out settlements altogether, or confining it to the frontiers . . . I am persuaded your constituents would receive from it much benefit.[414]

In the same message, Harrison's underlying intentions for securing peace with the Indian tribes surfaced, highlighting the conflict between his duties as governor and as superintendent of Indian affairs:

> Although much has been done toward the extinguishment of Indian title in the territory, much still remains to be done. We have not yet a sufficient space to form a tolerable state. The eastern settlements are separated from the western by a considerable extent of Indian lands, and the most fertile tracts that are within our territorial bounds, are still their property.[415]

The courts, in turn, also struggled with the jurisdictional complexities of American Indian law. While Indians were often subject to territorial laws for offenses committed outside of Indian Country (i.e., where Indian title had been extinguished by treaty), the courts often displayed comity toward tribal jurisdiction. Most cases dealt with the enforcement of territorial boundaries as specified under certain treaties and the

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[414] Message of the Governor, 12 November 1810, in Ibid. p. 352.

[415] Ibid. p. 354. Collusive intent between federal authorities becomes painfully evident in Jefferson's "private and friendly" letter to William Henry Harrison a year earlier:

> [The] system is to live in perpetual peace with the Indians, to cultivate an affectionate attachment from them, by every thing just & liberal which we can [offer] them within the bounds of reason, and by giving them effectual protection against wrongs from our own people . . . To promote this disposition to exchange lands which they have to spare and we want for necessaries, which have to spare and they want, we shall push our trading houses, and be glad to see the good and influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by a cession of lands . . . In this way our settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States or remove beyond the Missisipi [sic].

See Letter of Jefferson to Harrison, dated 27 February 1803, in Esarey, *Messages,* Vol. 1, p. 71.

federal trade and intercourse acts. Under these measures, federal Indian policy restricted white settlement in Indian Country, proscribed the private purchase of Indian lands, regulated trade, prohibited the trafficking of liquor in Indian Country, and established judicial procedures and remedies for the punishment of inter-jurisdictional crimes.[416] To avoid making private retaliation the rule of law along the frontier, the territorial courts (as well as the Indian tribes) attempted to enforce these provisions with at least some regularity.[417] For example, in 1801, "Captain Allen," an Indian chief, turned over to territorial authorities two Indians charged with murdering a settler.[418] In October of 1816, the Knox County Court of Common Pleas issued two indictments against Samuel Rocus and Sam Moore, respectively, "for trading with Indians without license."[419]

Despite reciprocal efforts to enforce jurisdictional boundaries, settlers frequently encroached on Indian Country. "Such instances," Governor Harrison regretted, had ". . .

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[416] Prucha, *American Indian Policy*, p. 2. For provisions regulating Indian-settler jurisdiction under the 1795 Treaty of Greenville, see supra, pp.105-106, n. 339. The Treaty of Fort Wayne, negotiated between William Henry Harrison and the Delaware, Pottawatomi, and Miami Tribes on 30 September 1809, included jurisdictional terms regulating inter-tribal disputes. Section 7 of the treaty provided that "when any theft or other depredation shall be committed by any individual or individuals of one of the tribes . . . upon the property of any individual or individuals of another tribe, the chiefs of the party injured shall make application to the agent of the United States . . . whose duty it shall be to hear the proofs and allegations on either side, and determine between them: and the amount of his award shall be immediately deducted from the annuity of the tribe to which the offending party belongs, and given to the person injured, or to the chief of his village for his use." See "Treaty with the Delawares, etc., 1809" in Kappler, *Indian Affairs,* Vol. 2, p. 102.

[417] The 1796 trade and intercourse act extended jurisdiction (excluding murder and other capital offenses) from the territorial superior and U.S. circuit courts to include the county courts of quarter sessions; see Act of 19 May 1796, 4th Cong., 1st sess., ch. 30, *Statutes at Large*: p. 473. An 1800 supplementary act expanded jurisdiction even further to include "justices of the inferior or county court of any county nearest to the place of [the accused's] arrest." See Act of 22 April 1800, 6th Cong., 1st sess., ch. 30, *Statutes at Large*: p. 40.

[418] See Homer J. Webster, "William Henry Harrison's Administration of Indiana Territory," *Indiana Historical Society Publications,* Vol. 4, No. 3, Indianapolis: The Bobbs-Merrill Co., 1906, p. 232, n. 1.

[419] *Minutes of the Knox County Court of Common Pleas, 1811-1817,* Vol. A, Pt. C, Indianapolis, Ind.: Indiana Historical Records Survey, 1940, pp. 431, 441. Indiana was admitted to the Union as a state on 11 December 1816. For two early nineteenth-century cases in which the Michigan Territorial Supreme Court acquitted Indians accused of murder by acknowledging tribal jurisdiction and customary law, see Blume, "Criminal Procedure," pp. 216-218. It is important to note that not until 1817 would Congress enact legislation extending full criminal jurisdiction over Indian Country; see Act of 3 March 1817, 14th Cong., 2nd sess., ch. 92, *Statutes at Large*: p. 383 (provisions of which Congress incorporated into the 1834 trade and intercourse act; see Prucha, *American Indian Policy*, p. 193).

a great tendency to exasperate the Indians and prevent them from delivering up those who may commit offenses against our laws."[420] In 1804, the General Court at Knox County indicted Robert Slaughter for the 1798 murder of Joshua Harbin. In his defense at trial, Slaughter argued that the "Court ought not to take further cognizance of the said Indictment because . . . the felony and murder . . . was so committed out of the Jurisdiction of this Court at a place . . . about sixty miles westward of Vincennes and within the Indian Country not then ceded by the Indians to the United States." The Court overruled Slaughter's motion and the jury, "composed of five Frenchmen and five Americans," found him guilty of the charges.[421]

Although the body of statutory law governing the western territories provided a general legal framework, custom continued to represent a fundamental source of legal authority. However, the process and extent to which lawmakers throughout the Old Northwest attempted to incorporate local customary laws into the fledgling body of western jurisprudence reveals considerable uncertainty over which were to be acknowledged as retaining normative force.

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[420] "Such was the case," Harrision added, "with the Delaware tribe upon my demand of White Turkey, an Indian who had robbed a house. They said they would never deliver up another man until some of the white persons were punished who had murdered their people." See Webster, "William Henry Harrison," p. 233.

[421] See Thornbrough and Riker, *Journals,* p. 59, n. 28. On 3 October 1804 Judge Thomas Terry Davis sentenced Slaughter to hang. Shortly after the decision, Davis wrote to President Jefferson that the territorial Judges were "divided in opinion" over the case. While Judge John Griffin apparently held the opinion that the "Courts here have no jurisdiction over the Offender," it is unclear whether Judges Davis or Henry Vanderburgh, or both opposed Griffin's view. Indiana Territory Attorney General Benjamin Parke argued that the crime "was within the limits of the United State and the proper & legal jurisdiction." See Carter, *Territorial Papers,* Vol. 7: *The Territory of Indiana, 1800-1810,* pp. 219-220, n. 52. Provisions under the 1793 and subsequent trade and intercourse acts authorized the president and territorial governors to apprehend criminals in the Indian Country for repatriation and prosecution; see Act of 1 March 1793, 2nd Cong., 2nd sess., ch. 19, *Statutes at Large*: p. 331.

Many lawmakers recognized the importance of community custom, but expressed concern over the confusion arising from the variegated mass of traditional legal sources. For example, in an 1806 petition to the United States Senate, Michigan Territorial judge Augustus Woodward visualized the process of lawmaking as an adaptive and empirical process. "The judges being necessarily acquainted with American jurisprudence," he wrote "are compelled also, by a constant action on the concerns of the people in the courts, to acquire a knowledge of their laws and customs."[422] However, his emphasis on "reducing" and "assimilating" the variety of customs and "foreign" sources of law "to one consistent and uniform system," specified conformity rather than plurality.[423]

In 1810, Michigan Territorial lawmakers took steps to eradicate existing laws and customs by adopting a statute that repealed all "foreign" sources of law. In addition to renouncing the force of all English parliamentary acts and repealing earlier legislation of the Northwest and Indiana territories, the measure formally abrogated the extant French law:

> That the *Coutume de Paris,* or ancient French common law, existing in this country, the laws, acts, ordinances, arrests and decrees of the governors or other authorities of the province of Canada, and the province of Louisiana, under the ancient French Crown, and of the governors, parliaments, and other authorities of the province of Canada generally, and of the province of Upper Canada particularly, under the British Crown, are hereby formally annulled, and the same shall be of no force within the territory of Michigan.[424]

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[422] As quoted in Cole, "Law and Community," pp. 203-204.
[423] Ibid. p. 204.
[424] Act of 16 September 1810, entitled "An Act to repeal all acts of the Parliament of England, and of the Parliament of Great Britain, with the Territory of Michigan in the United States of America, and for other purposes," in Michigan, *Laws of the Territory of Michigan,* Vol. 1, Lansing, Mich.: W.S. George & Co., 1871, pp. 900-903; also see Brown and Blume, *British Statutes,* pp. 168-170. The measure did not renounce the English common law. In their essay on Northwest Territorial laws, Arthur Belitz and Lyman Nash maintain that this Act "was not intended to repeal and did not repeal the common law established by the Ordinance of 1787 . . . nor did it repeal the common law inherited from and traced back through the laws of Indiana Territory, Northwest Territory and the Code of Virginia." Nevertheless, while

Indiana, on the other hand, appears never to have expressly repealed its inherited law, either during the territorial period or following statehood. In the years immediately preceding the transition to state government, the Indiana Territory's complex legal heritage left its lawmakers with a less than transparent vision for a homegrown *corpus juris*. At the same time, lawmakers could no longer rely on legislation alone. Territorial representatives had all too often realized the practical limitations in attempting to develop a local jurisprudence.

Thus, on 18 October 1814, Indiana Territorial delegate Jonathan Jennings petitioned Congress, requesting "that the duties of the courts . . . may be more clearly defined."[425] "[T]he decisions of the superior court," Jennings complained, otherwise intended "to settle in uniformity the principles of law and fact[,] . . . frequently are in a state of fluctuation."[426] Emphasizing the ambiguous provisions of the Northwest Ordinance, Jennings pleaded with Congress "to suggest the propriety of pointing out . . . what common law [it] refers to, whether the common law of England, or France, or of the Territory."[427] If that of England, Jennings considered it

> essential to define to what extent of that common law the judges shall take cognizance; whether the whole . . . of feudal and gothic customs of England; whether the customs, or unwritten law shall be taken with the statute law . . ; or whether the unwritten and statute law is to be taken in contradistinction to the laws, customs, and rules of chancery; or whether it includes that law which is common to all.[428]

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acknowledging the territorial government's capacity to repeal their own laws, the authors question Michigan's authority to annul those in place prior to territorial organization by terms of the Northwest Ordinance; see Belitz and Nash, "Common and Statute Law," p. 1825.

[425] U.S. Congress, House of Representatives, Judiciary of Indiana Territory, 13th Cong., 3rd sess., *Annals of Congress* (Oct. 1814): p. 400.

[426] Ibid.

[427] Ibid. p. 401.

[428] Ibid. William Wirt Blume and Elizabeth Gaspar Brown argue that:

> The Indiana legislators had little or no reason to believe that the term 'common law' used in the Ordinance of 1787 referred to the common law of France. The laws and customs of Canada,

In partial response to Jennings's petition, Congress passed an act setting forth the judicial calendar of the General Court, stipulating further that "it shall be composed of at least two of the judges appointed by the Government of the United States."[429] Yet having failed to solicit the proper jurisprudential guidance Jennings sought, the territory was left to decide what constituted the "common law."

As Indiana approached statehood, there was what can best be described as a tentative acceptance of English precedent. Overall, uncertainty prevailed. The 1807 reception statute was a qualified recognition of the English statutory and common law. Even if Indiana lawmakers had statutorily endorsed the "common law," it was obvious (as Jennings's petition to Congress illustrates) that not all of them thought of it in the same way. Until Indiana could establish a homegrown jurisprudence, English law served as model authority rather than binding precedent. Lawmaking, as an ongoing process of normative inquiry, was adaptive by necessity and tolerant of local custom regardless of the degree of uniformity sought.[430] Practitioners emphasized a mixing of legal traditions, surveyed and borrowed freely from a variety of sources—whether legal or extra-legal, Anglo-American, European, or international in provenance—and applied those ideas

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> including the Custom of Paris, previously in force in the area under the Quebec Act of 1774, had been recognized by the Ordinance, but only to the extent of 'saving' to the French and Canadian inhabitants of certain villages 'their laws and customs now in force among them relative to the descent & conveyance of property.' Reference to the legislative history of the Ordinance would have shown that the term 'common law' was used in contradistinction to 'chancery' and that both terms referred to jurisdiction of the kind exercised by the central English courts. 'Common law' without further specification was entirely too vague to serve as a guide for deciding cases.

See Blume and Brown, "Unifying Factors in the Development of American Legal Institutions," *Michigan Law Review,* Vol. 61, No. 1 (Nov., 1962): pp. 52-53. The problem with this argument lies in the inaccurate assumption that the Indiana Territory existed as a homogenous legal culture. By relying strictly on positive law enactments (e.g. the Ordinance of 1787)—which reflected little of the customary jurisprudence that still flourished in many local communities at the time—the authors failed to provide the appropriate historical context, which led Jennings to petition Congress for clarification.

[429] Act of 24 February 1815, 13th Cong., 3rd sess., ch. 54, *Statutes at Large*: p. 213; also see Barnhart and Riker, *Indiana to 1816,* pp. 424-425.

[430] Glenn, "Persuasive Authority," pp. 268, 270.

considered most relevant in creating a unique corpus juris suitable to local circumstances.[431] As opposed to displacing traditional community laws by express statutory abrogation, Indiana constructed gradually its own body of law for the new settler polity.

Yet Indiana lawmakers became equally concerned with avoiding complexity and confusion. To instill a greater sense of uniformity and certainty, the new system of common law jurisprudence relied upon written sources of authority rather than oral tradition. By recording judicial opinions, publishing case law, and writing legal treatises, Indiana jurists envisioned a normative vernacular built upon an original body of legal precedent. Lawmakers took corresponding measures to accommodate this process of legal domestication. For example, an 1808 Indiana territorial act required the courts to file written decisions. Judges were to "make up and deliver the opinion of the court . . . in writing . . . upon all questions and points of law."[432] Two years later, the legislature

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[431] An 1802 estate inventory of William Clarke, Chief Justice of the Indiana Territorial Court, included a diverse range of legal, historical, and religious titles in his private library. A few select titles are printed below. For a complete list, see Clarence E. Carter, "William Clarke, First Chief Justice of Indiana Territory," *Indiana Magazine of History,* Vol. 34, No. 1 (March, 1938): pp. 9-13.

Sir Edward Coke, *Institutes of the Laws of England, or a commentarie upon Littleton (Parts One to Three),* London, 1797.
Jean Jacques Burlamaqui, *The Principles of Natural Law,* 2 vols., London, 1748-1752.
Emerich Vattel, *The Law of Nations,* First American ed., New York, 1796
William Blackstone, *Commentaries on the Laws of England,* London (12th ed., 1793-1795, 4 vols.; 13th ed., 1800, 4 vols.).
Matthew Bacon, *A New Abridgement of the Law,* London, 1778, 5 vols.
Charles Montesquieu, *The Complete Works of Monsieur de Montesquieu,* London, 1777, 4 vols.
George Sale, *An Universal History, from the Earliest Account of Time*. London, 1747, 20 vols.
The American Museum; or, Repository of Ancient and Modern Fugitive Pieces, Prose and Poetical, Philadelphia: Printed by Matthew Carey, 1787-1792, 12 vols.
Laws of Virginia, 10 vols.
Laws of Kentucky, 8 vols.
Large family bible.

[432] Act of 25 October 1808, sec. 3 reads in full:

That the first, or presiding Judge of the General Court, District Court, or court of Errors and Appeals of this territory, shall collect, and he is hereby enjoined to collect, make up and deliver the opinion of the court, *seriatim,* in writing, with the reasons thereof, upon all questions and points of law, which may be decided by them; which opinion shall be by the said Judge, delivered

passed "An Act to perpetuate testimony," stipulating that depositions "read as evidence in any court of record" were to be certified and "lodged with the Clerk of the court."[433]

As legal decision-making migrated from community based forums of dispute resolution to a centralized court system, territorial lawmakers committed an otherwise fluid, customary, and locally adaptive jurisprudence to a formal, binding system of law. However, uniformity of law also depended upon an effective campaign of legal acculturation. At the turn of the century, the small, self-sustaining communities of the region faced a deluge of settler laws and institutions that viewed alternative legal systems with disdain. The westward migration of Anglo-American legal culture—through law books, private property, rules of civil and criminal procedure, a system of writs and pleadings, and other practices—brought the English common law along the frontier into sharper focus, systematically dismantling much of Indiana's plural legal order.[434]

"As waves of American settlers swept across the expansive territories," Richard Cole observes, "their legal cultures washed up against, and usually overwhelmed, those of traditional communities."[435] For the French, the greatest obstacle in retaining their autonomy under the Northwest Ordinance was a decline in their legal institutions and political representation during the territorial period. During the early 1790s, the

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> to the Clerk, and by him recorded at full length, upon the records of the said court; and should either of the said Judges differ in opinion, the dissenting Judge shall have the reasons of his dissent entered of record in said suit.

See Philbrick, *Laws,* pp. cxcvi, 663. For an overview of late eighteenth/early nineteenth-century law reporting, see Warren, *History of the American Bar,* pp. 326-332. The most comprehensive treatment of American legal publishing is Erwin Surrency, *A History of American Law Publishing,* New York: Oceana Publications, 1990.

[433] Act of 12 December 1810 in Ewbank and Riker, *Laws,* pp. 17, 127-128.

[434] Greene, "Cultural Dimensions," p. 18. For an overview of published legal materials available to the early Indiana bench and bar, see Michael H. Harris, "The Frontier Lawyer's Library; Southern Indiana, 1800-1850, as a Test Case," *American Journal of Legal History,* Vol. 16, No. 3 (July, 1972): pp. 239-251. For literature on English common law reception in the territories and states of the Old Northwest, see Brown and Blume, *British Statutes,* pp. 157-175.

[435] Cole, "Law and Community," p. 251.

French—in their capacity as judges and administrative officials—played a dominant role in county government. After 1800, however, their presence in public office diminished precipitously.[436] Echoing Cole's sentiments, Francis Philbrick's musings on the French emphasize patterns of cultural contest and displacement:

> Their submergence beneath the flood of American immigrants is unintelligible apart from the incidents of early years. The story is essentially one of the clash of two noncoalescible cultures . . . The attitude of the two peoples toward religion, the Indians, law, and mode of life was sharply distinct.[437]

"Although the displacement of the French custom by Anglo-American law was general," Philbrick adds, "it was of course somewhat gradual."[438] With few exceptions, the process of acculturation into settler society appears to have progressed with little disturbance in Indiana.[439] Many of the French inhabitants, however, simply left, fearing loss of property or unable to secure title to their land claims. For those that stayed, slavery—which the

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[436] This is most apparent in the French composition of county courts. In St. Clair County, between 1800 and 1809, the Court of the General Quarter Sessions, Common Pleas Court, and Orphans' Court, consisted of 18 judges (most served on each court concurrently), 4 of whom were French. In the Justice of the Peace courts, only 4 French names appear among 20 and only 1 served after 1801. In Randolph County, between 1800 and 1809, the courts of the General Quarter Sessions, Common Pleas, and Probate, listed 15 judges, 3 of whom were French. In the Justice of the Peace courts, only 3 French names appear among 20 and only 1 served after 1801. See Philbrick, *Laws,* pp. ccxix, ccxxix-ccxxxiv. The following data on county court appointees (again, many of whom served concurrently in different courts) are based on approximate tabulations from the Indiana Territorial *Executive Journal*: In Knox County, Governor Harrison made 2 appointments to the Circuit Court in 1814 and 1815, none of which included French names; 26 appointments to the Court of General Quarter Sessions between 1800 and 1803, 4 of which included French names; 28 appointments to the Common Pleas Court between 1800 and 1813, 4 of which included French names; and 54 Justice of the Peace appointments between 1801 and 1816, none of which included French names. In Wayne County, Governor Harrison made 8 appointments to the Circuit Court in 1814 and 1815, none of which included French names; 10 appointments to the Court of General Quarter Sessions in 1803, 5 of which included French names; 5 appointments to the Common Pleas Court in 1803, 2 of which included French names; and 15 Justice of the Peace appointments between 1810 and 1816, none of which included French names; see general index in William Wesley Woollen, Daniel Wait Howe, and Jacob Piatt Dunn, eds., "Executive Journal of Indiana Territory, 1800-1816," *Indiana Historical Society Publications,* Vol. 3, No. 3, Indianapolis: The Bowen-Merrill Co., 1900, pp., ix, xix.

[437] Philbrick, *Laws,* pp. ccxii-ccxiii.

[438] Ibid. p. ccxviii.

[439] Occasionally, the state made a few legal accommodations; see, for example, the case of *Lambert and Another v. Blackman* (1 Blackf. 59, 1820), in which the Court recognized a promissory note executed in the French language.

French viewed as a customary right to property under provisions set forth under the Northwest Ordinance—would become the most contentious issue.[440]

Despite the overwhelming lack of scholarly attention, the French played a significant role in Indiana legal history. In contradiction to British and American claims of frontier lawlessness, the French managed to provide for themselves an effective and sustainable form of law and government. "[I]n every way," notes Philbrick, "their record challenges a judgment that denies to the French element capacity for self-government."[441] In organizing their small communities, the French adopted the *Coutume de Paris* as a model code to govern matters of family law, property, and inheritance. Yet flexibility and choice of law remained necessary in adjusting to the unique circumstances of frontier life. The French adaptation to Indian laws and customs illustrates the cultural permeability of legal traditions, thus challenging the idea of incompatibility between two otherwise disparate peoples.

The French legal tradition in the region also demonstrates the extent to which territorial and early state law evolved and adjusted as a mixed jurisdiction. During the transition to statehood, the formation of western jurisprudence signaled the ends, rather than the means, of its diverse "common law" heritage.[442] By tracing the sources of Indiana law to their points of origin, the positivist idea of law as solely the product of the sovereign state collapses. Despite the rhetoric of the Declaration of Independence in 1776 and the façade of legal nationalism that spread with western expansion, the Quebec

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[440] On French claims to slavery as a privilege protected under the Virginia Act of Cession and Northwest Ordinance, see *State v. Laselle,* 1 Blackf. 60 (1820).
[441] Philbrick, *Laws,* p. ccxx.
[442] Glenn, "Transnational Common Laws," *Fordham International Law Journal,* Vol. 29, No. 3 (Feb., 2006): p. 461; also see Murphy, "Laws of Inheritance," p. 250, discussing the "various streams of law" that shaped Indiana by 1816; for examples citing specific statutes, see Ibid. nn. 217, 218, and accompanying text.

Act's spirit of multi-cultural continuity survived under the Northwest Ordinance, preserving certain provisions of the *Coutume de Paris* and principles of the Plan of 1764.[443]

Unlike the French, the Indians retained their distinct political status in Indiana. The federal government expressly recognized their sovereignty under the Northwest Ordinance and various treaties, thus formalizing a local and regional system of legal pluralism. The cultural terms and conditions of this political relationship, however, rested upon an attitude of imperial benevolence.[444] President Thomas Jefferson sought a policy of mutual co-existence, albeit strictly on American terms. For him, labor, property, and law were the keys to acculturation. In December of 1808, Jefferson addressed the White River Delaware Tribe, attempting to instill in them the "habits" of progress and civilization:

> When once you have property, you will want laws and magistrates to protect your property and persons, and to punish those among you who commit crimes. You will find that our laws are good for this purpose. You will wish to live under them; you will unite yourselves with us, join in our great councils, and form one people with us, and we shall all be Americans.[445]

Although he recognized tribal sovereignty and capacity for self-government, Jefferson, like many of his contemporary legal philosophers, denied Indigenous normative systems

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[443] On the French legal origins of the Northwest Ordinance, see Blume, "Probate and Administration," pp. 210-212. On the "domestic" sources of law, section 5 of the Ordinance provided, in part, that "the governor and judges, or a majority of them, shall *adopt and publish* in the district *such laws of the original States,* criminal and civil, as may be necessary and best suited to the circumstances of the district [emphasis added]." Although no mention of the Quebec Act (or Custom of Paris) appears in the legislative record, the Continental Congress had expanded the Northwest Ordinance's savings clause, which originally affected only "the inhabitants of Kaskaskia and Post Vincent," to encompass all French and Canadian inhabitants throughout the region; see Barrett, *Evolution of the Ordinance of 1787,* p. 74. O

[444] See generally, White, *Middle Ground,* pp. 471-476.

[445] Jefferson to Delawares in Esarey, *Messages,* Vol. 1, p. 334; also see White, *Middle Ground,* pp. 473-474.

the same legitimacy as those of Anglo-European tradition. His paternalism reflected the prevailing ethnocentric view that held Indians as a "lawless" people. Because of "the circumstance of their having never submitted to any laws, any coercive power, and shadow of government," Jefferson noted, "[t]heir only controuls are their manners, and that moral sense of right and wrong, which . . . in every man makes a part of his nature."[446]

Jefferson's views on tribal acculturation did not necessarily suggest assimilation and political incorporation. During the early national period, the Indian presence in the region divided American officials over whether to "civilize" or segregate the Indian tribes.[447] For many settlers, however, the importance of land in the Indiana Territory quickly superseded any interest in adopting Jefferson's philosophy of mutual co-existence. Under the Northwest Ordinance, full settler sovereignty could only be achieved by extinguishing Indian title, a process which could not be accomplished without tribal consent.

Faced with increasing settler demands for land, Indiana Territorial officials adjusted their legal strategies accordingly. Lacking full territorial sovereignty, Indiana lawmakers implemented a policy of personal and subject matter jurisdiction, aiming not only to regulate individual Indians but to facilitate further land cessions as well. On 15 December 1810, the legislature passed an act "regulating the trade with Indians within the part of the Territory to which the Indian title [had] been extinguished." The measure

[446] Thomas Jefferson, *Notes On the State of Virginia*, ed. Frank Shuffelton, New York: Penguin Classics, 1999, p. 98.
[447] See Rosen, *American Indians,* p. 14. For an overview of failed colonization plans for the Indians under organizing principles similar to those of the territorial system of government, see Robert F. Berkhofer, Jr., "Americans versus Indians: The Northwest Ordinance, Territory Making, and Native Americans," *Indiana Magazine of History,* Vol. 84, No. 1 (March, 1988), especially at pp. 98-102, and Annie H. Abel, "Proposals for an Indian State, 1778-1878," *Annual Report of the American Historical Association for the Year 1907,* Vol. 1, Washington: Government Printing Office, 1908, pp. 87-104.

entailed a host of stipulations governing Indian-settler relations. "[W]hereas . . . negociations between the United States and the Indian tribes are much interrupted by the interference of mischievious individuals . . . and jeopardized by such improper and unpatriotic conduct," the Act's preamble stated, the territorial legislature was "desirous . . . to facilitate those extinguishments of Indian title" as well as "to relieve their constituents from the injuries which they sustain from the depredations committed by Indians coming into the settlements to trade."[448]

By far, the Indiana territorial government's biggest concern was interference with future treaty making and land cessions:

> That if any person or persons shall without the permission or authority of the government of the United States, or of this territory, directly or indirectly, commence or carry on, any verbal or written correspondence or intercourse, with any Indian nation or tribe, any chief , sachem or warrior of any Indian nation or tribe, with an intent to influence the measures or conduct . . . in relation to any negociations or treaties, disputes or controversies . . . or if any person or persons . . . shall counsel or advise, aid or assist in any such correspondence . . . they shall be deemed guilty of high misdemeanor.[449]

When treaty cessions failed to suffice, the western state and territorial governments advocated for Indian removal. For example, in 1813 the Indiana territorial legislature petitioned Congress with a memorial requesting relief "to purchasers of public Lands," those of whom were "continually exposed to Indian depredations."[450] A companion memorial for the "Defense of the Territory" was more explicit in its request for Indian removal. In order to "ensure future safety to [the] frontier," the territorial legislature

[448] Act of 15 Dec. 1810, in Ibid. p. 149.
[449] Ibid.
[450] Memorial of the Indiana Territory General Assembly, dated 3 March 1813, in Ewbank and Riker, *Laws* pp. 790-792.

requested from Congress provisions "sufficient to the object of . . . driving from our borders those hordes of s[a]vages which . . . infest them."[451]

By then, however, the War of 1812 had marked the steady decline of tribal autonomy in the region. The defeat of the British and their Indian allies—including the Shawnee, Miami, Ojibway, Delaware, and Potawatomi tribes—brought to the American settlers a sense of security and control over the region.[452] Although the Northwest Ordinance and various treaties officially acknowledged tribal jurisdiction, after 1812 this relationship proceeded under the unilateral terms of the western state and territorial governments. With the Indian frontier receding, greater demand for land instilled deep ambivalence and sharp criticism over the federal-tribal treaty relationship. Rather than considering the American Indian treaty as a catalyst of sustained legal pluralism and reciprocity, many came to see it as a valid instrument of transferring land title.[453] In turn, aggressive settler interests afforded little continuing force to the basic principles of reciprocity, consent, and continuity toward the American Indians.

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[451] Memorial of the Indiana Territory General Assembly, dated 11 March 1813, in Ibid., pp. 793-794.
[452] Cayton, *Frontier Indiana,* p. 261. Following the War, the U.S. government made certain concessions to Indian jurisdiction under the 1814 Treaty of Ghent. In negotiating the terms of the treaty, the British insisted as a "sine qua non" that "the peace be extended to the Indian allies of Great Britain, and that the boundary line of their territory be definitively marked out as a permanent barrier between the dominions of Great Britain and the United States." The U.S. treaty delegation, led by John Quincy Adams, refused to proceed on these grounds by excluding the tribes from negotiations, arguing that "they live under their own laws and customs," not those of the United States, and "that their rights upon the lands . . . are secured to them by boundaries defined in amicable treaties." Despite these measures, Congress agreed "to put an end . . . to hostilities with all the Tribes or Nations of Indians . . . and forthwith to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to" prior to the War; see Hunter Miller, ed., *Treaties and Other International Acts of the United States of America,* Vol. 2: *Documents 1-40: 1776-1818,* Washington: Government Printing Office, 1931, p. 581; also see David Wilkins, "Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal," *Oklahoma City University Law Review*, Vol. 23, Nos. 1 and 2 (Spring and Summer 1998): pp. 306-308.
[453] See generally Dwight L. Smith, "The Land Cession Treaty: A Valid Instrument of Indian Title," in *This Land of Ours: The Acquisition and Disposition of the Public Domain,* Papers presented at the Indiana American Revolution Bicentennial Symposium, Purdue University, West Lafayette, Indiana, April 29 and 30, 1978, Indianapolis: Indiana Historical Society, 1978, pp. 87-102.

During the transition to settler statehood, the federal government demonstrated a consistent reluctance in asserting its authority over Indian affairs. Congress not only shared an interest with the territorial government in extinguishing Indian title to accommodate settler demands, but it also endorsed a greater role for the emerging states in negotiating land cessions with the tribes.[454] Consequently, the federal government's failure to clarify its regulatory goals encouraged the territorial governments to fashion their own Indian policies, leading to a doctrine of limited federalism adopted by the settler states in asserting absolute jurisdiction over the tribes.[455]

The transformation of settler sovereignty during the late eighteenth and early nineteenth centuries rested on evolving principles of national identity and statehood. Following Independence, the American perception of sovereignty emerged as a loose confederation of powers between the self-governing states and newly-formed federal government. During the territorial period, the compact theory of government enabled western settlers to reconcile an otherwise authoritarian system of rule with a view toward their long-term political rights.[456]

Legal pluralism persisted during this period. However, the persistent Indian presence in the region not only confounded jurisdictional boundaries but also represented

[454] On 30 March 1802, Congress passed "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." Section 12 of the Act provided "that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States . . . to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by treaty." The 1802 statute superseded all trade and intercourse acts previously in force; see Act of 30 March 1802, 7th Cong., 1st sess. ch. 13, *Statutes at Large*: pp. 140, n., 143.

[455] Cynthia Cumfer, "Local Origins of National Indian Policy: Cherokee and Tennessean Ideas about Sovereignty and Nationhood, 1790-1811," *Journal of the Early Republic,* Vol. 23, No. 1 (Spring, 2003): p. 39.

[456] Ford, *Settler Sovereignty,* 25; Onuf, *Statehood and Union,* p. 73.

a threat to the sovereign integrity of the settler polity. According to historian Lisa Ford, "Indigenous jurisdiction governed people and/or places in amorphous, poorly understood ways—ways at odds with emerging nineteenth-century understandings of settler sovereignty premised on exercises of territorial jurisdiction."[457] Whatever abstract principles structured federal Indian policy, in practice the settler states decided how and to what extent they would incorporate Indians into American society.[458]

[457] Ford, *Settler Sovereignty*, 56.
[458] Rosen, *American Indians*, p. 166.

CHAPTER 2: INDIAN-SETTLER CONFLICT IN INDIANA: FROM LEGAL PLURALISM TO A STATE-CENTERED LEGAL ORDER

During the late eighteenth and early nineteenth centuries, land had become *the* definitive factor in the transformation of Indian-settler sovereignty. As an asset to both the Indiana economy and settler agrarian values, private property signaled the displacement of Indian and tribal customary rights. By lacking cultural or territorial boundaries, the trading system that had long sustained the frontier economy came to represent a threat to state and local administrative order. Agriculture and private property, on the other hand, harnessed settler interests, defined state and personal boundaries, and effectively organized the settler community.[459] The transition from frontier trade economy to an Anglo-American agricultural economy had profound land tenure consequences for the tribes as well as direct implications on the socio-cultural relations of the region's inhabitants.

This chapter focuses on the transition of Indian-settler sovereignty from an inter-communal relationship of customary norms to a hierarchical legal order designed largely to secure the acquisition of land title and private property rights. Part one provides an overview of sources, precedents, theory, and doctrinal foundations upon which the American states, including Indiana, justified the exercise of complete sovereignty over the American Indians. Within this context, part two surveys Indiana's Indian law and policy. The overview begins with a narrative of early treaty negotiations, Indian removal, and the state's gradual jurisdictional encroachment over tribal lands; it assesses political ideologies, legislative debate, and judicial reasoning in justifying (or denouncing) these actions. This narrative also centers on the *legal* methods of land transfer. By imposing

[459] Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673-1800,* Cambridge: Cambridge University Press, 1997, p. xiii.

statutory disabilities on American Indians, Indiana facilitated the conveyance of land from Indian possession to settler ownership of real property in fee simple.

With a continuing emphasis on the expropriation of Indian land, part three analyzes the socio-cultural dimensions of public land policy. During the 1830s, Congress responded to squatter demands by enacting measures to protect settler pre-emption rights. Despite the extra-legal nature of their land claims and persistent violation of federal treaty obligations designed to protect tribal lands, squatters secured their titles through the lobbying efforts of western state representatives and a sympathetic federal government.

American Indians responded to these conditions in a variety of ways; they negotiated treaties to protect tribal land, made wills to ensure its heritable possession, litigated in courts, registered marriage records, and assisted in real estate transactions, among other measures. In examining the historical record, however, it is important to consider that each action taken or word recorded reflected a personal choice; American Indians not only pursued their own interests—whether for themselves or on behalf of their tribal community—they did so in unique, sometimes inconsistent ways.

The influx of American and Anglo-European migrants certainly tested the law of "community consensus" during the early years of statehood. As Governor Jennings remarked at his second inaugural address in December of 1819, the new immigrants had carried with them "a great diversity of political maxims and opinions" as well as their "prepossessions and prejudices." Accordingly, Jennings advised the legislative assembly to "approximate towards an uniformity and stability in our public regulations."[460] As

[460] *Indiana Gazette (Corydon),* 18 December 1819, as quoted by Donald F. Carmony, *Indiana, 1816-1850: The Pioneer Era,* Indianapolis: Indiana Historical Bureau & Indiana Historical Society, 1998, p. 96.

their political influence waned and customary laws faded under this principle, the French presented less of a cultural barrier to Indiana law and policy. For those having secured legal title to their land claims during the early nineteenth century, private property rights provided the French a greater common ground with the American settler polity.[461] However, many of the French simply migrated west of the Mississippi, leaving their small villages "out of repair or shut up."[462] Accordingly, there is little discussion of these long-established residents as a distinct, autonomous community.

Yet the transition to a state-centered legal order failed to immediately or entirely displace cross-cultural norms. While the locus of authority shifted and the rules of legal procedure diminished an informal, common discourse, this was a gradual transition rather than a rapid conquest by law. Much like the inter-communal relations of the colonial-era *Pays d'en Haut*, there were points of normative coherence, resistance, and departure. American Indian norms and customs continued to shape Indiana's fledgling jurisprudence in principle if not strictly in substance. In turn, mutual co-existence based on individual choice and consent sustained cross-cultural norms through shared goals and objectives. Indiana law was a product of practical reasoning and a process of individual negotiation. Indians and settlers alike exploited, shaped, and borrowed law and, in many ways,

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[461] Although many continued to utilize their lands in common, the French realized early on the necessity of adopting the Anglo-American system of land tenure in order to secure their titles. Having been "chiefly addicted to the Indian trade," and unable to form "an idea of dividing among ourselves our fruitful country," the residents of Vincennes explained in a 1787 petition to Congress, they had "in a great measure, overlooked the advantages . . . derived from the cultivation of lands." However, the "moment we were connected with the United States, we began to be sensible of the real value of lands." See Clarence E. Carter, ed., *The Territorial Papers of the United States,* Vol. 2: *The Territory Northwest of the River Ohio, 1787-1803,* Washington: U. S. Gov't Printing Office, 1942, p. 58. For further discussion on the division of property rights and the impact on Indian-settler relations, see pp. 162-163, infra.

[462] Donald Macdonald, "The Diaries of Donald Macdonald, 1824-1826," *Indiana Historical Society Publications,* Vol. 14, No. 2, Indianapolis: Indiana Historical Society, 1942, pp. 272, 281.

adjusted to cross-cultural norms and institutions not only to further their own objectives but also to accommodate socially evolving ideas of justice.[463]

By 1830, however, state officials had sought to destroy legal pluralism by exercising absolute authority over all subjects and persons within state boundaries. During the early nineteenth century, American Indian law and policy shifted from a model of "indirect rule" (which the federal government had failed to articulate in policy) to one of "direct rule" (sustained by state authority).[464] As Deborah Rosen observes, "[t]he reason for the states' preference for direct rule was clear: they lacked legal justification for indirect rule," the latter of which "presumes the continuation of separate indigenous communities" and state deference to federal authority. The states were able to defend their jurisdictional prerogative only to the extent that the Indians conceded their tribal identity (primarily in terms of collective land holdings) and integrated as members of the settler state.[465]

Rosen identifies six general ways by which state governments regulated Indians residing within their boundaries. These methods included: restrictions on land sales between Indians and settlers; disabilities on Indians to make enforceable contracts or participate in litigation; restrictions on settlers from encroaching on tribal lands or selling liquor to Indians; extension of criminal jurisdiction over Indian territory; taxation of Indian land; and submission of Indians to the state's civil laws of marriage, divorce, and

[463] Bruce P. Smith, "Negotiating Law on the Frontier: Responses to Cross-Cultural Homicide in Illinois, 1810-1825," in Daniel P. Barr, ed., *The Boundaries Between Us: Native and Newcomers along the Frontiers of the Old Northwest Territory, 1750-1850,* Kent, Ohio: Kent State University Press, 2006, p. 163.
[464] Deborah Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880,* Lincoln: University of Nebraska Press, 2007, p. 204.
[465] Ibid. p. 205.

inheritance.[466] Using Rosen's outline as a frame of analysis, this chapter surveys the legislative means by which the State of Indiana regulated its resident American Indians during the nineteenth century. By examining related state court opinions, this chapter also identifies the judicial reasoning that justified Indiana's American Indian policy. Rather than focusing on questions of tribal sovereignty, state courts, including those in Indiana, more often framed their analysis around issues of federalism and states' rights.[467] Historical patterns in Indiana correspond remarkably with Rosen's analysis in terms of the extent to which the state pursued a policy of Indian colonization.[468]

The transition to a state-centered system of direct rule over American Indians was not an inevitable feature of early national policy. Provisions under the 1785 Land Ordinance and 1787 Northwest Ordinance outlined the basic premises by which land was to be transferred to the newly-formed settler states once Indian title was extinguished. However, the question of the determination of Indian rights in the rush of settler expansion was left to later debate.[469] By the early nineteenth century, Congress had, in fact, considered an administrative scheme of sustained legal pluralism, preservation of tribal lands and self-government, and even tribal representation. However, plans for constructing a separate Indian state rested on American models of government rather than

[466] Deborah A. Rosen, "Colonization through Law: The Judicial Defense of State Indian Legislation, 1790-1880," *American Journal of Legal History,* Vol. 46, No. 1 (Jan., 2004): p. 28.
[467] Rosen, "Colonization," p. 27.
[468] While this study provides an in-depth survey of Indiana law and policy concerning American Indians, it presents little in the way of comparative state analysis. Rosen's study, on the other hand, provides a model foundation for further study of the role of state legal systems in American Indian policy.
[469] The Louisiana Purchase and the act providing for its territorial administration and temporary government resolved this question in part. Section fifteen of the Act authorized the President "to stipulate with any Indian tribes owning lands on the east side of the Mississippi, and residing thereon, for an exchange of lands . . . on the west side of the Mississippi." See Act of 26 March 1804, 8th Cong., 1st sess. ch. 38, *Statutes at Large*: p. 289.

a systemic regard for tribal laws and customs.[470] As Superintendent of Indian Affairs, Thomas L. McKenney suggested in 1829, the Indians could "be placed under a Government, of which they shall form part, and in a Colonial relation to the United States" where "the existing divisions among the Tribes would be superseded by a General Gov't for the whole."[471]

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[470] In 1824, President James Monroe proposed a "system of internal government which shall protect their property from invasion." See Special Message of James Monroe, 27 January 1824, as quoted by Robert F. Berkhofer, Jr., "Americans versus Indians: The Northwest Ordinance, Territory Making, and Native Americans," *Indiana Magazine of History*, Vol. 84, No. 1 (March, 1988): p. 98. The following year, the U.S. House of Representatives recommended a plan for Indian removal in exchange for lands further west and a "territorial Government over them of the same kind, and regulated by the same rules, that the Territories of the United States are now governed." See United States, Congress, *House Journal,* 19th Cong., 1st sess., 1825-1826, p. 97, as quoted by Berkhofer, "Americans versus Indians," p. 98. In turn, the House Committee on Indian Affairs introduced a bill "for the preservation of the Indian Tribes, within the United States," which outlined provisions for a territorial system of government, including the presidential appointment of a governor, a secretary, and three judges. A tribal legislative council and other administrative officers were to be chosen by the "said Indians, as the President may deem proper." See United States, *Bills and Resolutions of the House and Senate*, H.R. 113, (21 February 1826), 19th Cong., 1st sess., 1825-1826, as quoted by Berkhofer, "Americans versus Indians," p. 99. The proposed bill failed passage.

By the 1830s, plans for the preservation of tribal self-governance had become an even more pressing issue in the face of forced removal policies under the Jackson administration. In 1834, the House Committee on Indian Affairs reported another bill, which provided for the "establishment of the Western Territory, and for the security and protection of the emigrant and other Indian tribes therein." See United States, Congress, *Bills and Resolutions of the House and Senate*, H.R. 490, (20 May 1834), 23rd Cong., 1st Sess.; also see Berkhofer, "Americans versus Indians," p. 99. The proposed bill was designed with particular reference to the Cherokee, Choctaw, and Creek tribes; however, had it passed, the bill might have served as model legislation for other tribes. Through a confederated system of government, the tribes would elect a general council (akin to a legislative assembly) and a congressional delegate. The bill's aim was to "promote their advancement in the arts of civilized life, and to afford to them . . . all the blessings of free government, and admitted to a full participation of the privileges now enjoyed by the American people."

Congressional opposition, however, cited concerns (many of which were well-founded) over treaty violations, unconstitutional proposals of Indian government, the extension of slavery, tribal representation in Congress, internal partisan conflict within tribal government, and other issues. See Berkhofer, "Americans versus Indians," p. 100. Subsequent versions of the bill reflected what little confidence Congress held toward sustainable tribal government. Modifications in 1837 and 1839 included replacing a federal delegate with an agent, a superintendent of Indian affairs in place of a governor, tribal council proceedings to be recorded in English, and the presidential approval of all laws passed by the tribal council. The larger issue, as Robert Berkhofer points out, centered on whether or not the "tribes could ever reach a stage of political progress in their own governments that warranted the equality conferred by full-fledged statehood in the Union." See Berkhofer, "Americans versus Indians," p. 100. The failure of these bills answered this question with a resounding *no.*

[471] Letter of Thomas L. McKenney to Peter B. Porter, dated 31 January 1829, as quoted by Berkhofer, "Americans versus Indians," p. 101.

By the late 1830s, congressional proposals for a system of "indirect" rule over the Indian tribes had failed to develop. The states ultimately lead the colonization effort; however, rather than concede to a system of "indirect rule" as Congress had proposed, the state regulation of American Indians resulted in a process of tribal dissolution, jurisdictional incorporation, and legal absorption.

Sources, Precedents, Theory, and Doctrinal Foundations

The sources of law remained generally undisturbed with the transition to Indiana statehood. The state's new fundamental charter specified that "[a]ll laws and parts of laws now in force in this Territory not inconsistent with this constitution, shall continue and remain in full force and effect, until they expire or be repealed."[472] At the second legislative session, state lawmakers passed "[a]n Act declaring what Laws shall be in force," adopting verbatim, with minor exceptions, the 1807 common law reception statute.[473] The bench and bar relied on English statutory and common law. As one

[472] Indiana State Constitution (1816), art. 12, sec. 4. Also see article one, section 6, which provided "[t]hat no power of suspending the operation of the laws, shall be exercised, except by the Legislature, or its authority." Article 12 in its entirety provided for the administrative transition from territorial to state government. Sections 7 and 11 dealt specifically with the courts. At the first two legislative sessions, Governor Jonathan Jennings recommended a comprehensive revision of the laws to eradicate "obscure" sections of the code from years of statutory amendments. The General Assembly failed to pass a complete revision but instead enacted several measures, modifying the territorial laws to the extent necessary for adjusting to statehood. See Indiana, *House Journal,* 1816-1817, p. 11; and Indiana, *House Journal,* 1817-1818, p. 7, as cited by Carmony, *Indiana,* p. 96.

[473] Act of 2 January 1818, *Laws of the State of Indiana,* 2nd sess., pp. 308-309. Whereas the territorial act established the legal force of the English common and statutory law, "which are of a general nature, not local to that kingdom," the 1818 Indiana statute stipulated further that such laws were "not [to be] inconsistent with the laws of this state." The only other difference in language between the 1807 and 1818 acts was the substitution of "state" for "territory." Indiana readopted the 1818 statute in the state code revisions of 1824, 1831, 1838, and 1843. In his article on the English common law in Indiana, author Ray F. Bowman, III makes no mention of the state's first reception statute, nor subsequent adoptions until 1852 (referring only to those acts passed during the territorial period); see "English Common Law and Indiana Jurisprudence," *Indiana Law Review,* Vol. 30, No. 1 (1997): p. 414. For the text of the 1807 act, see supra, p. 118. By 1852, with the reliance on English and statutory law waning, Indiana lawmakers enacted a statute outlining the hierarchy of laws governing the state, which consisted of (1) the U.S. and state constitutions; (2) Indiana statutes; (3) Congressional Statutes; and (4) the English common and statutory law "not inconsistent with the first, second, and third specifications of this section." With the exception of this qualifying clause, the text of the English reception statute remained the same. Criminal offenses,

attorney from Jeffersonville noted in 1819, "Blackstone's *Commentaries* are considered the great medium of instruction."[474] However, the State of Indiana still consisted of multiple jurisdictions and diverse settler interests. The idea of a homogeneous legal system, especially one of English heritage, contrasted sharply with the multicultural composition of the state.[475]

Despite the 1818 reception statute and considerable reliance on English sources, the common law failed to secure unconditional acceptance among Indiana lawmakers during the first few decades of statehood. During the late 1820s and early 1830s, Indiana lawmakers expressed a significant interest in moderating and even abolishing English statutes for purposes of forming a more home-grown jurisprudence.[476] In 1828, Indiana lawyer and politician Samuel Judah derided the English common law as "founded in barbarism, nourished in ignorance and tyranny, and cherished by aristocracy and monarchy," the corpus of which had become "a vast and confused mass of sayings and opinions, and rules, scattered through a thousand heavy volumes."[477] The year prior, Governor James B. Ray declared to the General Assembly his "intention to present to a

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however, were to be "defined, and punishment therefor fixed, by statutes of this State, and not otherwise." See *Revised Statutes of the State of Indiana,* 36th sess. (1852), Vol. 1, pp. 351-352. The 1852 statute remains in effect today.

[474] James Flint, "Letters From America," in Reuben Gold Thwaites, ed., *Early Western Travels, 1748-1846,* Vol. 9, Cleveland, Ohio: A. H. Clark company, 1904, p. 195, as quoted by Michael H. Harris, "The Frontier Lawyer's Library; Southern Indiana, 1800-1850, as a Test Case," *American Journal of Legal History,* Vol. 16, No. 3 (July, 1972): p. 241.

[475] Bowman, "English Common Law," pp. 412-413.

[476] During the 1822-1823 legislative session, the General Assembly voted to condense all existing "acts and parts of acts . . . into one consistent act" without modifying their substance. The code revision was to include an abridgement of all English statutes. The General Assembly appointed Governor William Hendricks as the principal code reviser. In compiling the laws, Hendricks considered it "prudent" not to include all British statutes but to declare which of those continued in force in aid of the common law; see Carmony, *Indiana,* p. 97.

[477] *Western Sun* (Vincennes), 20 October 1827, as quoted by Carmony, *Indiana,* p. 98. For a popular literary account on the persisting critical views of the English common law in early Indiana, see "British Authorities in Indiana Courts," in O.H. Smith, *Early Indiana Trials and Sketches,* Cincinnati: Moore, Wilstach, Keys, Printers, 1858, pp. 122-123.

future Legislature, a code of laws, both *civil* and *criminal,* for its consideration." By utilizing the French Napoleonic and Louisiana Codes as model systems, future revisions would "enable the governed to know what the law is, and to have it in their power to acquire that knowledge without much trouble or expense."[478]

When dealing with issues related to American Indian law and policy in the new settler state, Indiana lawmakers faced an intellectual dilemma of source authority. During the territorial period, the Northwest Ordinance had provisionally sustained a jurisprudence of legal pluralism. Section fourteen, article four codified Indian sovereignty, regulated Indian-settler relations, and recognized Indian title to lands. Under the state's Enabling Act, Congress authorized Indiana territorial representatives to "form a constitution and state government," provided that "the same, whenever formed, shall be republican, and not repugnant to those articles of the ordinance . . . which are declared to be irrevocable between the original states, and the people and state of the territory northwest of the river Ohio." [479] In addition to these obligations, U.S.-tribal treaty provisions forced state governments to distinguish the legal personality of the Indian polity from the general settler population.

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[478] Indiana, *House Journal,* 1827-1828, pp. 30-32, 414-417, as quoted by Carmony, *Indiana,* p. 98. According to Carmony, the preparation of such a code had achieved little success two years later. Also see Ibid. p. 130, which discusses the publicity surrounding Governor Ray's use of the Indiana State Library's copy of the Louisiana Civil Code. On the influence of civil law during the early national and antebellum periods, see Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform,* Westport, Conn.: Greenwood Press, 1981, especially, pp. 69-95; Peter Stein, "The Attraction of the Civil Law in Post-Revolutionary America," *Virginia Law Review,* Vol. 52, No. 3 (April, 1966): pp. 403-434; Rodolfo Batiza, "Sources of the Field of Civil Code: The Civil Law Influences on a Common Law Code," *Tulane Law Review,* Vol. 60, No. 4 (March, 1986): pp. 799-819; and M.H. Hoeflich, "John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer," *American Journal of Legal History,* Vol. 29, No. 1 (Jan., 1985): pp. 36-77.

[479] Act of 19 April 1816, 14th Cong., 1st sess. ch. 57, *Statutes at Large*: pp. 290-291. Aside from these federal statutory requirements, several provisions of the 1816 Constitution reflected the enduring spirit of the Northwest Ordinance; these included the prohibition of slavery, public education, and religious tolerance. Conspicuously absent from the new Constitution, however, were provisions protecting the rights of American Indians. The only mention of American Indians in the state's fundamental law referred to their exemption from military service; see Indiana State Constitution (1816), art. 7, sec. 1.

Yet the question of who held the constitutional authority—whether the states or federal government—to administer relations with the Indian tribes, remained largely unanswered during the first two decades of the nineteenth century. The United States Constitution provided less than clear direction on these issues and the framers failed to articulate this tri-partite political relationship.[480] The Tenth Amendment to the U.S. Constitution, ratified in 1791, specified that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The lack of clarity set forth by the Founding Fathers and under the nation's fundamental law provided the states with broad interpretive discretion in matters of Indian law and policy.

The political character of tribal sovereignty and the U.S. government's recognition of the Indian tribes as distinct nations, led federal lawmakers to approach these questions in terms of international law.[481] By the 1820s, the states had considerable experience in exercising what they had considered to be their own sovereign prerogative in the sphere of international affairs and foreign relations. In fact, since American independence the federal government had often faced jurisdictional interference from the states in matters of international diplomacy.[482] The question of tribal sovereignty intensified this debate; the U.S. Constitution prohibited a state from being "formed or

[480] Article 1, section 8 provided that "Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article 2, section 2 provided the President with the power "by and with the Advice and Consent of the Senate, to make Treaties."
[481] See generally, James H. Lengel, "The Role of International Law in the Development of Constitutional Jurisprudence in the Supreme Court: The Marshall Court and American Indians," *American Journal of Legal History,* Vol. 43, No. 2 (April, 1999): pp. 117-132.
[482] For a discussion and legal analysis of state interference in matters of international law and policy during the post-Revolutionary period, see Mark W. Janis, *America and the Law of Nations, 1776-1939,* Oxford: Oxford University Press, 2010, pp. 31-48.

erected within the Jurisdiction of any other State," and the concept of an Indian *imperium en imperio* met with considerable resistance among state lawmakers.[483]

When state judges and legislators decided cases or debated policy involving American Indians, they often examined the history of colonialism, relying predominantly on English and Continental authorities to provide guidance on issues of sovereignty and land title.[484] State lawmakers, including those in Indiana, had access to a host of these scholarly texts, which constructed a "working law of international relations" between the states and the Indian tribes.[485] Two European philosophers, in particular, offered important lines of reasoning for nineteenth-century jurists to interpret and apply when determining the extent and character of American Indian rights. Dominican professor of theology Franciscus de Victoria argued that Indigenous peoples, while subject and inferior to their Christian, European colonizers, possessed inherent natural rights to property and political rights to self-government.[486] Swiss diplomat Emerich de Vattel, on the other hand, believed that an international legal order could only exist through cooperation and mutual obligation among and between civilized nations.[487] For Vattel, conquest was a fundamental component of international law. In the Americas, he believed that the Indigenous peoples' "unsettled habitation . . . [could not] be accounted [as a] true and legal possession."[488] Consequently, "the people of Europe . . . were

[483] U.S. Constitution, art. 4, sec. 3 provides that "New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."
[484] Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations,* Athens, Ga.: University of Georgia Press, 2002, pp. 59, 69.
[485] Ibid. p. 69.
[486] Victoria's leading work was a series of lectures entitled "On the Indians Lately Discovered," delivered in 1532 and published in 1557.
[487] Vattel's *Law of Nations* was first published in 1758.
[488] Quoted by Garrison, *Legal Ideology,* p. 71.

lawfully entitled to take possession of [the land], and settle it with colonies." Vattel's writings proved to be the most influential, particularly as American legal and political theorists sought to articulate and apply concepts of statehood and sovereignty. Much like Blackstone's *Commentaries* influenced the frontier's English common law reception, Vattel's *Law of Nations* became the standard authority for state lawmakers when considering the international dimensions of constitutional law and American Indian rights.[489]

American colonial law and policy also served as a precedential foundation to state sovereignty over Indian tribes.[490] Following the American Revolution, several of the former colonies, including Massachusetts, Connecticut, Rhode Island, and New York, continued to manage tribal relations on an individual basis. The equal footing clause of the Northwest Ordinance, incorporated into the preambles of each of the new western states' enabling acts, provided western lawmakers with the justification for exercising jurisdictional authority over American Indians.[491]

Territorial law and policy provided another basis for the western states to exercise jurisdiction over the Indians. Once Congress admitted a territory to the Union, the states

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[489] Garrison notes a 1932 citation analysis in which Vattel far outnumbered references to other European scholars in American cases between 1789 and 1820; see Garrison, *Legal Ideology,* p. 257, n. 18. On Vattel's influence on state courts, see Cynthia Cumfer, "Local Origins of National Indian Policy: Cherokee and Tennessean Ideas about Sovereignty and Nationhood, 1790-1811," *Journal of the Early Republic,* Vol. 23, No. 1 (Spring, 2003): p. 43. For an early twentieth-century analysis, see Charles G. Fenwick, "The Authority of Vattel," *American Political Science Review*, Vol. 7, No. 3 (Aug., 1913): pp. 395-410.

[490] An 1832 published compilation of American colonial and state laws relating to Indian affairs provides a suitable illustration of this assumption of jurisdictional continuity. As noted in the preface, the purpose of the work was to "assist researches on that subject, whether undertaken with a view to legislative action or speculative inquiry." See United States, *Laws of the Colonial and State Governments, Relating to Indians and Indian Affairs, From 1633 to 1831, Inclusive: With an Appendix Containing the Proceedings of the Congress of the Confederation ; and the Laws of Congress, From 1800 to 1830, On the Same Subject,* Washington: Thompson and Homans, 1832, p. iv.

[491] Rosen, "Colonization," p. 26. Section 14, article 5 of the Ordinance provided that "whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, *on an equal footing with the original States in all respects whatever* [emphasis added]."

often considered their jurisdiction to supplant federal law.[492] In Indiana, territorial government exercised jurisdiction over American Indians in several ways. A prominent

[492] Rosen, "Colonization," p. 36. For Indiana's early statehood period, the decisions of the territorial courts of contiguous jurisdictions provide an important perspective on questions of federalism, including the extent of states' rights, tribal sovereignty, and territorial government jurisdiction in American Indian law and policy. Michigan, having reached statehood in 1837 (more than twenty years after Congress admitted Indiana to the Union) serves as a unique example. In a series of cases during the 1820s and 1830s, the Michigan Territorial Courts produced some of the most revealing legal opinions on the tensions within the federal system of government. In addition to the Supreme Court of the Michigan Territory at Detroit, Congress created a federal district court in 1823 for the counties of Michilimackinac, Brown, and Crawford, which was to "have and possess concurrent jurisdiction with the said supreme court, in and over all actions arising under the acts and laws in force, or which may be enacted, for the regulating trade and intercourse with the Indians, and over all crimes and offences which shall be committed *within that part of the Indian country* lying north and west of Lake Michigan, within the territory of Michigan [emphasis added]." See Elizabeth Gaspar Brown, "Judge James Doty's Notes of Trials and Opinions: 1823-1832," *American Journal of Legal History,* Vol. 9, No. 1 (Jan., 1965): p. 21. Judge James Duane Doty was federal district judge from 1823 to 1832; his notes provide remarkable contemporary insight on the tensions of the federal system of government and delegation of authority in establishing legal relations with the Indian tribes.

For example, in the 1824 case of *U.S. v. Waushayguauny,* the question arose as to whether the defendant could be found guilty in the absence of statutory authority providing the court with criminal jurisdiction over offenses committed within Indian Territory; Ibid. p. 26. The case involved the maiming of a non-Indian, federally licensed agent trading with the Menominee Tribe. The question centered on the scope of a Michigan Territorial statute entitled "An act for the punishment of crimes," which the governor and judges had adopted in 1818 by virtue of clauses in the Northwest Ordinance. Section 8 provided that "[f]or the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature." In his notes to the decision, Judge Doty posed the idea that if the "Ordinance amount[s] to a surrender or relinquishment of the sovereignty and jurisdiction of the United States over this Territory to the Territorial government[,] the laws of the United States creating and punishing offences in the *Indian Country,* must be considered as not extending to this Territory." Rather "[t]he land, and its tenants are understood to be subject to the *exclusive* jurisdiction of the United States," which "has all the sovereignty and jurisdiction it can ever acquire—from its treaties with . . . the Indian Tribes." See Ibid. pp. 37, 38. "[E]ven on the admission of *new states* into the union," Doty contended, "the United States retains its jurisdiction over the Indians and their lands within such states." See Ibid. p. 39. Consequently, Doty was "of the opinion, that the act for the punishment of Crimes adopted by the Governor and Judges [did] not extend to the Indian country . . . [and,] There being no Statute of the United States for the punishment of the crime . . . within the Indian country, the prisoner [was] discharged from the custody of the Sheriff." (Doty apparently rescinded his judgment in 1827 after reconsidering Congress's Act of 3 March 1817; see Ibid. pp. 26, 40).

The shift in ideas of sovereignty and jurisdiction is, nevertheless, evident nearly six years following Doty's 1824 opinion in *Waushayguauny*. On 15 June 1830, Michigan's Federal District Court at Brown County charged a local grand jury with investigating the "right of the United States to extend their jurisdiction over the savage Tribes which inhabit this county, the degree of sovereignty which they are permitted to exercise, and the relations which exist between those tribes and the general and territorial governments." See Brown, "Judge James Doty's Notes of Trials and Opinions: 1823-1832," *American Journal of Legal History,* Vol. 9, No. 4 (Oct., 1965): p. 350. "It is apparent," Doty acknowledged, "that the customs of the Indians, when applied by themselves to their own people, are respected by the laws of the United States." "But what the precise boundaries are between the lands of the government and the Indian possessions within this county," he proceeded indecisively, ". . . I have not yet discovered." See Ibid. p.

example, as noted above, involved the regulation of trade and intercourse acts. With approval from President Jefferson, Governor Harrison authorized the territorial legislature in 1805 to enact laws restricting trade and the sale of liquor to Indians, as a means to supplement the "entirely ineffectual" measures of Congress.[493] After 1816, state officials often assumed continuity in jurisdiction over these matters and enforced these laws with at least some regularity. In 1832, for example, the Indiana State legislature passed "An Act to prevent the sale of Ardent spirits to the Indians."[494] The measure specified "[t]hat no person . . . shall sell, give, barter, or exchange, or dispose of in any way . . . any spirituous or intoxicating liquors, to any Indian . . . within this state." Those found guilty were subject to a fine "not less than five dollars, and not exceeding fifty dollars," and faced imprisonment "at the discretion of the jury . . . not exceeding ten days." Twelve years later, the same law, which by then had been sustained by a decision of the Supreme Court of Indiana, remained on the statute books.[495] In *State v. Jackson,* Judge Isaac Blackford held that the sale of "spirituous liquor . . . to an Indian . . . [is] contrary to the form of the statute and against the peace of this State."[496]

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353. The question of a limited federal government, on the other hand, had apparently become a settled one: "It is the opinion of the highest officers in this government, that the Indians can be declared, by the Legislature of any state within whose limits they may reside, subject to the government of that state, and bound to obey its laws." See Ibid. p. 352.

[493] As quoted by Francis Paul Prucha, *American Indian Policy in the Formative Years: The Trade and Intercourse Acts, 1790-1834,* Lincoln: University of Nebraska Press, 1962, p. 105. Congress had passed its most recent trade and intercouse act in 1802; see Act of 30 March 1802, 7th Cong., 1st sess. ch. 13, *Statutes at Large*: pp. 139-146. Section 21 of the Act provides that "the President of the United States be authorized to take such measures from time to time . . . to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes."

[494] Act of 3 February 1832, *Laws of the State of Indiana,* 16th sess., pp. 268-269.

[495] *Revised Statutes of the State of Indiana* (1843), p. 980. Intended to "protect" Indians from settler incursions, these laws not only decided (without Indian consent or input) with whom the Indians could interact, but also caused greater ethnic divisions and distinct cultural boundaries.

[496] *State v. Jackson,* 4 Blackf. 49 (1835). Judge Blackford made no reference to the Trade and Intercourse Act or any federal authority for that matter. However, Indiana lawmakers later appear to have wavered on their authority. On 23 January 1847, the General Assembly passed "A Joint Resolution relative to the sale of intoxicating liquors . . . to Indians." See Act of 23 January 1847, *General Laws of the State of Indiana,*

Until the 1820s, there was very little U.S. case law to which jurists could turn for authority in deciding issues related to American Indians. Two U.S. Supreme Court cases that relate to issues of state sovereignty deserve brief mention here. In *Fletcher v. Peck,* the Court considered in 1810 whether or not the legislative repeal of a Georgia statute, which regulated the sale of Indian lands to corporate entities, violated the contract clause of the U.S. Constitution (the Court held that it did).[497] The question also concerned whether the state or the federal government was "legally seised in fee of the soil thereof subject only to the extinguishment of Indian title thereon."[498] The Court decided that the land remained "within the state . . . and that . . . Georgia had power to grant it."[499] To settle any lingering doubts over the state's authority, Chief Justice John Marshall held that "[t]he majority of the court is of opinion that the nature of the Indian title . . . is not such as to be absolutely repugnant to seisin in fee on the part of the state."[500] In the 1815, the Supreme Court followed this holding in *Meigs v. M'Clung's Lessee* by ruling that the states possessed the right of exclusive purchase, or pre-emption, over tribal lands and could grant an interest to individuals subject to the extinguishing of Indian title.[501]

Between 1823 and 1832, the U.S. Supreme Court decided a series of cases that firmly established the doctrinal foundations of Indian land title, tribal political status, and

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31st sess., p. 163. In unequivocal deference to federal law, the resolution's preamble acknowledged that "[t]he constitution of the United States grants to Congress the express power to 'regulate commerce with the Indian tribes.'" Rather than pass statutory measures, state legislators instructed their senators and requested their representatives in Congress "to use their best exertions to have efficient laws enacted to punish all persons . . . convicted of" such crimes. The reason for this reversal in policy is unclear. Congress had passed its most recent trade and intercourse act in 1834 (see Act of 30 June 1834, 23rd Cong., 1st sess. ch. 161, *Statutes at Large*: p. 729), the year prior to Blackford's opinion in *Jackson.* The transition may have been the result of a change of political power in the state legislature.

[497] *Fletcher v. Peck,* 10 U.S. 87 (1810); also see Robert J. Miller, "The Doctrine of Discovery in American Indian Law," *Idaho Law Review,* Vol. 42, No. 1 (2005): p. 60.

[498] As quoted by Miller, "Doctrine of Discovery," p. 60.

[499] Ibid.

[500] Ibid. p. 61.

[501] Ibid. pp. 61-62.

the authority of state and federal governments in regulating these issues. In *Johnson v. M'Intosh*—a case involving conflicting claims to large tracts of land in present-day Illinois and southern Indiana—the Court introduced venerated European authorities on international law into American legal thought, endorsing notions of "discovery" and "conquest" in establishing the principle of absolute U.S. sovereignty.[502]

According to the Marshall Court, the doctrine of discovery recognized Indians' rights to occupy their lands, however, "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will . . . was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[503] In essence, the right of pre-emption—which the U.S. had inherited as the successor state to its European predecessors under principles of the law of nations—precluded all claims to Indian lands other than those of the "discovering" nation. The United States possessed "absolute title," which was "subject only to the Indian right of occupancy, and . . . the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it."[504]

Buried within this elaborate legal fiction, the primary rule established by the *Johnson* decision prohibited the private purchase of Indian lands. The legal basis for this rule extended from a history of colonial statutes, rules, and executive orders.[505] While

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[502] Garrison, *Legal Ideology,* p. 60; *Johnson v. M'Intosh,* 21 U.S. 543 (1823). For context and litigation leading to the U.S. Supreme Court case, see Eric Kades, "History and Interpretation of the Great Case of *Johnson v. M'Intosh,*" *Law and History Review,* Vol. 19, No. 1 (Spring, 2001): pp. 67-101; also see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands,* Oxford: Oxford University Press, 2005, especially pp. 1-59.
[503] *Johnson,* p. 574.
[504] *Johnson,* p. 585.
[505] Eric Kades, "The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands," *University of Pennsylvania Law Review,* Vol. 148, No. 4 (April, 2000): p. 1107; also see Kent McNeil, *Common Law Aboriginal Title,* Oxford: Oxford University Press, 1989, pp. 227-228. According to James Kent, this rule was "established by numerous compacts, treaties, laws, and ordinances,

British imperial, American colonial, and early national policies generally coincided with this argument, the Court's view that discovery "necessarily diminished" the Indians' property rights, reflected little historical accuracy.[506] Rather, Marshall's opinion signaled a paradigm shift in Anglo-American legal thought that vested superior land rights or "ultimate dominion" in the European sovereign and its successors in interest.

At the time of *Johnson,* essentially two competing theories on property rights informed the Court's decision. On the one hand, legal-political theorists such as David Hume, Thomas Hobbes, and Jeremy Bentham, viewed property as a positivistic, social institution. Because a state "enjoys an exclusive right to regulate matters pertaining to the ownership of property . . . it may determine not only the processes by which title may be acquired, retained or transferred, but also what individuals are to be permitted to enjoy

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and founded on *immemorial usage* [emphasis added]." See James Kent, *Commentaries on American Law,* 4th ed., Vol. 3, New York: E.S. Clayton, Printer, 1840, p. 381. In 1674, for example, the General Court of Colonial Virginia upheld a statute that prohibited private purchases. Because the "Peace and Safety of this Colony" depended upon the "preservation of the Indians right and propriety in Those lands which have beene Assigned them by the publique Authority," the court held that "it Should not be in the power of any Indian . . . to sell or alienate any of the lands within Said bounds, and all Such Bargaines and Sales are by the Said Act Declared voyde." See Order of 8 April 1674, in *Minutes of the Council and General Court of Colonial Virginia, 1622-1632, 1670-1676,* ed. H.R.McIlwaine, Richmond: The Colonial Press, Everett Waddey Co., 1924, pp. 370-371.

[506] See, for example, Councells Opinions Concerning Col. Nicholls Patent and Indian Purchases, dated [?] 1675, in in E.B. O'Callaghan and B. Fernow, eds., *Documents Relative to the Colonial History of New York* [hereinafter cited as *DRCHNY*], Vol. 13, Albany: Weed, Parsons and Co., 1881, pp. 486-487. This opinion held that by the "Law of Nations if any people make Discovery of any Country of Barbarians the Prince of [that] people . . . hath y^{e} Right of y^{e} Soyle & Goverm^{t} of [that] place & no people can plant there without y^{e} Consent of y^{e} Prince or of Such Persons to whom his Right is Devoulved & Conveyed the Practice of all Plantations has been according to this & no people have been Suffered to take up Land but by y^{e} Consent & Lycence of y^{e} Gov^{r} or proprietors under ye princes title." Moreover, it was "Usual Practice of all Propriet^{rs} to give their Indians Some Recompence for their Land & So Seems to Purchase it of them yet [that] is not done for want of Sufficient title from y^{e} King or Prince who hath y^{e} Right of Discovery but out of Prudence & Christian Charity."

In the months leading up to the Albany Conference in 1754, the Lords of Trade and Plantation recommended to the colonists "not make grants to any persons whatsoever of lands purchased by them of the Indians upon their own accounts," but rather "when the Indians are disposed to sell any of their lands, the purchase ought to be made in His Maj$^{ty's}$ name and at the publick charge." See Proceedings of the Congress held at Albany, by the Commissioners of the several Provinces, &c., 19th June to 11th July, 1754, in *DRCHNY,* Vol. 6, p. 855.

privileges of ownership."[507] On the other hand, natural law philosophy also influenced the Court's reasoning.[508] English and Continental authorities such as John Locke, William Blackstone, Hugo Grotius, and Emerich de Vattel identified private property rights as inviolate or fundamentally independent of state sovereignty. This perspective identifies property rights as evolving from "within a prescribed legal order, an order which derives its validity not from the ultimate legislative authority but from the very community itself."[509] To divest individuals of their natural right to property without their consent violated the basic principles of social order.[510]

According to the latter of these two theories, the American Indians would have enjoyed full ownership rights to the land they possessed at the time of European settlement. "Occupancy," William Blackstone wrote, ". . . is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that society, were common to *all mankind*."[511] However, as William Bassett points out, "there were really two natural law theories, one of property in an evolved society, the other a theory of the evolution of persons and society itself." "The appearance and protection of law," according to Bassett, "coincided historically with the stage at which primitive man settled in one place to live upon and cultivate the

[507] Charles Hyde, *International Law, Chiefly as Interpreted and Applied by the United States,* 2nd rev. ed., Boston : Little, Brown, 1947, Vol. 1, p. 650, as quoted by L. Benjamin Ederington, "Property as a Natural Institution: The Separation of Property From Sovereignty in International Law," *American University International Law Review,* Vol. 13, No. 2 (1997): p. 273.
[508] For example, in *Fletcher v. Peck*, as James Ely points out, "Marshall ambiguously cited both the Contracts Clause and the 'general principles,' which are common to our free institutions.'" See James W. Ely, Jr., "The Marshall Court and Property Rights: A Reappraisal," *John Marshall Law Review,* Vol. 33, No. 4 (Summer, 2000): p. 1048.
[509] Quoted by Ederington, "Property," p. 299.
[510] Section 14, Article 3 of the Northwest Ordinance is a perfect example of this natural law theory.
[511] William Blackstone, *Commentaries on the Laws of England,* 3rd ed., Vol. 2, Oxford: Clarendon Press, 1768, p. 258 [emphasis added].

soil."[512] The consequence of this view positioned Indians as too primitive in the stages of civilization to enjoy exclusive rights to occupancy and possession.[513]

Rooted in Enlightenment-era thought and colonial discourse, this staged analysis of history had become conventional wisdom during the eighteenth century.[514] In *Johnson,* the U.S. Supreme Court incorporated this historiographical theory into legal doctrine. While the tribes retained residual sovereignty following the European conquest of North America, they lost full ownership rights to the lands they occupied. The sovereign settler state gained "ultimate dominion" by virtue of discovery while "[c]onquest," Marshall wrote, "gives a title which the Courts of the conqueror cannot deny."[515] The *Johnson* decision—by establishing the root of all land titles in the U.S. government—virtually erased Indian title from American history.[516] Accordingly,

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[512] William W. Bassett, "The Myth of the Nomad in Property Law," *Journal of Law and Religion,* Vol. 4, No. 1 (1986): pp. 135, 144.
[513] Ibid. p. 144.
[514] "Law in particular," wrote Scottish philosopher Lord Kames in 1758, "becomes then only a rational study, when it is traced historically, from its first rudiments among savages through successive changes to its highest improvements in a civilized society." See Henry Home, Lord Kames, *Historical Law-Tracts,* Union, N.J.: Lawbook Exchange, 2000, p. v. In 1758, French lawyer and parliamentarian Antoine Yves Goguet described law's historical stages of development in his treatise on the origin of laws:

> There was a time when mankind derived their whole subsistence from the fruits which the earth produced spontaneously, from their hunting, fishing, and their flocks. This kind of life obliged them often to change their abode, consequently they had no dwelling place or settled habitations. Such was the ancient manner of living, till agriculture was introduced; in this manner several nations still live, as the Scythians, Arabians, Savages, etc. The discovery of agriculture introduced a different set of manners. Those nations who applied to that art, were obliged to fix in a certain district. They built and inhabited cities. This kind of society having need of many more arts than were necessary for those . . . ignorant of agriculture, most of course also need many more laws.

See Antoine Yves Goguet, *De L'Origine des Lois, Des Arts, et Des Sciences, et De Leurs Progrès Chez les Anciens Peuples,* Eng. trans., Edinburgh: Donaldson and Reid, 1761, as quoted by Bassett, "Myth," p. 146.
[515] *Johnson,* p. 588.
[516] Although having declined precipitously following the Royal Proclamation of 1763, which barred the private purchase of Indian lands, the process of tracing property titles to Indian ownership ceased altogether with the *Johnson* decision. Today, the only method of tracing the history of a particular section of real property to its root Indian title is to locate the relevant treaty (which include detailed legal descriptions) in which the tribe ceded the land in question. Some historical organizations have compiled data sets from land office records listing Indian lands sold at public auction; see, for example, the Indiana Commission on Public Record's "Indian Lands Noted on the LaPorte-Winamac Land Office [1833-1855]," available at http://www.in.gov/icpr/2611.htm (accessed 6 August 2011).

"Indian lands could be depopulated of their inhabitants and expropriated to a higher and more productive use without violation of any legal or ethical principle."[517]

During the first quarter of the nineteenth century, American jurists convinced themselves that the division of Indian-settler property rights had resulted out of fundamental necessity. "[T]o mix with [the Indians], and admit them to an inter-community of privileges," James Kent wrote in 1828 "was impossible under the circumstances of their relative condition." Instead of recognizing their equality under the law, "[t]he peculiar character and habits of the Indian nations, rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage."[518] In *Johnson*, Marshall had made this division quite clear:

> Humanity . . . has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.[519]

In contrast:

> the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible,

[517] Bassett, "Myth," pp. 134-135; also see Albert S. Miles, et al., "Blackstone and American Indian Law," *Newcastle Law Review,* Vol. 6, No. 1 (2002): pp. 99-100.
[518] Kent, *Commentaries,* Vol. 3, p. 310.
[519] *Johnson,* p. 589.

> because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[520]

Whereas the doctrine of acquired rights—itself a venerable international norm of natural law theory—evolved with particular emphasis on the preservation of private property, this applied only to "civilized" inhabitants.[521] Despite their customary differences, by the early nineteenth century, private property had established a common interest among the European inhabitants and the new American settlers. On the other hand, since American Indians—as "wandering nomads" too "primitive" to settle and cultivate the soil—were incapable of legally possessing land, natural law failed to protect their ownership rights by occupancy.

In 1831, the High Court undertook its first extended analysis of tribal legal status in *Cherokee Nation v. Georgia.*[522] The case centered on whether or not the Tribe constituted a "foreign state" for the Court's purposes of determining the validity of a Cherokee injunction against the State of Georgia to prevent it from imposing its laws over the Tribe's territory.[523] In a fractured decision, Marshall emphasized the diminished rights of tribal sovereignty and Indian title to real property, effectively denying the Cherokee Nation their "foreign" status:

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[520] *Johnson,* p. 590.

[521] Chief Justice John Marshall memorialized this principle of continuity as applied under the laws of state succession in the 1833 case of *U.S. v. Perchman:*

> [I]t is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.

See *U.S. v. Perchman* (32 U.S. 86-87), as quoted by D.P. O'Connell, *State Succession in Municipal Law and International Law,* Vol. 1: *Internal Relations,* Cambridge: Cambridge University Press, 1967, p. 240; also see McNeil, *Aboriginal Title,* pp. 249-250.

[522] *Cherokee Nation v. Georgia,* 30 U.S. 1. (1831).

[523] Miller, "Doctrine," p. 70.

> [I]n any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States. . . . [T]hey occupy a territory to which we assert a title independent of their will, which must take effect in point in possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[524]

In essence, although an Indian tribe remained a "distinct political society . . . capable of managing its own affairs," and whose laws and customs were to remain undisturbed for purposes of self-government, these were qualified rights, subject to the plenary power of the United States government.[525]

Marshall's dicta (and the general ambiguity of his opinion) left many issues unresolved following the *Cherokee* decision. In particular, the Court largely failed to answer the question of whether the state or the federal government held the exclusive authority to regulate intercourse with the American Indian tribes. In 1832, the Marshall Court attempted to settle the uncertainty.

In *Worcester v. Georgia,* the Court considered whether or not the state could extend its criminal laws over missionaries (including the appellant Samuel Worcester) legally residing on Cherokee lands by authority of the U.S. government and the Tribe.[526] In short, the Court held that the Cherokee Nation was a "distinct community, occupying

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[524] *Cherokee Nation,* p. 17, as quoted by Miller, "Doctrine," pp. 70-71. In contrast to this decision, see Marshall's 1828 opinion in *American Insurance Co., v. Canter,* 26 U.S. 511 (1828), concerning the acquired rights afforded to those inhabitants of a territory ceded to the United States:

> Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it, and the law, which may be denominated political, is, necessarily, changed; although that which regulates the intercourse and general conduct of individuals, remains in force, until altered by the newly created power of the state.

[525] *Cherokee Nation,* p. 16.

[526] *Worcester v. Georgia,* 31 U.S. 515 (1832). For an extended treatment of the case and its aftermath, see Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review,* Vol. 21, No. 3 (Feb., 1969): pp. 519-531.

its own territory . . . in which the laws of Georgia can have no force."[527] However, Marshall backtracked from the *Johnson* and *Cherokee* decisions:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.[528]

Two days after Marshall delivered his opinion in *Worcester,* the U.S. Supreme Court ordered Georgia to release the missionaries. Georgia failed to comply and without a written refusal from the state court, Marshall and his colleagues could not enforce their decree.[529] In effect, the ostensibly non-binding decision in *Worcester* created a legal vacuum. So far as Georgia was concerned, the doctrinal foundations had already been laid and, by the early 1830s, the idea of limited federalism in American Indian law had taken firm root among the several states. State jurisdictional authority over the Indian tribes would become the *de facto* law of the land.[530]

In sum, the sources of legal authority for many of the western states in regulating American Indians consisted of a variety of resourcefully selected international law

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[527] *Worcester,* p. 561.
[528] Ibid. pp. 542-543.
[529] Burke, "Cherokee Cases," pp. 524, 526.
[530] Garrison, *Legal Ideology,* p. 197. Georgia Governor Wilson Lumpkin considered the ruling in *Worcester* a "usurpation" of the state sovereignty and intended to confront the decision "with determined resistance." As quoted in Ibid. p. 191. Georgia's official view on the case was that "the right of the State to pass this law [prohibiting whites from residing on Cherokee lands], results as a necessary consequence to the right which she has to the soil, and jurisdiction over Cherokee lands." See Report of the Committee on the State of the Republic, Presented to the Legislature of Georgia, 15 December 1831, in George R. Gilmer, *Sketches of Some of the First Settlers of Upper Georgia, of the Cherokees, and the Author,* New York: D. Appleton and Co., 1855, p. 431.

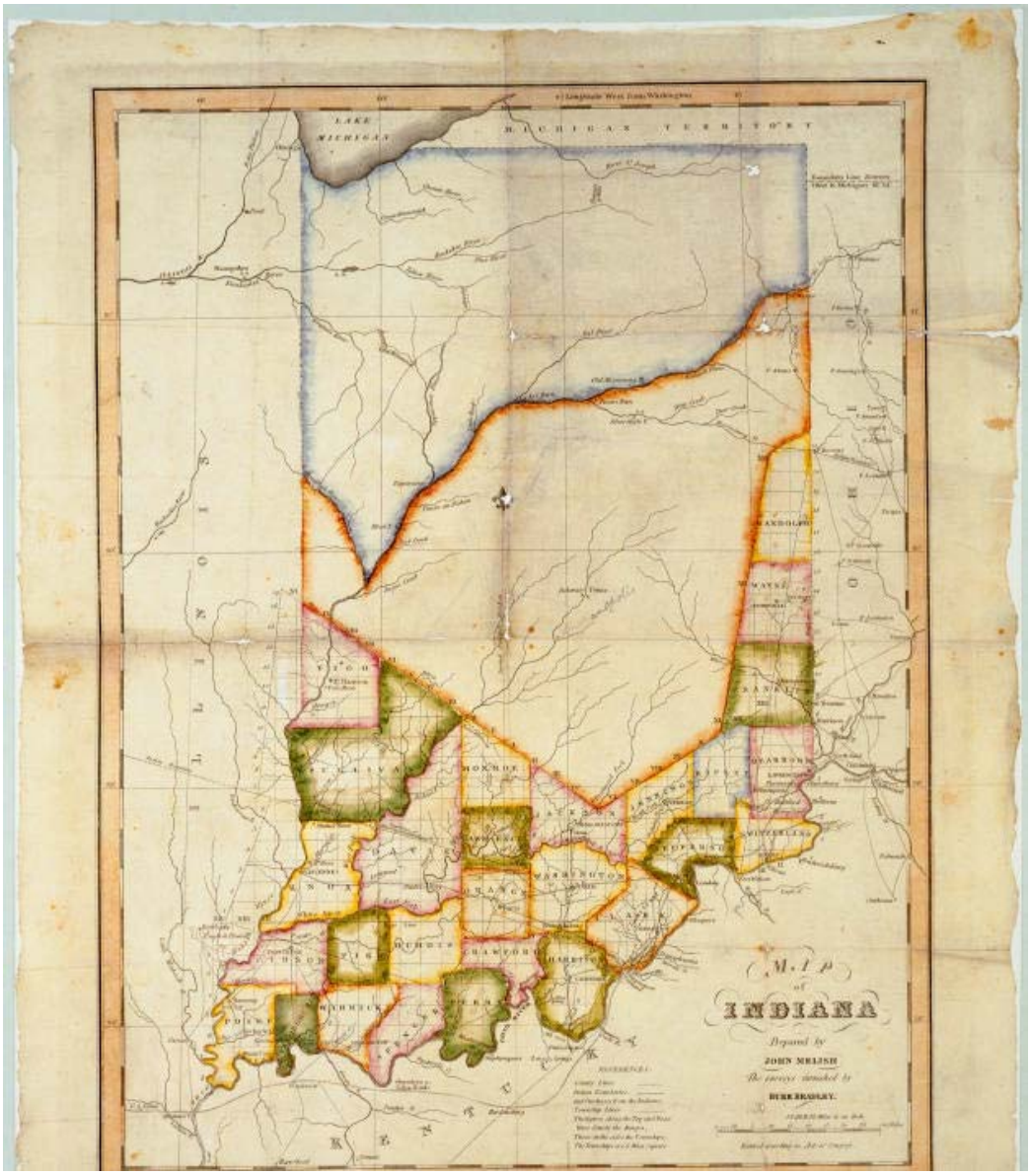
principles, treaties, colonial, territorial, and state statutes, and other texts. Paradoxically, however, while English, Continental, and American legal authorities—including Blackstone, Vattel, and Kent—provided the intellectual basis of Indian law and policy, tribal laws and customs possessed little probative force in determining American Indian status at common law. With legal precedence from colonial, territorial, and early state judicial decisions, an "equal footing" position with the original thirteen states, reconstructed doctrines of "discovery" and "pre-emption" from the Marshall Court, and little resistance from Congress, Indiana and other states carved out of the Old Northwest proceeded to regulate American Indians with their newly-defined legal authority.

Beyond *Worcester*: A Survey of American Indian Law and Policy in Indiana

During the first quarter-century of statehood, land acquisition was the principal object of Indiana policy. In 1816, a majority of the state's future land base remained in tribal possession. Following the string of treaties entered into between 1803 and 1809, the Miami retained control of most of the central region and the Potawatamies commanded the north. However, following the War of 1812, both tribes found themselves as conquered peoples behind the settler frontier and their only claim of defense against the American authorities was the title to land. Future treaty negotiations would be critical to their cultural survival and political autonomy.[531]

Despite the existing rivalry among Indiana's leading political parties, Whigs and Democrats alike maintained a general consensus when it came to issues such as funding

[531] Rafert, *Miami Indians,* p. 78. For a map of state landholdings in 1816, see Ibid. p. 67.



Map 4. *First State Map of Indiana,* by John Melish, 1817, from Indiana Historical Society Map Collection (Digital Images Collection #007).

internal improvements, expediting Indian removal, and securing liberal policies for the distribution of the public domain.[532] Under the Enabling Act of 1816, Congress retained the exclusive authority to extinguish Indian title, dispose of public lands, and manage

[532] Carmony, *Indiana*, p. 514.

settlement.[533] Local practice, however, often failed to conform. The slow pace of the federal land survey system and the tenacity with which the Indian tribes defended their land—despite growing pressure for removal—encouraged the western states to initiate policy change through both internal measures and petitions to Congress.

The first step in the process of acquiring land was to extinguish Indian title. Long used by the British and other European imperial powers as an instrument of diplomacy and means of recognizing tribal customary rights to land and self-government, the Indian treaty became, during the early nineteenth century, an effective and cost-efficient mechanism for transferring legal title. One of the first treaties concluded after Indiana statehood took place with the Miami Tribe at St. Mary's, Ohio on 6 October 1818.[534] Indiana Governor Jonathan Jennings, Michigan Territorial Governor Lewis Cass, and Indiana federal district court judge-turned-Indian agent, Benjamin Parke negotiated the terms of agreement with the Tribe for the purchase of lands covering most of central and portions of northern Indiana, totaling nearly 4.3 million acres. At the insistence of Miami chief Jean Baptiste Richardville, the Treaty created what became known as the "Miami National Reserve" (or "Big Miami Reservation"), an 875,000 acre tract of land located in north central Indiana. Additional provisions reserved six villages and twenty-four

[533] In Indiana, as with other states of the Old Northwest, the legal basis of the land system came from the territorial Ordinances of 1785 and 1787. The 1785 Land Ordinance provided for the survey of lands and specific policies for sales and distribution after Indian title had been extinguished. Section 10, article 4 of the 1787 Northwest Ordinance provided that "[t]he legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers." Moreover, "[n]o tax shall be imposed on lands the property of the United States; and, in no case, shall nonresident proprietors be taxed higher than residents."

[534] "Treaty with the Miami," 6 October 1818, in Charles Joseph Kappler, ed., *Indian Affairs: Laws and Treaties:* Vol. 2, "Treaties," Washington: Govt. Print. Office, 1903 [hereinafter Kappler, *Indian Affairs,* Vol. 2], pp. 171-174. A treaty with the Delaware Tribe was held three days prior at the same location; see Ibid. pp. 170-171.

individual plots of land for the Miami tribe.[535] That Richardville was instrumental in securing these lands—despite the efforts of his American counterparts—is evident in Parke's ensuing correspondence with Secretary of War John Calhoun. In his letter, Parke described Richardville as "avaricious, Shrewd, acquainted with the value of property, and his manners those of a well bred gentleman."[536] Although "decidedly in favor of the treaty," Richardville was, according to Parke, nevertheless "anxious to provide for himself, and his selfish views had the sanction of the chiefs of the Mississinniway Town, without whose concurrence a treaty could not be obtained."[537]

The individual allotments were a new feature of the U.S.-tribal treaty system. Used during the colonial period, the practice of granting tracts of land in fee simple had been revived by Thomas Jefferson to promote the benefits of American land tenure.[538] Others, however, were less concerned with assimilation through private property than with tribal removal and complete cession of Indian lands.[539] Benjamin Parke considered the "precedent" as having a potentially "injurious influence on future negociations."[540] Nevertheless, the system had enduring consequences on collectively-held tribal lands. As historian Stewart Rafert observes, "the individual treaty grants were the beginnings of the

[535] Ibid. p. 172; Also see Rafert, *Miami Indians,* p. 80.
[536] Letter of Benjamin Parke to Sec. of War, John Calhoun, dated 7 December 1818, Benjamin Parke Papers, 1816-1818, Indiana Historical Society.
[537] Ibid.
[538] Normally, Indian land sales required the approval of the U.S. president. In rare circumstances, however, treaty provisions exempted Indians from this process when conveying their individual reserves to private purchasers. The single exemption under the 1818 St. Mary's Treaty was the grant made to John B. Richardville; all others were subject to approval by the president.
[539] Under this view, according to Deborah Rosen, "the presence of separate Indian communities within the state impeded white settlement, migration, use of natural resources, and implementation of transportion projects." In addition, "the federal government was likely to assert authority over distinct Indian communities," thus "depriving states of control over both the Indian lands and the Indians themselves." See Rosen, *American Indians,* p. 15.
[540] Letter of Parke to Calhoun, 7 December 1818.

allotment system and the eventual breakup of Indian lands held in common across the United States."[541]

By the 1820s, Indiana lawmakers had generally agreed with Parke's sentiments. Not only had the federal government's civilization policy faded but also westward migration and large-scale speculation in tribal lands had intensified Indiana officials' efforts to clear northern portions of the state for settlement and internal improvements.[542] In 1824, the Indiana General Assembly passed a "Joint Resolution on the subject of extinguishing the Indian title to lands within the state."[543] The goal was to "facilitate the intercourse of the whole western country with the eastern and middle states; increase in a great degree, the population of the northern section of this state; tend to improve the navigation of . . . rivers in the interior, and further the grand object of effecting a canal communication between the waters of the Ohio and the lakes."

In October of 1826, Indian Agent John Tipton, along with Michigan Territorial Governor Lewis Cass and Indiana Governor James Brown Ray, commenced treaty negotiations with the Miami and Potawatamie tribes to clear additional portions of land in northern Indiana for construction of the Michigan Road and Wabash and Erie Canal.[544]

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[541] Rafert, *Miami Indians,* p. 81. Culminating in the 1887 General Allotment (or "Dawes") Act, the allotment system attempted to acculturate American Indians through private property indoctrination by dividing tribal lands into individual parcels. See Act of 8 Feb. 1887, 49th Cong., 2nd sess., ch. 119, *Statutes at Large*: pp. 388-391.

[542] Rafert, *Miami Indians,* p. 91. For a detailed discussion of the federal government's "civilization" policy and programs in Indiana, see Joseph A. Parsons, Jr., "Civilizing the Indians of the Old Northwest, 1800-1810," *Indiana Magazine of History,* Vol. 56, No. 3 (Sept., 1960): pp. 195-216; also see Reginald Horsman, "American Indian Policy in the Old Northwest, 1783-1812," *William and Mary Quarterly,* Vol. 18, No. 1 (Jan., 1961): pp. 35-53.

[543] Act of 26 January 1824, *Special Acts of the State of Indiana,* 8th sess., p. 112.

[544] See generally Juanita Hunter, "The Indians and the Michigan Road," *Indiana Magazine of History,* Vol. 83, No. 3 (Sept., 1987): pp. 244-266. For respective treaties, see Kappler, *Indian Affairs,* Vol. 2, pp. 273-277 (Potawatamie), 278-281 (Miami).

Neither tribe conceded readily. For the Miami, Chief Le Gros addressed the three commissioners:

> The land we have we wish to keep to live on—it was given to us by the Great Spirit for the means of our subsistence. . . . It was told us by our forefathers, that we should stay on the land which the Great Spirit gave us, from generation to generation, and not leave it.[545]

However, in realizing that concessions had to be made, both tribes made demands of their own. In exchange for approximately 925,000 acres of land (less than a quarter of the land ceded under the 1818 Treaty of St. Mary's), Tipton and his colleagues agreed, on behalf of the U.S. Government, to immediately distribute over thirty thousand dollars worth of goods and wares, assume Miami and Potawatamie trading debts (totaling nearly seventeen thousand dollars), increase tribal annuities payments, and donate large herds of cattle and livestock.[546]

Although Tipton achieved only modest concessions, the treaties created numerous individual grants (eighty-six to the Potawatamie and twenty to the Miami), which fragmented tribal lands into small village reserves. The results led to greater tribal dependence on trade in place of traditional subsistence hunting and collective farming. Falling deeper into debt, many allottees eventually sold their reserves to satisfy local creditor-traders.[547]

With a significant portion of Indiana's Indian title extinguished, the Treaties of 1818 and 1826 set the stage for removal. Between 1829 and 1831, the Indiana legislature

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[545] As quoted in Raftert, *Miami Indians,* p. 92.
[546] In addition, the commissioners agreed to provide the Potawatamie with a grist mill, several laborers to work for the tribe, and additional funding for the education of Potawatamie children at the Choctaw Academy. The Miami were to receive an additional forty thousand dollars worth of goods and wares over the next two years and a house for each of the nine chiefs valued at six hundred dollars each; see Paul Wallace Gates, "Introduction," in Armstrong Robertson and Dorothy Riker, eds., *The John Tipton Papers* [hereinafter cited as *Tipton Papers*], Vol. 1, Indianapolis: Indiana Historical Bureau, 1942, pp. 14-16; and Rafert, *Miami Indians,* pp. 92-93.
[547] Ibid. pp. 94-95.

passed a flurry of Indian removal legislation, petitioning Congress to extinguish remaining Miami and Pottawatomie land titles in the northern part of the state.[548] For example, on 29 January 1830, the General Assembly passed a joint resolution for purposes of "extinguishing the Indian title to lands within this state, and of removing the Indians beyond the Mississippi."[549] In order "to avert from the Potawatamies and Miamies, the fate which has attended many of their kindred tribes," the memorial urged "the adoption of measures, to induce the Indians . . . to abandon . . . their narrow forests . . . and to emigrate to the country . . . which is so much better adapted to their wants and habits."[550] In "regard for the national reputation" and out of "humane and philanthropic consideration," state legislators justified their arguments for removing the Indians who possessed "neither the knowledge nor inclination to change their native customs."[551]

Anxious to move forward with a "general system of internal improvement," the General Assembly petitioned Congress again on 31 December 1830, requesting "the passage of an act . . . authorizing the total extinguishment of the Indian title to lands within the jurisdiction of the state."[552] With little success following then recent treaty negotiations, state legislators exhibited a greater willingness to employ manipulative rhetoric in their resolution. According to the Memorial, the tribal occupied lands were "of the very best soil of the state . . . which from general report they [the tribes] *are anxious to sell*."[553] Three years later, the General Assembly petitioned Congress again

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[548] Ibid. p. 95; Also see Bert Anson, *The Miami Indians,* Norman: University of Oklahoma Press, 1970, p. 274. Not until 1832, however, did Congress make an appropriation "for the purpose of holding Indian treaties, and . . . extinguishing Indian title, within the state of Indiana," Illinois, and the Michigan Territory; see Act of 9 July 1832, 22nd Cong., 1st Sess., ch. 175, *Statutes at Large,* p. 564.
[549] Act of 29 January 1830, *Laws of the State of Indiana,* 14th sess., p. 176.
[550] Ibid. p. 177.
[551] Ibid.
[552] Act of 31 December 1830, *Laws of the State of Indiana,* 15th sess., p. 181.
[553] Ibid; emphasis added.

following a series of unsuccessful treaty negotiations with the Miami Tribe. Faced with increasing pressure in the construction of the Wabash and Erie Canal—portions of which were to pass "through the lands belonging to said nation"—the memorialists hoped "to induce such an appropriation . . . deem[ed] expedient . . . to the attainment of so desirable an object."[554]

The General Assembly petitioned Congress yet again with a joint memorial passed on 6 January 1834, praying "that the title of the Miami tribe of Indians to land within the . . . state should be speedily extinguished."[555] Hoping to permanently resolve treaty negotiations with the Tribe, which the "commissioners of the general government [had] failed to treat," the memorialists requested "that a private treaty . . . could be made with less expense by giving the agent of the Wabash agency, or some other competent individual, power to treat with said tribe of Indians at any time he may chose, for land or any part thereof."[556] There is no indication that Congress approved these terms; however, in the Miami and Potawatamie treaties of 1834, local merchants and Indian traders such as Allen Hamilton and Cyrus Taber served as "commissioners" or sub-agents to assist with the negotiations.[557]

The process of Indian removal in Indiana was not a unilateral action by Congress, but rather—as the above petitions illustrate—a direct initiative of the state. Over the course of the following decade, Indiana expedited the extinguishment of Indian title to a majority of tribal lands in the state. To clear lands for internal improvements and to accommodate the rush of American settlers, a series of treaties from 1834 to 1840

[554] Act of 18 January 1833, *Laws of the State of Indiana,* 17th sess., p. 244.
[555] Act of 6 January 1834, *Laws of the State of Indiana,* 18th sess., p. 375.
[556] Ibid.
[557] See "Treaty with the Miami," 23 October 1834 and "Treaty with the Potawatamie," 4 December 1834, in Kappler, *Indian Affairs,* Vol. 2, pp. 425-428, 428-429.

accelerated the path to Indian removal. The results of the 1838 Treaty with the Miami had particular consequences on the legal status of the tribe.[558] Although reserving large portions of the Great Miami Reserve, the Treaty created forty-three individual land grants, further fragmenting tribal landholdings against the rising tide of encroaching settlers.[559]

Although most conveyances remained contingent upon presidential consent, the approval process became an administrative technicality in the grand scheme of things. Indian agents simply made favorable recommendations in their reports to the president. In effect, many of these transactions circumvented the *M'Intosh* rule barring the private purchase of Indian lands. In contrast to the federal statutory methods of land acquisition and disposal—which included congressional acquisition by treaty cession, survey, and sale at public auction—individual allotments were alienable in fee simple, and thousands of acres of land never became part of the public domain in Indiana.[560]

Numerous instances of private conveyance illustrate the efficiency with which tribal reserves passed into the hands of Indian agents, local merchants, and land speculators in Indiana. Shortly after the Miami Treaty of 1826, John Tipton persuaded

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[558] Treaty provisions exempted the tribe from removal; however, the Miami conceded to sending a delegation of chiefs to the Kansas Territory to explore potential new reservations, which the United States "stipulate[d] to . . . guarranty to them forever . . . *when the said tribe may be disposed to emigrate from their present country."* Article 6 of the treaty provided that no "person or persons other than the members of said Miami tribe, who may by sufferance live on the land of, or intermarry in, said tribe, have any right to the land or any interest in the annuities of said tribe, until such person or persons shall have been by general council adopted into their tribe." To prevent outsiders from interfering with or subverting tribal affairs, regulating membership was critical to Miami self-government. Paradoxically, however, these measures forced the Miamis to create deeper ethnic divisions by excluding many of the French and métis with whom the tribe had maintained strong ties in the past. See "Treaty with the Miami," 6 November 1838, in Kappler, *Indian Affairs,* Vol. 2, p. 521.

[559] For individual tribal land grants, see Rafert, *Miami Indians,* p. 97.

[560] Paul Wallace Gates, *History of Public Land Law Development,* Holmes Beach, Fla.: Gaunt, 1987, p. 452. Gates indicates that "[i]n the two states of Indiana and Alabama alone 550,000 acres were thus patented." See Gates, "Introduction," in *Tipton Papers*, Vol. 1, pp. 17-18, 43-44. See, for example, the numerous deeds and related legal documents in the Allen Hamilton Papers, Indiana Historical Society.

Chief Le Gros to leave him more than twenty-five hundred acres of land in his last will and testament.[561] On 17 September 1828, Mary St. Coub, "a part Pottawattimie Indian," and her husband Louis, executed a deed to Allen Hamilton for "one quarter section of land" located in Allen County "in consideration of the sum of Two hundred dollars."[562] Two weeks later, Hamilton conveyed the same tract of land to Hugh Hannah "for and in consideration of the sum of Three hundred dollars."[563] On 18 February 1835, Sheaupo Truckey, "a Potowatomie Indian woman," conveyed her tract of land to Cyrus Tabor for the "sum of eighteen hundred dollars."[564] Occasionally, for reasons of their own, the Indians were instrumental in these transactions. Identified as an "authorized interpreter," John B. Richardville translated and witnessed a deed of conveyance from Met-chin-e-qua to Hamilton and Tabor on 16 March 1838.[565] At the same time, Hamilton and Tipton were equally keen on securing Richardville's reserves. On 21 November 1838, Richardville, in his capacity as "principle chief of the Miami Nation," quitclaimed six sections of land to Allen Hamilton. Each parcel of land had been "granted by the provisions of the Treaty made between the United States and the Miami Nation" in 1834.[566]

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[561] Apparently, when the bequest became known upon Le Gros's death, public criticism compelled Tipton to compensate the Chief's heirs four thousand dollars for the land he had received; see *Tipton Papers,* Vol. 1, p. 19.
[562] Mary and Louis St. Coub to Allen Hamilton, Warranty Deed dated 17 September 1828, Allen Hamilton Papers, Indiana Historical Society. According to the deed, the President had approved the sale on 3 April 1828. For the original grant to Mary St. Coub, see "Treaty with the Pottawatomi," 16 October 1826, Kappler, *Indian Affairs,* Vol. 2, p. 277.
[563] Allen Hamilton to Hugh Hannah, Quitclaim Deed dated 10 October 1828, Allen Hamilton Papers.
[564] Sheaupo Truckey to Cyrus Tabor, Deed dated 18 February 1835, Allen Hamilton Papers. For the original grant to Truckey, see "Treaty with the Pottawatomi," 27 October 1832, Kappler, *Indian Affairs,* Vol. 2, p. 373.
[565] Met-chin-e-qua to Allen Hamilton and Cyrus Tabor, Warranty Deed dated 16 March 1838, Allen Hamilton Papers, Indiana Historical Society.
[566] John B. Richardville to Allen Hamilton, Quitclaim Deed dated 21 November 1838, Allen Hamilton Papers, Indiana Historical Society; also see *Tipton Papers,* Vol.1, pp. 43-44.

Despite the frequency with which these questionable transactions occurred, they had not gone unnoticed. By 1835, accusations of fraud and corruption directed at the Indian agency had spread to such an extent that the U.S. House of Representatives responded. On 12 January, Representative Jonathan McCarty of Indiana introduced a resolution calling for the investigation of "all agents and sub-agents . . . connected with . . . the survey, locations, sales, and transfers of all Indian reserves of lands since the year 1825."[567] Speculation in tribal lands had apparently become so widespread, rumors circulated that "a stock company had been formed for the purchase of Indian reserves, consisting of a capital of $100,000 in shares . . . and that there was one individual who had subscribed $5,000 . . . in services, by exercising his influence, and certifying that the transactions were fair and honorable."[568] Although McCarty refused to implicate specific agents by name or agencies by location, his state colleague, Representative Amos Lane, was "led to suppose . . . that the frauds which rumor had thrown upon the public, had taken place in Indiana."[569] Although several representatives had initially expressed concern over the expense of such an investigation, the House adopted a Resolution on 2 February 1835.[570] Despite the Resolution's passage, apparently no report materialized addressing the problems the House had intended to remedy. In fact, the systematic

[567] Because these transactions required presidential approval, Rep. McCarty was careful not "to cast any imputation upon the Executive." See *Congressional Globe*, 23rd Congress, 2nd sess., p. 155.
[568] Ibid.
[569] Ibid. p. 156. Without referring directly to John Tipton, McCarty asserted that he had "made no charge against the agent in Indiana." See Ibid. p. 187. The Representative was, however, more direct when it came to protecting the private property interests of his State's constituency: "[A] good many reserves were made by the [Miami] treaty of 1826, in Indiana, to the minor Indian children of a particular school. Those children have mostly gone from the country, and it is believed that their lands, or many of them, have been transferred; if so, the titles may be questioned, and innocent purchasers may suffer." See Ibid. p. 186. The "particular school" in reference was the Carey Mission School of St. Joseph County; see *Tipton Papers,* Vol.1, p. 18.
[570] For the full text of the Resolution as adopted and corresponding votes, see United States, *House Journal,* 23rd Cong., 2nd Sess., pp. 312-313.

conveyance of Indian reserve grants continued throughout most of the nineteenth century.[571]

Regardless of the means by which Indiana secured title, the overwhelming success in converting tribal lands to private property had given state lawmakers the confidence needed to assert complete jurisdiction over the Indians.[572] Accordingly, the Indiana General Assembly had shifted its attention to regulating those Americans Indians that remained within state borders. During the early stages of the national removal crisis, Indiana politicians from both sides of the ideological aisle weighed in on the issue. The General Assembly's spirited debate reflected the divisive nature of contemporary Indian affairs.

On Saturday, 26 December 1829, Senator Stephen Stevens, Chairman of the Committee of the Judiciary, reported to the General Assembly on "the jurisdiction . . . and right of the state to extend over those tribes the operation of her laws."[573] Although acknowledging "the subject matter of inquiry" to be a "vexatious one," Stevens regarded

[571] By the late 1880s, the validity of title to several of these tracts of land was still under question. In a letter dated 12 June 1888, Peru, Indiana attorney W.W. Sullivan asked A.H. Hamilton (Allen Hamilton's son) for the original U.S. patent to Francis Godfroy for a particular reserve of land, which would have been "delivered to Allen Hamilton [as Godfroy's] Executor." "The Reserve is now owned by many persons," Sullivan wrote, and "it is desired for the purpose of recording to perfect the chain of title to the several tracts." Three days later, A.H. Hamilton replied that he could "find no such patent." Obviously annoyed with the request, Hamilton wrote that "[e]very transaction of his [father's] was authorized by the 'Court,'" and "[w]hoever holds under those titles can have no better title," for "time has remedied any defects." See Allen Hamilton Papers, Indiana Historical Society.

[572] In 1838, after several years of negotiations and periodic land cessions by treaty, Indian agent John Tipton led the Pottawatomie removal from Indiana, leaving the Miami the only remaining tribe interfering with settler expansion; see Rafert, *Miami Indians,* pp. 96, 97. For the series of treaties with the Pottawatomie Tribe between 1832 and 1836, see Kappler, *Indian Affairs,* Vol. 2, pp. 353-355, 367-370, 372-375, 402-415, 428-431, 450, 457-459, 462-463, 470-471.

[573] Senate Proceedings, *Indiana Journal,* 30 December 1829, Iss. 345, col. d. For a biographical sketch of Stevens, see Rebecca A. Shepard, et al., eds., *A Biographical Directory of the Indiana General Assembly,* Vol. 1: *1816-1899,* Indianapolis: Select Committee on the Centennial History of the Indiana General Assembly; Indiana Historical Bureau, 1980, pp. 371-372.

"the rights of the state, as a free and independent sovereignty," to have formed "no well-founded difference of opinion."[574] The state, according to Stevens, "has an absolute right to supreme command, and to direct and control what ought to be done." By invoking the "laws of nations, rights of sovereignty, sound policy, and principles of humanity," Stevens supported the Committee's position that "the laws of the state should be the rule of civil conduct . . . and that all manners of persons resident therein should be subject thereto."[575] However, while holding these "general principles" to be "incontrovertible," Stevens cautioned their "application . . . to the Indian tribes." "The measures adopted should be mild," he argued, "and progressive in their operation—that those Indians should first have due notice, [and] . . . unless they remove without our limits . . . the operation of our laws will be extended over them."[576]

Despite this conjecture of consensus, Stevens's report failed to solicit the undivided endorsement of the Indiana General Assembly. The following month, Senator William Graham questioned the "right of the state to extend her laws over other nations, who have from time immemorial lived on their own soil; [and] who have been governed by their own laws and the customs of their fathers."[577] According to Graham, the Indian tribes "were nations who were strong and powerful, before the state of Indiana, or Great Confederation, had an existence." He refuted such pretentious claims that "the government of the United States have guaranteed to the state of Indiana full sovereignty over everything within her acknowledged limits." In attempting to distance his state from the germ of anti-federalist sentiment, Graham observed that "the new and popular

[574] Ibid.
[575] Ibid.
[576] Ibid.
[577] Debate, *Indiana Journal*, 27 January 1830, Iss. 353, col. a. For a biographical sketch of Graham, see Shepard, *Biographical Directory*, p. 150.

doctrine of state rights . . . [being] the doctrine of a southern atmosphere . . . seems to be contagious, so much so, that we have it from the Presidential chair."[578]

In an attempt to discredit Stevens's report, Graham documented the continuity of tribal rights to self-government under the laws of state succession and the binding force of treaties. Invoking international legal conventions, Graham held it to be "universally admitted that no individual, body corporate, or sovereignty can transfer to another a better or [more certain] law than he, or they possessed at the time of making such transfer."[579] By virtue of legal inheritance, therefore, "the right which the government of the United States transferred to Indiana is precisely the right which she had received from the Crown of Great Britain," a colonial power who had "always considered the Indians as nations, who had rights in common with other nations of the earth." Moreover, "when the colonies declared themselves independent of Great Britain, they assumed no other or greater right to the soil or sovereignty of our country, than that which they had received from the mother country." Under the law of nations, "the [Paris Peace] treaty of 1783, was only intended to cede to the United States, that nominal sovereignty which enabled that government to resist the encroachment of European powers." In turn, "the United States have, since the formation of the government, considered the Indian tribes in a certain sense as independent nations."[580]

To illustrate his point, Graham pointed to the federal government's "right to make treaties, [which] has by all civilized nations been considered one of the strongest evidences of sovereignty." Otherwise, it would have been "a perfect absurdity for this . . . government to appoint a minister plenipotentiary to treat with their own subjects . . .

[578] Ibid.
[579] Ibid.
[580] Ibid.

over whom they could [have] extend[ed] their laws at pleasure." On the qualified right to sovereignty, Indiana "received her existence from the federal compact, and congress guaranteed to her certain limits." Within that settler polity, concomitantly, "[t]here were nations of Indians whose rights had been guaranteed to them by treaty with that same government." The state, therefore, had "no power under the federal compact, to extinguish Indian title, either to soil or to sovereignty, without being guilty of an act of rebellion against the general government."[581]

Graham's views failed to secure a foothold in Indiana political ideology. In 1839, state lawmakers devised an elaborate colonization scheme for the Miami tribe. That year, the General Assembly passed "An Act attaching certain territory to the counties therein, and for other purposes."[582] This inconspicuously titled measure was an exercise in complete territorial sovereignty over federally recognized tribal lands. The act extended certain portions of Carroll, Cass, Miami, Grant, and Hamilton Counties to encompass the boundaries of the Great Miami Indian reservation "for judicial purposes."[583] Each county, to which the reservation or "territory" was to be "temporarily attached," could "exercise all the rights, privileges and jurisdictions . . . according to law in other cases." Further provisions set forth the means to dissolve the existing tribal entity and incorporate the "territory" into Indiana civil government: "When the population . . . will warrant, [the territory] shall form . . . townships and order the elections of justices of the peace, and other . . . officers." Moreover, the inhabitants of the territory were to

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[581] Ibid. col. c.
[582] Act of 16 February 1839, *Laws of a General Nature,* 23rd sess., pp. 75-76. In 1829, the State of Georgia passed a similar measure annexing Cherokee lands; see Gerard N. Magliocca, "The Cherokee Removal and the Fourteenth Amendment," *Duke Law Journal,* Vol. 53, No. 3 (Dec., 2003): p. 885.
[583] Act of 16 February 1839, pp. 75-76. For details on the land survey of the Miami National Reserve between 1838 and 1839, see George E. Wilson, *Early Indiana Trails and Surveys,* Indianapolis: Indiana Historical Society, 1986, pp. 85-88.

"exercise all the rights and privileges that other citizens of said counties [were] entitled to." Upon reaching this transitional phase of government, the territory was to "form and constitute a separate county to be known and designated by the name of Richardville," provided, of course, "at such time as the Indian title shall be extinguished." Nevertheless, prior to consolidation, "[t]he circuit courts" were still permitted to exercise "jurisdiction and authority to try all offences committed within said territory in as full and ample a manner as if the Indian title to the same was extinguished." Minor jurisdictional stipulations provided "that Indians residing within said territory [were] not [to] be subject to punishment for violations of the criminal laws . . . except in cases of grand and petit larceny . . . committed upon the property of citizens of this state." In these instances, the accused Indian was to be "deemed and taken to be guilty . . . upon conviction . . . by a competent jury."[584]

The justification with which Indiana lawmakers passed this internal colonization act clearly rested with those principles set forth by *M'Intosh*. By extending jurisdiction over tribal lands prior to extinguishing Indian title, Indiana lawmakers voiced their acceptance of the discovery doctrine and superior right of pre-emption powers. By process of territorial consolidation, Indiana could effectively grant lands to individual citizens "subject only to the Indian right of occupancy." So long as Indiana prohibited the private purchase of Indian lands, Congress interfered little with these measures.

Following this Act and under the increasing pressure of settler encroachment, the Miamis signed a treaty in 1840, relinquishing most of their remaining land within the Miami National Reserve.[585] Chief Richardville and his "business advisor," Allen

[584] Act of 16 February 1839, p. 76.
[585] "Treaty with the Miami," 28 November 1840, in Kappler, *Indian Affairs,* Vol. 2, pp. 531-534.

Hamilton, negotiated and drafted the terms of the treaty. Article one stipulated that the "Miami tribe of Indians, do hereby cede to the United States all that tract of land . . . commonly known as 'the residue of the Big Reserve[,]' [b]eing all of their remaining lands in Indiana."[586] Despite this language, several individual reserves and the tribally-held Meshingomesia reserve remained in Miami possession.[587] "The treaty jargon," Rafert suggests, "simply meant that the tribal government was to be moved west with a portion of the Miami people, and any lands remaining in Indiana, even if held in common, were supposedly no longer 'tribal.'"[588] Although a majority of the Tribe accepted removal, the treaty provided exemptions to the families of Francis Godfroy and Meshingomesia and granted individual tracts to Richardville and his son-in-law, Francis Lafontaine.[589] However, with the seat of Miami government situated in the Kansas Territory, the legal status of the remaining Indiana Miamis was tenuous and uncertain. Soon after removal, the federal Indian agency left its post at Fort Wayne and Indiana lawmakers expected those individual Miamis who remained to incorporate themselves into the general population.[590]

Although state and federal officials contended that Indian title had been extinguished in Indiana, in 1846 Miami landholdings still amounted to nearly fifteen thousand acres.[591] In addition, many individuals from the Tribe vigorously exercised

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[586] Ibid. p. 531.
[587] Ibid. p. 532.
[588] Rafert, *Miami Indians,* p. 99.
[589] See treaty articles 5, 7, and 10 in Kappler, *Indian Affairs,* Vol. 2, pp. 532, 533.
[590] Rafert, *Miami Indians,* p. 116.
[591] Ibid. p. 118. That same year, the U.S. House Committee on Private Land Claims reported a bill to Congress, which authorized a special board to adjudicate the nearly five thousand pending pre-emption claims, many of which involved conflicting settler interests. Congress enacted the bill, which authorized the Commissioner of the General Land Office "to determine, upon principles of equity and justice, . . . all [pending] cases of suspended entries . . . and to adjudge in what cases patents shall issue upon the same." See Act of 3 August 1846, 29th Cong., 1st sess., ch. 78, *Statutes at Large*: pp. 51-52. Several petitions,

their legal rights under existing federal treaties and state laws to protect their land. For example, pursuant to the terms of the 1840 Treaty, Francis Godfroy left twenty-five hundred acres of land to his family, stipulating that it was "to remain unsold until the youngest of said children shall arrive at the age of twenty-one years."[592] Ozahshinquah, a Miami woman, owned a small reserve in addition to over eight hundred acres of land she had inherited from her husband Tahconah. Along a portion of the Mississinewa River, Meshingomesia and other family members owned in common a ten-square-mile reserve. John B. Richardville had bequeathed over 2,400 acres of land to his family in portions of Allen and Huntington Counties.[593] Inevitably, however, the process by which the Indians were to "exercise all the rights and privileges [of] other citizens" under the 1839 Act, subjected them to further legal reforms once a majority of tribal lands had been ceded and the state considered its jurisdiction to extend in full.

Taxation of tribal lands previously exempt initiated the state's new regulatory scheme. On 15 February 1841, the Indiana General Assembly approved "An Act for the relief of owners of Indian reservations."[594] The measure made it "lawful for any of the owners of such reservations, at any time before the first day of December 1841, to pay to the collector of the state tax for the year 1841." Only a few months prior to this Act's passage, the state supreme court had decided a case concerning the taxation of Indian

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however, involved tracts of Indian lands "for which the treaty of cession had not been ratified at the time the pre-emption act was adopted." Congress extended the Act until 3 August 1849 and revived it, again, on 3 March 1853 for a period of ten years. See Gates, *Public Land Law,* pp. 241, 242.

[592] Kappler, *Indian Affairs,* Vol. 2, p. 532.

[593] Rafert, *Miami Indians,* p. 118.

[594] Act of 15 February 1841, *General Laws of the State of Indiana,* 25th sess., pp. 160-161. Indiana had passed at least two tax laws affecting tribal lands prior to this measure; see Act of 1 February 1834, *Laws of the State of Indiana,* 18th sess., p. 194, providing that taxes "annually be charged on all Michigan road lands which . . . have been reserved by any Indian treaty." An 1841 "Act pointing out the mode of Levying Taxes," subjected "all lands and town lots" to state taxation, including "all individual reserves of land, reserved to or for any individual, Indian or white, by any treaty between the United States and any Indian tribe or nation." See Act of 12 February 1841, *General Laws of the State of Indiana,* 25th sess., pp. 34, 35.

reserves. In *Frederickson v. Fowler*, the issue before the Court was "whether the provision in the ordinance of 1816, exempting certain lands from taxes for five years from the time of sale" applied to a certain tract of land under an 1832 Pottawatomie Treaty with the United States.[595] The tract of land was an individual grant to Tribal member John B. Chadana (or Chadanais), which he had in turn sold to Frederickson, the plaintiff. In his opinion, Judge Isaac Blackford held that "the land was subject to taxes" and that "[t]he exemption in the ordinance only applie[d] to lands sold by the *United States,*" which, according to the Court, was not the case under consideration. Rather, the sale concerned a parcel of land used in the construction of the Michigan Road, "which," Blackford ruled, "expressly require[d] the taxing of such reserved lands" by statute.[596]

Seven years later, in *Hanna v. Board of Comm'rs of Allen County*, the Court held that "[t]he power of taxation is . . . an incident of sovereignty"[597] "In the several states of the Union," the opinion reads, "it extends to all subjects over which their sovereign power extends, and the sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission." Asserting absolute jurisdiction and superiority of title, the Court further contended that this power existed regardless of "the

[595] *Frederickson v. Fowler*, 5 Blackf. 409 (1840). The "ordinance of 1816" refers to Indiana's Enabling Act. Section 6, part 5 of the Act stipulated "that every and each tract of land sold by the United States, from and after the first day of December next, shall be and remain exempt from any tax, laid by order or under any authority of the state, whether for state, county or township, or any other purpose whatever, for the term of five years, from and after the day of sale." See Act of 19 April 1816, 14th Cong., 1st sess. ch. 57, *Statutes at Large*: p. 290. For the Pottawatomie Treaty of 27 October 1832, see Kappler, *Indian Affairs,* Vol. 2, pp. 372-375.

[596] *Frederickson,* p. 409; See Act of 1 February 1834, *Laws of the State of Indiana,* 18th sess., p. 194, which levied taxes "on all Michigan road lands which have heretofore been sold, or which may hereafter be sold by the state of Indiana, and upon all lands within the limits of this state, which have heretofore been reserved by any Indian treaty to any individual or individuals."

[597] *Hanna v. Board of Comm'rs of Allen County,* 8 Blackf. 352 (1847).

different kinds of property to which it . . . applied, or the tenure under which such property is held."[598]

In 1841, Indiana passed "An Act for the relief of the Miami and other Indians."[599] First, the measure repealed "all laws . . . which authorize[d] the issue and service of the writ of *capias ad respondendum,* so far as the Miami and other nations of Indians residing in the state . . . [were] concerned." Second, the Act stipulated that "[i]n all cases . . . when suits may be commenced against any Indian . . . either in the circuit court, or before any justice of the peace, no other writ or process shall issue, except a common summons, and no bail shall be required." Despite the terms of these legally enabling acts, the state certainly did not intend for these measures to be an equitable means of procedure for the Indians. In "cases where judgment shall be obtained" the Act abolished all writs "except a common *fieri facias,*" a court order that directed the sheriff to seize and sell the defendant's property in order to satisfy the costs of judgment. While the Act failed to establish whether or not the execution of this writ included the seizure of land or real property (rather than personal property alone), Indiana statutory and common law had generally decided that it did.[600] In light of these provisions, sections four and five of the 1841 Act created distinct racial and ethnic boundaries. The process of "common summons" was to be "extended to all persons of Indian descent, who are recognized as

[598] Although this case applied to lands already ceded by the Tribe, it laid the foundations for the taxation of individual Indian reserves. As a direct assertion of state jurisdiction over tribal lands and a challenge to the Tribe's federally recognized status, Indiana taxed Miami lands for more than two decades following the Court's decision in *Hanna*. Not until 1871 would the Supreme Court of Indiana reverse these practices in *Meshingomesia v. State*, 36 Ind. 310 (1871).
[599] Act of 3 February 1841, *General Laws of the State of Indiana,* 25th sess., p. 134.
[600] In *Frakes v. Brown,* Judge Blackford held that "[t]he writ denominated by us a fieri facias is an execution expressly commanding the sheriff to make the money of the goods and chattels, lands and tenements, of the debtor." See 2 Blackf. 295 (1830). Also see Act of 30 January 1824, Revised Laws of Indiana, 8th sess., pp. 188-196 ("An Act subjecting Real and Personal Estate to Execution"). Also see Kent, *Commentaries,* p. 430.

members of any tribe residing in the state of Indiana, down to those having one-eighth Indian blood." In turn, "[n]o white man or negro" was to "have the benefit of any of the legal remedies for the collection of debts . . . contracted by an Indian . . . and all contracts hereafter made" were to be "null and void."[601]

State courts often supported legislation that regulated Indian land sales and contracts. In 1856, the Indiana Supreme Court upheld these statutory proscriptions as they applied to the Miami. In *Lafontaine v. Avaline,* the Court held that, while the 1841 Act imposed a disability on the sale and transfer of land, "these [legal] obstacles [were] designed for the Indian[s'] benefit" and to "shield them from the wiles and fraudulent practices of their more intelligent neighbors."[602] Three years later, however, Miami leader Gabriel Godfroy filed a complaint against Ebinezer Loveland in the Miami County Circuit Court for restitution of 185 acres of land, charging the defendant with fraudulently drafting the sales contract.[603] In *Godfroy v. Loveland,* the jury found in favor of the plaintiff, "and that he [was] the owner and entitled to the possession of the real estate described in his complaint."[604] The Court agreed and ruled that Godfroy was "entitled to the possession of the same" and that he "do recover of said defendant EP Loveland . . . damages so found . . . together with his costs and charges in this behalf expended."[605]

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[601] Act of 3 February 1841, p. 134.
[602] *Lafontaine v. Avaline,* 8 Ind. 6 (1856), at 10; also see Rosen, *American Indians,* pp. 62-63.
[603] Section 14, article 2 of the Northwest Ordinance provided that "in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed."
[604] *Godfroy v. Loveland,* Miami Circuit Court, Order Book D (1859), p. 329; also see Stewart Rafert, *The Miami Indians of Indiana: A Persistent People, 1654-1994,* Indianapolis: Indiana Historical Society Press, 1996, p. 147.
[605] *Godfroy,* p. 329.

In 1843, the General Assembly passed "An Act relative to suits against Miami Indians."[606] Sections one and two provided "[t]hat on the trial of all suits, actions, plaints or pleas in any of the circuit courts of this State . . . in which any member of the Miami Tribe . . . is or shall be [a] defendant . . . [he] shall be entitled to plead . . . without payment of costs." In turn, "[a]ny member . . . of the said Miami tribe . . . against whom a judgment may be rendered . . . shall have the right to appeal . . . to the proper circuit court . . . without giving bond . . . or for the payment of . . . costs that have accrued." The only property expressly "exempt from levy and sale under execution" included the "ordinary wearing apparel, and one hundred and fifty dollars valuation of the personal property of each member of said Miami Tribe of Indians (to be selected by them)." In other words, the Act left Miami lands subject to seizure in cases when the court rendered judgment against a member of the Tribe.

Having established Indian reserves as a taxable land base and "relieving" the Indians of certain legal disabilities, the state turned its attention to regulating the sale, conveyance, and inheritance of Indian lands. Pursuant to the terms of the Miami Treaty of 1840, the General Assembly passed an act in 1846, which removed encumbrances on the Richardville and Lafontaine families "to sell and convey real estate."[607] The statute was further intended "to legalize any sales that may have been made by them . . . previous to the passage of this act."[608] In effect, such measures brought Indian land into

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[606] Act of 11 February 1843, *General Laws of the State of Indiana,* 27th sess., pp. 37-38.
[607] Act of 10 January 1846, *Local Laws of the State of Indiana,* 30th sess., p. 70. Specific individuals referred to in the Act include Francis Lafontain[e], Catherine Richardville, LaBlond Richardville, Susan Richardville, "and the widow and children of Francis Godfroy."
[608] The legislature intended for this retroactive provision to reconcile any disabilities imposed by a contracts clause under an 1841 act entitled "An Act for the relief of the Miami and other Indians," which provided that "all contracts . . . made with Indians shall be null and void." See Act of 3 February 1841, *General Laws of the State of Indiana,* 25th sess., p. 134. Seven days later, the General Assembly suspended this contracts provision for a term of five years, which was set to expire at the time of the 1846 Act; see

the settler market economy by making it readily available to speculators and private purchasers.

In 1848, Indiana passed its most comprehensive land policy reform law affecting American Indians. By Act of 5 December, the General Assembly resolved "[t]hat all Miami Indians prohibited by law from alienating or encumbering lands in this State, may hereafter . . . file a petition in probate court of the county of Allen . . . praying the sale thereof."[609] Subject to the judge's discretion, the court was to appoint an "agent to have the said land . . . be duly appraised . . . by two discreet freeholders . . . acquainted with the land—its quality and advantages." "[U]pon the return of said appraisement" the court was to "order and decree a sale thereof."[610] Two provisions under the Act were particularly relevant to the state's interests. In cases where the land belonged to an Indian minor, section three vested authority in the court, pursuant to the agent's recommendation and petition, to order the sale and conveyance of such land for the child's benefit, "or for the purposes of their education and support." Under section four, the agent retained the authority to execute conveyances of tribal land in his name, which "operate[ed] as an effectual bar both in law and equity against such Indian or Indians." The bar applied equally to Indian children, assuming the "proceedings [were] conducted in good faith and

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ibid. p. 135. However, under Indiana's Revised Statutes of 1843, a provision concerning real property specifies that "[n]o Indian can . . . make any contract for or concerning the sale of any lands . . . or in any manner give, sell, devise, or otherwise dispose of any such lands . . . by which such Indian shall be divested of the absolute control, possession, and management of such lands for a longer term than five years, without the authority or consent of the legislature of this state." See *Revised Statutes of the State of Indiana,* 27th sess. (1843), p. 414. The 1846 Act thus appears to have been a safeguard measure against any potential legal disabilities imposed by the courts on the Richardville and Lafontaine families. However, Indiana lawmakers intended for the measure to support state interests rather than protect tribal lands. As discussed previously, the individual, fee-simple allotments served to facilitate the transfer of real property in a much more efficient manner than disposal through the public domain.

[609] Act of 5 December 1848, *General Laws of the State of Indiana,* 33rd sess., pp. 71-73.

[610] The Act appointed French-born Father Julian Benoit as agent, subject to the approval of the court, "for the faithful performance of all the duties and trusts of said agency." For a biographical note on Benoit, see Herman Joseph Alerding, *The Diocese of Fort Wayne, 1857-September 1907: A Book of Historical Reference, 1669-1907,* Ft. Wayne, Ind: Archer Print. Co., 1907, pp. 60-62.

without fraud." This legislation facilitated the expeditious transfer of land to American settlers by according little to no legal protection or negotiable interest to the minor Indians. Moreover, the Act disinherited Indian children from the testamentary will of the parents in cases where the appointed agent considered the land sale to be in the child's "best interest."[611]

On 9 March 1861, the General Assembly enacted a law authorizing "any non-resident alien to acquire real estate in this state by descent or devise, and to hold, sell, alienate and convey the same as if he or she were a citizen of the United States."[612] Three days later, the legislature amended the Act to include "an Indian, or negro or mulatto, or other person of mixed blood."[613] The purpose of both acts was to amend an act of 6 May 1852, which provided "that no person except a citizen of the United States or an alien, who shall be, at the time, a *bona fide* resident . . . shall take hold, convey, devise, or pass by descent, lands, except in such cases . . . as are provided for by law."[614] Section two of the revised 1861 Act provided "[t]hat all *bona fide* sales, conveyances, purchases and devises heretofore made by any Indian, negro or mulatto, or other person of mixed blood, and all estates heretofore acquired by [them] . . . by conveyance, devise or descent, be and the same are hereby legalized, and such tenants are hereby declared to

[611] Section 8 of the Act stipulated that it was "to take effect and be in force from and after its passage." However, questions inevitably arose as to the legality of land sales or conveyances prior to the Act's passage. To avoid extended complications associated with statutory revision, state lawmakers simply passed local or private acts. For example, on 2 January 1850, the General Assembly approved "An act for the relief of William Sloan and Richard Sloan." The Act provided that a "deed of conveyance from . . . John Pi-ash-wa and Mary Pi-ash-wa, dated September 20th, 1849, for the land [in Kosciusko County] . . . is hereby declared to be, a legal conveyance . . . and that the same shall pass and convey all the title and interest of . . . John and Mary Ann in and to the same, and shall vest said title in . . . William Sloan and Richard Sloan as fully to all intents and purposes, as though said sale and conveyance had been made by white persons, capable of selling and conveying lands in this State." See Act of 2 January 1850, *Local Laws of the State of Indiana,* 34th sess., p. 166.
[612] Act of 9 March 1861, *Laws of the State of Indiana,* 41st sess., p. 5.
[613] Act of 11 March 1861, Ibid. p. 153.
[614] *Revised Statutes of the State of Indiana,* 36th sess. (1852), Vol. 1, p. 232. The Act made no express provisions for American Indians or African Americans.

hold the same as fully and to the same extent as though there was no disability to the contrary."[615]

In May of 1863, the Supreme Court of Indiana considered whether an Indian possessed the testamentary capacity as a "resident alien" to "convey property by devise," in *Parent v. Walmsly's Administrator.*[616] Parent, the appellant, petitioned the Court seeking validity of a deed to a certain tract of land in Warren County, which his wife, Mary (Griffiths) Parent, had devised to him in her last will and testament.[617] Rejecting the legality of this transaction, the appellees contended that "*Mary Griffiths* . . . was not, when she executed said will, or at the time of her death, a citizen of the *United States;* but was an Indian woman; that her ancestors were Indians of the tribe of the *Pottawatomies.*" As a result, "[Mary] had no legal capacity to make the will, or devise the property." Griffiths had executed her will on 13 July 1858, one day prior to her death. While the Court took notice that her will "was duly admitted to probate and duly recorded," the 1861 Act, the appellees argued, would not have applied at the time. Instead, under the 1852 statute regulating the conveyance of lands, the appellees "insisted that 'Indians are neither aliens nor citizens; that the *United States* hold them to a relationship similar to that of guardian and ward, and they can not therefore, exercise any of the privileges of citizens.'" The Court, however, disagreed. Quoting *Scott v. Sandford,* Judge Andrew

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[615] Ibid. p. 154. During the 1861 regular session, Senator J.R. Slack introduced bill 104. While "the bill was intended to affect all persons of mixed blood," Sen. Slack declared "his purpose was to reach Indian lands." "In the northern portion of the State," Slack held, "large tracts of land is held by Indians, who are continually contracting and selling their real estate." Senator DeHart, in turn, "hoped the bill would pass, in order to quiet titles in the Wabash Valley." See Indiana, *Brevier Legislative Reports: Embracing Short-Hand Sketches of the Journals and Debates of the General Assembly of the State of Indiana*, Vol. IV (1861), pp. 257-258.

[616] *Parent v. Walmsly's Adm'r*, 20 Ind. 82 (1863).

[617] The primary dispute at the trial court had centered on the responsibility of satisfying a lien held against the tract of land, which Walmsly had not disclosed to Griffith upon execution of the deed to her on 14 August 1856. Griffiths and Parent legally wed on 10 December of that year.

Davison held "that the course of events has brought the Indian tribes within the limits of the *United States,* under subjection to the white race, and it has been found necessary, for their sake, as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy." Moreover, the Indians may, "like the subjects of any other foreign government, be naturalized by the authority of Congress, and become citizens of a State, and of the *United States*," in which case they "would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people." Consequently, "[a]n Indian may be admitted to citizenship, and though not a citizen, may be a resident alien within the intent of the [1861 Indiana] statute."[618] By recognizing the alienability of Indian title under the 1861 Act, the Court removed existing legal impediments to the effective transfer of lands held within the state.

In light of each of these state-sanctioned measures, American Indians faced a formidable challenge to exercising their legal rights in Indiana. However, westward migration and settler intrusions presented an equal, if not greater threat to the dispossession of tribal lands and political autonomy. As the doctrine of discovery and principle of pre-emption migrated west with national expansion, the settlers themselves invoked these tenets as an egalitarian means of acquiring land. In *Johnson,* long-standing statutory practice barred the private purchase of tribal lands, but common settler usage effectively expropriated Indian title. Squatting, rather than the private acquisition of Indian lands, had become the most cost-efficient means of bypassing the *Johnson* rule.

[618] Ibid. p. 83.

The Law of the Land: From the Indian Right of Occupancy to the "Custom or Common Law of the Settlers"

For the common settler as well as for the new nation, territorial expansion was, at its very core, a process of community building. Ironically perhaps, the premise of settler sovereignty centered on the exclusive right to property, "that sole and despotic dominion," William Blackstone had written, "which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[619] To reconcile this contradiction in terms, settlers and statesmen alike envisioned the habitation of the western frontier through a common belief in labor, improvement, and self-sufficiency. In the New England colonies, land distribution had signaled a desire for the continuity of community and, as historian Wesley Frank Craven wrote in 1964, "if there was one thing which bound the colonists together in a common experience, it was the necessity they found . . . to dig their livelihood out of the soil."[620]

But while many easterners had enjoyed the social and economic benefits of free tenure, the inequitable allocation of real property left others with very little. In the west, on the other hand, lay a vast "wilderness" from which those without land might freely claim a portion for themselves. In 1774, Thomas Jefferson proposed an act to enable the American settler to "appropriate to himself such lands as he finds vacant," by which "occupancy will give him title."[621] While the American Revolution prompted no major

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[619] William Blackstone, *Commentaries on the Laws of England,* 3rd ed., Vol. 2, Oxford: Clarendon Press, 1768, p. 2.

[620] Wesley Frank Craven, *Diversity and Unity: Two Themes in American History,* Princeton, N.J.: Princeton University Press, 1965, p. 6, as quoted by Malcolm J. Rohrbough, "'A Freehold Estate Therein': The Ordinance of 1787 and the Public Domain," *Indiana Magazine of History,* Vol. 84, No. 1 (March, 1988): p. 48.

[621] Thomas Jefferson, *A Summary View of the Rights of British America (1774),* Delmar, N.Y.: Scholars' Facsimiles & Reprints, 1976, p. 29. At Virginia's Constitutional Convention in 1776, Governor Jefferson recommended a law, which would have entitled landless men to fifty free acres. However, in a letter to his colleague Edmund Pendleton on 13 August 1776, Jefferson regretted his idea of gratuitous property: "The

shift in the sense of these priorities, new rules for the acquisition and disposal of the public domain soon qualified the settlers' vision of unclaimed lands ripe for the taking.

During the early years of the American republic, federal policymakers condemned unauthorized squatting in the western territories. Concerned with maintaining a "civilized" frontier and peaceful relations with the Indian tribes, Congress aimed to regulate the pace and character of settlement.[622] As early as 1783, prior to the Virginia cession, the Continental Congress issued a proclamation prohibiting "all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States."[623] But, when General George Washington toured the newly-formed Northwest Territory in 1784, he reported that squatters and speculators "roam over the Country on the Indian side of the Ohio, mark out lands, Survey, and even settle them" in complete "defiance of the proclamation of Congress."[624]

Only by recognizing the Indians as the rightful proprietors of their land could the U.S. government successfully negotiate the transfer of title. Such measures could be

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opinion that our lands were allodial possessions is one which I have very long held, and had in my eye during a pretty considerable part of my law reading which I found always strengthened it." However, he conceded, "[i]t was mentioned in a very hasty production." See Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora—The United States, Canada, Australia, and New Zealand, 1600-1900,* Cambridge: Cambridge University Press, 2002, p. 147; for quote from letter, see Thomas Jefferson and Paul Leicester Ford, *Writings of Thomas Jefferson: 1776-1781,* Vol. 2, New York: G.P. Putnam's Sons, 1893, p. 78.

[622] John R. Van Atta, "'A Lawless Rabble': Henry Clay and the Cultural Politics of Squatters' Rights, 1832-1841," *Journal of the Early Republic,* Vol. 28, No. 3 (Fall, 2008), p. 342. For an overview of early debates over methods of public land disposal and the emergence of federal policy, see Gates, *Public Land Law,* pp. 63-65.

[623] Proclamation of 22 September 1783, Worthington C. Ford, ed., *Journals of the Continental Congress, 1774-1789,* Vol. 25: *1783,* Washington, D.C.: U.S. Gov't Printing Office, 1922, p. 602.

[624] Letter of George Washington to Jacob Reid, dated 3 November 1784, in John C. Fitzpatrick, ed., *Writings of George Washington,* Vol. 27, Washington, D.C.: Government Printing Office, 1938, as quoted by Karsten, *Law and Custom,* p. 105.

accomplished, Secretary of War Henry Knox argued "without the least injury to the national dignity." To maintain otherwise, in either policy or practice, "would be a gross violation of the fundamental laws of nature, and of the distributive justice which is the glory of a nation."[625] On 13 July 1787, Congress formally adopted this position in the formation of the western state governments by incorporating a "good faith" clause in the Northwest Ordinance.

Meanwhile, the state governments had come under increasing pressure from their settler constituents to make individual land grants. In the years following the Revolution, many states—acting under the presumptive right to title by conquest—had become accustomed to granting tracts of Indian land not yet purchased. When federal policy began to recognize the Indians as possessing full ownership rights to unceded lands, considerable uncertainty arose as to the validity of these grants.[626] One of the first American cases to address this issue was *Marshall v. Clark* (1791), in which the Virginia Supreme Court held that "[t]he Indian title did not impede . . . the power of the legislature to grant the land."[627]

In the western territories, private transactions between Indians and settlers persisted. Shortly after taking office, Northwest Territorial Governor Arthur St. Clair

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[625] Quoted in Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier,* Cambridge, Mass: Harvard University Press, 2005, p. 132.

[626] Ibid. pp. 136, 161. In addition to federal treaty provisions and article 3 of the Northwest Ordinance, Congress passed the first measure regulating trade and intercourse with the Indian tribes in 1790. Section 4 of the Act "*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." See Act of 22 July 1790, 1st Cong., 2nd sess. ch. 32, *Statutes at Large*: p. 138.

[627] *Marshall v. Clark,* 4 Call (Va.) 270 (1791), as quoted by Banner, *Indians*, p.162. This case is particularly interesting because of the parties involved. Thomas Marshall, the lead plaintiff and father of U.S. Supreme Court Chief Justice John Marshall, challenged the validity of a Virginia grant to Revolutionary War hero, George Rogers Clark.

discovered the extent to which settlers claimed title by virtue of private purchase. "If one Indian sale is approved," he presumed, "it is probable that a great many will be brought forward."[628] Other settlers took a more efficient approach. Under the new federal regulatory scheme, as outlined in the 1785 Land Ordinance, the distribution and settlement of the public domain entailed public auctions to individual or corporate buyers under the administration of the General Land Office (GLO). However, as Peter Karsten points out, "settlers did not always wait for such legal ceremony," nor did they rely "upon the generosity of Common Law jurists" in clearing their otherwise imperfect titles. Rather, "[i]ndividuals and families bypassed the formal legal means of acquiring title by simply moving onto and 'improving' tracts of land."[629]

The Continental Congress also faced the administrative complexities associated with recognizing the legitimate land claims of existing European settlers under international laws of state succession. The Virginia Act of Cession had stipulated that the French and Canadian inhabitants who "professed themselves citizens of Virginia," were to "have their possessions and titles confirmed to them." In 1791, Congress confirmed these land claims in the Northwest Territory and granted up to four hundred acres to each head of family who had taken the oath of American citizenship.[630] Under article two of

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[628] As quoted by Banner, *Indians,* p. 137.
[629] Karsten, *Law and Custom,* pp. 102, 149, 186.
[630] See Act of 3 March 1791, 1st Cong., 3rd sess. ch. 27, *Statutes at Large*: pp. 221-222. French grievances during the territorial period reflect the extent to which the American government failed to adequately protect their acquired rights. Following independence from the British, the French inhabitants had expected "personal liberty" and "rights to property both real and personal," which were to be secured "under the equitable and humane government of the United States." During the first decade of the nineteenth century, however, the U.S. had failed to rectify many French title claims with respect to the disposition of public lands. The complexities of sorting out foreign land grants reflected a larger cultural misunderstanding as American officials attempted to administer alien legal systems following state succession. Difficulties arose from the "removal of public offices and records, on change of government, and in several instances of title papers, previously deposited . . . for safe keeping." On 17 January 1805, several citizens of Wayne County, a majority of whom were "the lineal descendants of the ancient French," petitioned Congress with a memorial of their claims. Tracing their rights and privileges under the French

the 1794 Jay Treaty with Great Britain, the U.S. guaranteed to "[a]ll Settlers and Traders" residing within the western territories "all their property of every kind."[631]

As if these exemptions had not created enough administrative wrangling, Congress amended federal land law in 1804 to accommodate thousands of pre-emption claims raised when France ceded the Louisiana Territory to the United States. By enacting strict laws prohibiting settler intrusions into this newly-acquired territory, the federal legislature took determined measures to safeguard the property rights of the French inhabitants.[632] In order to determine the legitimacy of claims and to validate proper title, Congress applied federal land policy as well as the laws of the former sovereign under whose government the claims had originated.[633] In light of these statutory pre-emption grants, however, adjudicating land claims proved to be an insuperable task.

Such was the state of affairs in 1807 when Secretary of the Treasury Albert Gallatin wrote to the district General Land Office (GLO) registrar in the Indiana Territory concerning the investigation of claims in the district:

> [I]t will be difficult to decide which of the actual settlers who may not apply for permissions should be considered as Intruders. Those whose claims are embraced by the Acts of Congress, may in the mean while

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and British governments, U.S. treaty provisions, and "by virtue of actual improvements," the memorialists "pray[ed] that a law may be passed confirming the claimants and their heirs in the same." See *Translation of a Memorial in the French Language, of Sundry Citizens of the County of Wayne, in the Indiana Territory: 17th of January 1805: Referred to the Committee Appointed the 7th Instant to "Enquire Whether Any, and If Any, What Alterations Are Necessary to Be Made in the Laws, for the Disposal of he Public Lands, North West of the Ohio,"* Washington City: Printed by William Duane & Son, 1805, pp. 3, 4, 9. For another petition, see the Remonstrance to the General Assembly from the French Inhabitants of Vincennes, dated 16 August 1807, in which the petitioners "*Resolved unanimously,* That any attempt to divest the town of Vincennes of the right of the commons . . . would in the present state of the territorial government be unjust." See Thornbrough and Riker, *Journals,* p. 141.

[631] Treaty of 19 November 1794, "Treaties between the United States of America and Foreign Nations," *United States Statutes at Large*, Vol. 8, pp. 116-132.

[632] See Gates, *Public Land Law,* p. 219; also see Act of 26 March 1804, 8th Cong., 1st sess. ch. 38, *Statutes at Large*: pp. 287-289.

[633] Gates, *Public Land Law,* p. 88.

> receive assurances, that notwithstanding the expressions in the law, of "recognized & confirmed," a discretion having been vested in the President it is not intended to disturb them in their actual possession, whilst the investigation is pending. But on the other hand, those who have unlocated claims must be aware that an attempt to settle before a location has been made in conformity with law, would endanger their title.[634]

In addition to informing the GLO on recent statutory amendments to federal land policy, Gallatin expressed particular concern with certain "unfound and fraudulent claim[s]" to land title based on questionable Indian grants:

> It is . . . desirable to know whether any persons, claiming under the Wabash or Illinois companies, under certain large Court deeds not recognized by any law . . . have attempted or will attempt settlements. As there will be no hesitation in removing persons of that description, it is necessary that the information should reach the Executive without delay.[635]

Even with these precautionary measures, squatters continued to plague public lands. Federal Indian Agent Return Meigs reported to the Secretary of War in 1809 that "[t]hese intruders[,] . . . some of them shrewd & of desperate character, have nothing to lose" and "in hopes the land will be purchased . . . they will plead a right of preemption, making a

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[634] Letter of the Secretary of the Treasury [Albert Gallatin] to Michael Jones, dated 28 March 1807, in Clarence E. Carter, ed., *The Territorial Papers of the United States,* Vol. 7: *The Territory of Indiana, 1800-1810,* Washington: U. S. Gov't Printing Office, 1939, p. 445.

[635] Enclosed with Gallatin's letter was a copy of "An Act to prevent settlements being made on lands ceded to the United States, until authorized by law." See Act of 3 March 1807, 9th Cong., 2nd sess. ch. 46, *Statutes at Large*: p. 445. The complexity of rules and conditions prescribed in the Act made it ripe for numerous conflicts of interests along the frontier. First, the measure made it a crime for any person to survey or make "a settlement on any lands ceded or secured to the United States, by any treaty made with a foreign nation, or by a cession from any state to the United States, which lands shall not have been previously sold, ceded, or leased by the United States." Trespassers faced forfeiture of "all his or their right, title, and claim . . . of whatsoever nature or kind the same shall or may have, to the lands aforesaid." Furthermore, the Act vested authority in the "President of the United States to direct the marshal, or officer acting as marshal, . . . to take such . . . measures, and to employ such military force as he may judge necessary and proper, to remove [such persons] from lands ceded, or secured to the United States." However, the Act was not to be "construed to affect the right, title, or claim, of any person to lands in the territories of Orleans or Louisiana" protected under federal law (see Act of 2 March 1805, 8th Cong., 2nd sess. ch. 26, *Statutes at Large*: pp. 325-329). For those persons who "had taken possession of, occupied, or made a settlement on any lands ceded or secured by the United States," prior to the passage of the 1807 Act, "and who at the time . . . actually inhabit[ed] and reside[d] on such lands," could apply, under prescribed conditions, "to the proper register or recorder . . . of the land-office established for the disposal, registering, or recording of such lands."

merit of their crimes."[636] However, despite the violation of federal treaty provisions, Congress took little initiative in reconciling squatter transgressions. Reginald Horsman notes:

> Even though the United States had tried to bring some order into the western advance by organizing repeated cessions and creating boundary lines, which for the time being were supposed to be inviolate, the government was never able to stem the illegal advance. Settlers crossed the boundary line to obtain choice lands, and the government never mustered sufficient military force to prevent the intrusions.[637]

As a consequence, "[t]he government indirectly subsidized white intrusions onto Indian lands by enforcing the prohibition on land sales more effectively than they enforced the prohibition on squatting."[638]

Yet the distance between the federal government and the western frontier insulated Congress and the president from the democratic impulse of settler society. Western public opinion, in fact, had grown increasingly hostile to the federal government's conservative land policies. In the absence of consistent government enforcement, squatters asserted a quasi-legal title by claiming to "own" their land by the "natural right" to work and improve "vacant" settlements. By invoking this Lockean rhetoric, squatters argued that those laws which denied the value of their improvements violated "the Rules of natural Justice."[639]

Legal innovations in American jurisprudence likewise began to reflect this frontier pragmatism. During the late eighteenth and early nineteenth centuries, states

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[636] Return Meigs to William Eustis, 26 October 1809, as quoted by Francis Paul Prucha, *American Indian Policy in the Formative Years: The Trade and Intercourse Acts, 1790-1834,* Lincoln: University of Nebraska Press, 1962, p. 160.
[637] Reginald Horsman, *Expansion and American Indian Policy, 1783-1812,* Norman: University of Oklahoma Press, 1992, p. 160.
[638] Jennifer Roback, "Exchange, Sovereignty, and Indian-Anglo Relations," in Terry L. Anderson, ed., *Property Rights and Indian Economies,* Lanham, MD: Rowman & Littlefield, 1992, as quoted by Kades, "Dark Side of Efficiency," p. 1174.
[639] Karsten, *Law and Custom,* pp. 164-165, 170.

such as Kentucky and Tennessee enacted a series of "occupying claimant" laws designed to protect squatters from outright eviction without receiving at least some benefit from their "improvements." As Kentucky and Tennessee settlers wrested control of the public domain, other states passed laws that regarded actual occupancy as constituting "color of title" and sanctioned the squatters' legal rights to the equitable value of those improvements.[640] Following these trends, the Indiana legislature passed an "Act for the relief of occupying claimants of land" in 1818.[641] The measure provided that any squatter "being in quiet possession of any land, for which such person can shew a plain and connected title in law or equity . . . shall not be evicted or turned out of possession until . . . fully paid the value of all lasting . . . improvements." The value assessment of these improvements, "at the request of either party," was to issue from an appointed commission of "three judicious[,] disinterested freeholders of the county where such judgment may be rendered."

"The high courts of these states," Peter Karsten observes, "generally found no fault with these statutes, nor could they be persuaded to interfere with the local juries of assessment created by the statutes to determine the value of squatter improvements."[642] The Indiana Supreme Court was no exception, and in 1825 the state's "occupying claimants" act withstood its first constitutional challenge. In *Armstrong v. Jackson,* the Court held that "[i]t cannot be contended that it is unconstitutional for the successful claimant to be compelled to pay the occupant for his improvements," or for "the

[640] Karsten, *Law and Custom,* p. 149.
[641] Act of 28 January 1818, *Laws of the State of Indiana,* 2nd sess., pp. 197-200. Also see Act of 22 January 1820, *Laws of the State of Indiana,* 4th sess., p. 126, which provided "[t]hat no action of Ejectment shall be commenced . . . for the recovery of any lands or tenements, against any person . . . who may have been in quiet and peaceable possession of the same for twenty years."
[642] Karsten, *Law and Custom,* p. 150.

occupant's retaining possession of the land he has improved until such payment is made."[643] However, the Court declared the Act's provisions stipulating value assessments to be determined by an appointed commission "can not be reconciled to that clause in the 5th section of the 1st article of the [Indiana] constitution, that secures the right of trial by jury."[644]

The U.S. Supreme Court, on the other hand, would see these measures from a different perspective, at least initially. In *Green v. Biddle,* decided the same year as *Johnson,* the Court struck down Kentucky's "occupying claimant" law as a violation of the Contracts Clause, holding that the statute "materially impair[ed] the rights and interests of the rightful owner in the land itself."[645] Needless to say, the decision proved highly unpopular not only in Kentucky but in other western states as well. Responding to popular norms and the states' continued defiance of the decision in *Green,* the Court reversed its decision nearly eight years later in *Hawkins v. Barneys Lessee.*[646]

The rising tide of westward migration also forced Congress to re-assess public land policy. Without declaring comprehensive squatters' rights, federal lawmakers began to emphasize a more democratic process of disposing the public domain by conditional pre-emption measures and graduated land prices. Steadily, Congress responded to

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[643] *Armstrong v. Jackson on the Demise of Elliott,* 1 Blackf. 374 (1825).
[644] Ibid. For statutory amendments following *Armstrong*, see Act of 28 January 1830, *Laws of the State of Indiana,* 14th sess., pp. 101-102; also see *Revised Statutes of the State of Indiana,* 22nd sess., pp. 260-262; and Act of 22 January 1842, *General Laws of the State of Indiana,* 26th sess., pp. 145-146.
[645] *Green v. Biddle,* 21 U.S. 1 (1823); for further legal context and the development of national policy debate, see Paul Wallace Gates, "Tenants of the Log Cabin," *Mississippi Valley Historical Review*, Vol. 49, No. 1 (June, 1962): pp. 3-31.
[646] *Hawkins v. Barneys Lessee,* 5 Peters (30 U.S.) 457 (1831).

popular pressure, first by loosening prohibitions against squatting, and eventually by enacting retroactive measures that pardoned past intrusions.[647]

On 29 May 1830, Congress passed its first comprehensive pre-emption act.[648] Federal legislators intended the measure to apply retroactively for all occupants or "actual settlers" improving public lands prior to 1830, and the law guaranteed pre-emption rights for one year following the date of enactment. Restrictive provisions under the Act and administrative setbacks, however, effectively diminished many settlers' chances of securing title to their public land claims within the time allotted.[649] Nevertheless, despite the Act's one-year sunset provision, Congress had planted the seeds of reform and, as historian Paul Wallace Gates observes, "the West would never again be content without (1) a series of annual measures to continue the policy or (2) a general prospective pre-emption measure."[650] Thus, between 1831 and 1837 the western states lobbied Congress either for an extension of time for squatters to file their claims or to re-enact further pre-emption measures to accommodate rising public land sales and settler demands. Until these changes were made, "[t]he laws of the federal government and of the states and territories lagged behind the needs of the people on the frontier, and as a result the spirit of 'popular' or 'squatter sovereignty' manifested itself."[651]

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[647] In response to persistent intrusions in the Indiana Territory, President James Madison issued a proclamation on 12 December 1815 declaring the government's intention to expel all persons illegally settling on public lands. Apparently, the executive declaration led to such a public outcry that Congress took immediate measures to legalize the otherwise illegitimate settlements; see Gates, *Public Land Law,* p. 220. For full text of Madison's declaration, see James D. Richardson, ed., *A Compilation of the Message and Papers of the Presidents, 1789-1897,* Vol. 1, Washington: U.S. Gov't Printing Office, 1896, pp. 572-573.

[648] Act of 29 May 1830, 21^{s} Cong., 1st sess. ch. 208, *Statutes at Large*: pp. 420-421.

[649] The law exempted unsurveyed lands from prior claims and Congress failed to make fiscal appropriations for further surveys. For those lands that had been surveyed, plat maps failed to reach the regional GLOs in a timely manner; see Gates, *Public Land Law,* pp. 225, 226.

[650] Ibid. p. 228.

[651] Benjamin H. Hibbard, *A History of the Public Land Policies,* Madison, Wisc.: University of Wisconsin Press, 1965, p. 198.

In response, dozens of claims associations sprouted throughout the west "to assure orderly buying at most public land sales and to prevent speculators from overbidding or claim jumpers from buying the land of settlers."[652] On 4 July 1836, pioneer settler and agriculturalist Solon Robinson organized a meeting of squatters in Lake County, Indiana "for the purpose of adopting measures & forming a constitution for the better security of the settlers upon public lands."[653] Members of the new Squatters' Union surveyed and recorded detailed descriptions of settlers' tracts, assisted in settling disputes related to overlapping claims, and secured purchases of land at public auction without competition.[654] At its first meeting an appointed committee reported "rules for the government of the members of [the] union" and elected a secretary, register of claims, and a "board of three County Arbitrators."[655] Article nine of the constitution provided "that the board of arbitrators shall . . . take an oath or affirmation before some magistrate,

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[652] Gates, *Public Land Law,* p. 236. In anticipation of forthcoming public auctions in Chicago in 1835, a newspaper editorialist sympathetic to the squatters' plight warned those readers less familiar with the "law of the land":

> As the time approaches when there is to be a large sale of public lands at this place, and as there will doubtless be many here who are unacquainted with the situation of the settlers on the tracts of land and with the local customs of this western country, we feel it our duty to allude to this subject at this time. Custom, as well as the acts of the General Government, has sanctioned the location of settlements on the unsurveyed public lands, and the Government has encouraged the settlers in such lands, by granting them a preemption right to a sufficiency for a small farm. Many of the settlers on the tract now offered . . . came to the West and made their locations under the implied pledge of the Government by its past acts: that they should have a preference and a right to purchase the lots on which they located, when the same came into market, and at the minimum price. Government was then morally bound to provide for these settlers, and have been guilty of an act of injustice in bringing these lands into market without making such provision. "Public opinion is stronger than law," it has well been said, and we trust it may prove so in this case, and that the strangers who come among us, and especially our own citizens, will not attempt to commit so gross an act of injustice as to interfere with the purchase of the quarter section, on which improvements have been made by the actual settler. We trust for the peace and quietness of our town that these local customs, to which long usage has given the force of law . . . and which are so strongly sustained by the principles of justice and equity, will not be outraged at the coming sales.

See *Chicago Democrat*, 4 June 1835, as quoted by Hibbard, *History,* p. 201.

[653] Minutes of the Organization of the Squatters' Union, 4 July 1836, in Herbert Anthony Kellar, ed., *Solon Robinson, Pioneer and Agriculturist: Selected Writings,* Vol. 1, Indianapolis: Indiana Historical Bureau, 1936, p. 68.

[654] Kellar, *Solon Robinson,* pp. 11-12; also see Carmony, *Indiana,* p. 558.

[655] Kellar, *Solon Robinson,* pp. 68-69.

faithfully & partially . . . [to] perform all the duties enjoined upon them, not inconsistent with the law . . . and make their acts a rule of court before some magistrate, according to the statute provided for arbitrated cases."[656]

As Paul Wallace gates notes, "one of the most important functions of the claim associations, which were commonly organized in advance of the establishment of local government, was to provide a title registration system." According to this arrangement:

> titles of claims—both before and after the public sale and until county government had been created nearby—could safely be conveyed, accumulated, divided, and even mortgaged, though the government title had not yet been conveyed. Common interests involving land ownership drew people together as nothing else did.[657]

Solon Robinson and other squatters throughout Indiana and the western states created their own "common law," which served to "transform their mere occupancy to titled freehold estate at low cost."[658] "They had, in the absence of all other law," one circuit rider in Wisconsin observed in 1835, "met & made a law for themselves" and "there was an understanding . . . equivalent to a law of the land, that the settlers should sustain each other."[659] Or, as John Newhall wrote in 1841, "[a]lthough 'claim law' is no law derived from the United States, or from the statute book of the territory . . . it nevertheless is the

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[656] Constitution of the Squatters Union in Lake County, Indiana, in Kellar, *Solon Robinson,* pp. 73-74. The full text of the Constitution, including a photo illustration of the original manuscript, can be found at ibid. pp. 69-76. Additional articles included a declaration of rights, election rules, membership duties, claim methods and stipulations, arbitration proceedings, and even a system of jurisdiction for district and county boards. Adopted on 6 July 1836, the Constitution had 476 signatories.
[657] Gates, *Public Land Law,* p. 236.
[658] Karsten, *Law and Custom,* p. 171.
[659] Ibid. p. 174, quoting Alfred Brunson, "A Methodist Circuit Rider's Horseback Tour From Pennsylvania to Wisconsin, 1835," in Reuben Gold Thwaites, ed., *Collections of the State Historical Society of Wisconsin,* Vol. 15, Madison: Democrat Printing Co., 1900, p. 277.

law, made by and derived from the sovereigns themselves, and its mandates are imperative."[660]

By the mid-1830s, common settler usage had effectively dictated the terms of American land tenure and property law in the west. Accordingly, many of the western states began to petition Congress for pro-squatter reforms, or pre-emption rights, in federal land law.[661] The "customary right" to settle and "improve" the land ignited the process of reshaping the law "from below." What resulted was a major regional debate in Congress with western state representatives defending "actual settlers" as loyal and industrious frontiersmen and eastern state representatives condemning "squatters" as "lawless land grabbers" who lacked respect for absentee property holders and Indian rights.[662]

In January of 1833, the Indiana General Assembly passed a joint resolution to Congress relative to public lands:

> Whereas, the liberal policy of the general government granting pre-emption rights to settlers upon the public lands has met with the approbation of the people of Indiana, and awakened the warmest feelings of gratitude in the mind of the actual settler," the legislature believed "that a continuance of the same policy is alike called for both by justice and liberality towards many of our industrious but unfortunate citizens.[663]

Successive petitions expressed little confidence in the administration of the federal government in shaping western land policy.

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[660] Hibbard, *History,* p. 203, quoting John B. Newhall, *Sketches of Iowa, or, The Emigrant's Guide,* New York: J.H. Colton, 1841, p. 56.
[661] Van Atta, "Lawless Rabble," p. 354; Paul Wallace Gates defines pre-emption as "the right of the squatter to be protected against the speculator and to gain title to his land without competing at auction." See Gates, *Public Land Law,* p. 66.
[662] Ibid. pp. 223-224.
[663] Act of 15 January 1833, *Laws of the State of Indiana,* 17th sess., p. 233.

As Congress gradually relinquished its authority to the states, their intercession in western land law risked greater Indian-settler conflict, dissolution of Indian rights, and the dispossession of tribal lands. Prior to survey or public sale, settlers routinely squatted on federal lands recently ceded by the tribes. When the Pottawatomie ceded most of their lands in 1832, the Treaty of Yellow River exempted the tribe from immediate removal.[664] However, in anticipation of the tribe's departure, squatters began almost immediately to settle this land and assert title under existing pre-emption laws. Violent clashes were frequent and squatter vigilantes destroyed several Indian villages and threatened to force Pottawatomie removal by extra-legal means.[665] "So alarming was the situation," historian Paul Wallace Gates describes, "that Governor [David] Wallace, in August of 1838, authorized [John] Tipton to raise a force of one hundred officers . . . to police the frontier and . . . to secure the consent of the Indians to their own removal."[666]

Yet the story is never one of complete struggle or dispossession. Occasionally, squatters found common ground with the Indians and enjoyed the mutual benefits of accommodation and co-existence. The reasons for reciprocity varied. Sometimes, these relationships developed as a result of a common enemy like the unscrupulous land speculator. When Solon Robinson settled in northern Indiana in 1834, the Pottawatomie Tribe had recently ceded much of their land.[667] Pursuant to the terms of an 1832 Treaty, the federal government had approved several individual reserves to be selected by

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[664] Negotiations culminated in the 1836 Treaty of Yellow River. Article 3 stipulated that the "bands agree to remove to the country west of the Mississippi river, provided for the Potawattimie nation by the United States within two years." See "Treaty with the Potawatomi," 5 August 1836, in Kappler, *Indian Affairs,* Vol. 2, pp. 462-463.

[665] Paul Wallace Gates, "Introduction," in *Tipton Papers,* Vol. 1, p. 45; also see Carmony, *Indiana, 1816-1850,* p. 556.

[666] Gates, "Introduction," in *Tipton Papers,* Vol. 1, p. 45.

[667] Although surveying had already begun in 1832, the GLO did not offer the lands at public auction until 1839; see Kellar, *Solon Robinson,* pp. 11-12.

members of the Tribe upon executive approval.[668] Although these provisions stipulated that the reserves were to be located in Illinois, several members of the Pottawatomie expressed interest in returning to their lands in northern Indiana. Prior to the Treaty's execution, Pottawatomie Chief Shobonier and other members of the Tribe had resided on portions of land later claimed by Robinson. In fact, when Robinson first settled the area, he had met Shobonier at a nearby camp. Acting out of mutual necessity and support in an otherwise meager frontier economy, the two exchanged food and supplies and, over time, established a neighborly relationship.[669]

Hoping to capitalize on a potential Indian-settler conflict of claims, William Butler, a Michigan-based land speculator, attempted to relocate Shobonier on Robinson's tract through fraudulent means. Apparently, Butler's scheme entailed a forged petition to the GLO at La Porte, Indiana, alleging to represent Shobonier and requesting the president to issue a patent for the Chief for a portion of land then claimed by Robinson.[670] Butler's attempts not only failed but actually facilitated Robinson's legal purchase of the settled tract of land under federal pre-emption laws and, more importantly, with the blessing of Chief Shobonier.

In his affidavit to federal administrators in 1837, Robinson stated that after he "had settled upon this land and made valuable improvements thereon," William Butler had threatened to "get 'old Sho-bon-nier to locate his reservation upon [these] improvements.'"[671] Being "well acquainted with Indian customs" and sufficiently knowledgeable of "the Indian language to converse with . . . Sho-bon-nier . . . upon the

[668] "Treaty with the Potawatomi," 20 October 1832, Kappler, *Indian Affairs,* Vol. 2, p. 353.
[669] Kellar, *Solon Robinson,* p. 14.
[670] Ibid. pp. 12-13.
[671] "Shobonier Claim—Deposition and Affidavits," dated 4 November 1837, in Ibid. p. 81.

subject of his reservation," Robinson testified that the Chief "never pretended . . . that his said 'village' was on them [the lands in question]," but rather located at "some other place . . . near the Illinois line, known . . . as 'Mus-qua-och-bis' (Red Cedar Lake)."[672] By "placing full faith in the . . . treaty [of 1832] . . . and by the word the said Sho-bonnier himself that this was not his reservation," Robinson petitioned for the right to pre-emption for having "incurred great expense in improving farms" on the land."[673]

In exchange for Shobonier's support, Robinson vowed to donate a tract of land to the Chief for use as a tribal "commons." According to Robinson's biographer, this was "a promise which he kept when the town of Crown Point was governmentally established in 1840."[674] The "commons" became a site where "Shobonier's children and grandchildren played ball while the pioneer and the Indian watched their fun and smoked the pipe of peace together." Despite the fact that Solon Robinson and Chief Shobonier conceptualized land use from culturally distinct perspectives, their unique circumstances united them on a common ground (quite literally) that reconciled their otherwise conflicting interests.

By the mid-1830s, both houses of Congress had supported measures preventing settlers from intruding on Indian lands, including those recently ceded. The general Pre-Emption Act of 1838, signed into law on 22 June, granted a two-year claim process for all settlers in possession of public lands at the time of enactment. Excluded from these

[672] Ibid. p. 82.
[673] Ibid. Also see accompanying affidavits of local witnesses at pp. 83-84.
[674] Ibid. p. 14.

claims were squatters on Indian reserves, with specific provisions exempting those settling on Miami land cessions.[675]

The new law had not passed, however, without fierce debate from the western states over these exclusion clauses.[676] In late January of that year, Senator John Tipton of Indiana addressed the U.S. Senate on the pending pre-emption bill. Responding to Kentucky Senator Henry Clay's proposed amendment prohibiting individual pre-emption claims to portions of the recently-ceded Miami Reserve, Tipton argued that it would "make an invidious distinction between our own constituents and the citizens of other new States of the West," and deprive Indiana settlers of "a privilege which this bill secures to others."[677] In an effort to conciliate his opponents, Tipton agreed to the proposed amendments that prohibited pre-emption grants "to any person who settled upon the lands before the Indian title had been extinguished."[678] Yet the issue of speculation in tribal lands remained a larger concern for Tipton's colleagues in Congress as well as Indiana State legislators. In response to lingering rumors emanating from Representative McCarty's 1835 Resolution, Tipton contended that he was "not, and never expect[ed] to be, personally interested . . . in any pre-emption that may be, granted or obtained by the bill . . . on the Miami . . . or any other lands."[679] Tipton's efforts were in vain. Congress passed the bill, which included the original provisions exempting pre-

[675] Act of 22 June 1838, 25th Cong., 2nd sess. ch. 119, *Statutes at Large*: pp. 251-252; also see Gates, *Public Land Law,* p. 235.
[676] For an overview of proposed amendments to the bill concerning the exemption of Miami lands, see *Tipton Papers,* Vol. 3, pp. 517-518, n. 27.
[677] Ibid. p. 522.
[678] Ibid.
[679] Ibid. p. 525.

emption claims "to the lands lately acquired by treaty with the Miami tribe of Indians, in the State of Indiana."[680]

Tipton's vote in favor of settler pre-emption, however, had not been entirely in line with Indiana's majority political position. At the state level, legislative debate over the acquisition and disposal of the public domain had centered on four major proposals: federal cession, graduation (incremental price reduction), pre-emption, and distribution. Of the four alternatives, the latter two had received the widest support from Indiana lawmakers during the early to mid-1830s. Distribution allocated a percentage of proceeds from public land sales to the states for purposes of financing internal improvements. However, with the financial panic of 1837, Congress withheld surplus distributions indefinitely, leaving Indiana and other states without federal aid and an insufficient public infrastructure in the nascent frontier economy.[681] Pre-emption, on the other hand, remained a viable option for yielding tangible progress based on the sweat equity of settler improvements, with the added benefit of public lands sales (albeit often at a reduced price) once settlers registered their claims with the General Land Office.

In his speech to Congress, Tipton referred to a pending joint resolution of the Indiana General Assembly, which considered a provision for settler pre-emption claims on the Great Miami Reserve.[682] While admitting that it would give him "great pleasure to aid [Indiana] in raising means to carry on her public works," Tipton contended that, "as

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[680] Act of 22 June 1838, *Statutes at Large*: p. 251

[681] Carmony, *Indiana,* pp. 560-561.

[682] For the joint resolution, see Indiana, *Senate Journal,* 22nd sess. (1837-1838), pp. 421-423: "*Resolved,* That the committee on ways and means be instructed to inquire into the expediency of reporting a joint resolution and memorial instructing our Senators and requesting our representatives in Congress to use their influence in obtaining for the use of the State of Indiana, the right of pre-emption at the minimum price, to the lands lately acquired of the Miami Indians, to aid and assist in the progress of her works of Internal improvement." Senator Charles Cathcart "moved to amend by adding 'that all actual settlers upon the government lands in this state shall be entitled to the right of pre-emption to purchase each 160 acres . . ; Which was accepted." Cathcart's amendment failed to pass, however, in the final vote.

public men we should have an eye as well to individual justice as to public benefit."[683] Five days later, however, the Whig-controlled Indiana legislature passed the joint resolution, opting not for pre-emption but for public land grants to the state for internal improvements.[684] In blatant disregard of the legislature's resolution, Tipton voted for individual pre-emption provisions in the congressional bill, and the Indiana General Assembly subsequently censured him for his actions.[685]

The two-year sunset provision under the 1838 Act inevitably failed to appease settler demands. Having secured retrospective rights over the course of the decade, the western states then turned their attention to obtaining permanent, prospective pre-emption. Historian Paul Wallace Gates observes, "Westerners had long felt that this [goal] was desirable as it would assure settlers moving on public lands that they would not have to wait for congressional action to protect them in their claims."[686] With much greater interests at stake, the debate in Congress elicited high emotions and intense political rallying. The State of Indiana, again, took center stage.

On 14 January 1841, U.S. Senator Oliver H. Smith (a pro-Jackson Whig) of Indiana addressed Congress on the prospective pre-emption bill.[687] Acknowledging his colleague's differences "upon many points connected with the land question," as well as the "diversified interests of the states," Smith entered the debate espousing the populist

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[683] *Tipton Papers,* Vol. 3, p. 521.
[684] Act of 1 February 1838 , *Laws of a Local Nature,* 22nd sess., p. 439: "*Resolved, by the General Assembly of the State of Indiana,* That our Senators and Representatives in Congress be earnestly requested to use every exertion to procure the passage of a law authorizing the State of Indiana to purchase the whole of said land recently purchased by the United States of the Miami Indians, within the limits of said State, at the minimum price of one dollar and twenty-five cents per acre, to be by her again sold, and the proceeds thereof applied to the construction of her internal improvements."
[685] *Tipton Papers,* Vol. 3, p. 517, n. 27.
[686] Gates, *Public Land Law,* p. 237.
[687] "Speech of Mr. Smith, of Indiana, on the Prospective Pre-emption Bill," *Indiana Journal,* 27 February 1841, Iss. 976, col. a*;* For a biographical sketch of Smith, see Shepard, *Biographical Directory,* Vol. 1, p. 364.

sentiments of his Indiana constituency. The senator's primary contention centered on the opposition's argument that pre-emption "grants exclusive privileges to a class of men who rush in advance of civilization and seize upon the public property." In advocating their interests, Smith staunchly defended the settlers as "pioneers" of western progress:

> I have seen my State in her infancy, with the fairest and largest portion of her territory in the possession of the Indians. I have seen her pass through the different gradations of improvement until she has arrived at her present high grade . . . and let me assure Senators he is the last man that would willingly do injustice to his country . . .[688]

Rather than attempt to restrain the inexorable social force, Smith argued "that legislation should always adapt itself to the conditions of affairs." The "real state of things," he declared, was merely an extension of progress and industry in American history:

> That spirit of enterprise and discovery which is characteristic of the Anglo-Saxon race—that spirit that animated the Pilgrims, and the first settlers at Jamestown—that spirit that prompted a Boon, a Clark, and a Kenton to penetrate the Western wilds and encounter and overcome the perils that surrounded them—the spirit which fired the early settlers of the West, induced them to leave the peaceful homes of their fathers, and brave the savage rifle and tomahawk, to settle a new country, —I say that same spirit is impelling our people onward . . . .[689]

By suggesting that squatters' rights had evolved by long and settled usage, "pre-emption laws," according to the Senator, were "merely declaratory of the custom or common law of the settlers."[690] A majority of Congress agreed, and on 4 September 1841, President John Tyler signed the Pre-emption-Distribution Act into law.[691]

The new law directed ten percent of the "nett [sic] proceeds of the sales of the public lands" to the western states, including Indiana. Land grants were to be used "for

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[688] "Speech of Mr. Smith," cols. b, d.
[689] Ibid. col. d.
[690] Ibid.
[691] Act of 4 September 1841, 27th Cong., 1st sess., ch. 16, *Statutes at Large*: pp. 453-458; also see Gates, *Public Land Law*, pp. 238-240.

purposes of internal improvement."[692] Moreover, the states were not to dispose of public lands "at a price less than one dollar and seventy-five cents per acre." The Act authorized every person, "over the age of twenty-one years, and being a citizen of the United States" or having filed a declaration of intent, to register a claim not exceeding 160 acres, for lands settled on 18 June 1840 or anytime thereafter. Of further significance was the lack of sunset provisions. Previous measures had restricted settler claims to a limited timeframe, but the new Act was to "continue and be in force until otherwise provided by law."[693]

In many respects, however, the 1841 Act still limited full squatters' rights. Settlement exemptions included lands reserved for internal improvements, schools, and the Indian tribes, specifically those "acquired by . . . the two last treaties with the Miami tribe of Indians in the State of Indiana."[694] More importantly, the law continued to restrict pre-emption claims to surveyed lands only, which, as experience had shown, largely failed to curb illegal squatting and settler intrusions on Indian lands.[695] By failing to enforce these restrictions, the western states helped subsidize the expropriation of tribal lands. Thus, by the 1840s, the "custom or common law" of the western settlers had vested in them a superior title, while effectively replacing the Indians' customary land rights with a mere right of occupancy.

In the years following the 1840 Miami Treaty cession (and in response to the exclusion clauses under the1841 Act), the Indiana General Assembly passed a series of

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[692] Act of 4 September 1841, *Statutes at Large*: pp. 453, 455.
[693] Ibid. p. 454.
[694] Ibid. p. 456.
[695] In 1862, Congress extended the right of pre-emption to unsurveyed public lands in all states and territories; see Act of 2 June 1862, 37th Cong., 2nd sess., ch. 94, *Statutes at Large*: p. 413; also see Gates, *Public Land Law*, p. 244.

memorials petitioning Congress to pass pre-emption laws for the relief of settlers on the Miami National Reserve. On 13 February 1843, the Indiana legislature passed a joint resolution instructing the state's Senators and requesting the Representatives in Congress, "to vote for and use their aid and influence in procuring the passage of an act extending the provisions of an act of the 4th of September 1841."[696] The petition specifically called for a measure "granting pre-emption rights to all settlers on lands not included in the last two treaties with the Miami Indians, and which were settled upon before their being selected and confirmed to the state of Indiana, for the construction of the Wabash and Erie Canal."[697]

With little response, Indiana legislators petitioned Congress again in December of 1845 "to procure the passage of a Law for the relief of Pre-emption Settlers on the Miami Reserve."[698] "If," however, "the passage of such an act cannot be procured," the petition instructed Indiana's Representatives in Congress "to endeavor to procure remuneration to the settlers for their improvements."[699] Before the GLO opened portions of the Miami National Reserve to public auction in 1848, there was such high demand that Congress decided to sell the lands above the standard market price.[700] The Indiana General Assembly responded accordingly. Believing that "injustice [had] been done to the settlers . . . in requiring them to pay two dollars per acre for their land in order to avail themselves of the benefit of such pre-emption laws," the legislature requested their

[696] Act of 13 February 1843, *Laws of a Local Nature*, 27th sess., pp. 204-205.
[697] Ibid.
[698] Act of 19 December 1845, *General Laws of the State of Indiana*, 30th sess., pp. 126-127.
[699] A subsequent resolution during the same session reflects the extent to which Indiana sought to accommodate the growing number of settlers in the state. On 19 January 1846 , the General Assembly sought to procure "the passage of a law by Congress, to grant to each . . . citizen of the United States settling *bona fide* on any public lands . . . a pre-emption to the same for three years . . . [and] to purchase one quarter section . . . so resided on, at fifty cents per acre." See Ibid. pp. 131-132.
[700] Gates, *Public Land Law*, p. 243. Gates notes that 1,776 pre-emption claims had been filed with the land offices at Winamac, Ft. Wayne, and Indianapolis.

"senators in Congress . . . to procure the passage of an act . . . reducing the price . . . to one dollar and twenty-five cents per acre."[701] Congress refused to compromise. The following year, state lawmakers passed yet another resolution, this time instructing Indiana's representatives "to use their utmost exertions to procure the passage of a law . . . postponing the public sales . . . for five years."[702] Congress still had made no concessions by the time land sales commenced in May of 1848.[703]

By mid-century, settler pre-emption rights had been firmly established in the state and federal statutory and common law. As a result of the individual allotment system, Indian-settler land disputes arose with greater frequency. In 1849, the Supreme Court of Indiana addressed the legal issues surrounding this problem for the first time in *Longlois v. Coffin.*[704] The facts of the case centered on the Miami Treaty of 1837, in which several individuals from the tribe, including the plaintiff Peter Longlois, were to receive specified grants of land "by patent from the president of the *United States.*"[705] However, when Longlois received the patent, it had apparently excluded a section of the original grant included in the Treaty. Instead, the U.S. had granted a portion of the land to the state, which was subsequently sold to the defendant named in the case. The Court dismissed Longlois's claim on the grounds that the Treaty grant merely amounted to a contract for

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[701] Act of 14 January 1847, *General Laws of the State of Indiana,* 31st sess., p. 156.
[702] Act of 13 January 1848, *General Laws of the State of Indiana,* 32nd sess., pp. 101-102.
[703] See United States, *House Journal,* 30th Congress, 1st Sess., pp. 637-638 (30 March 1848, the House of Representatives referred both resolutions to the Committee on Public Lands); United States, *Senate Journal,* 30th Congress, 1st Sess., p. 248 (31 March 1848, the Senate ordered both resolutions to lie on the table); Ibid. 2nd Sess., pp. 280-281 (1 March 1849, the Senate discharged the Committee on Public Lands from further consideration of Indiana's Resolutions).
[704] *Longlois v. Coffin,* 1 Ind. 446 (1849).
[705] Ibid. The Miami Treaty was signed on 23 October 1834; however, because it failed to stipulate removal, President Andrew Jackson's veto delayed congressional ratification until 22 December 1837. The Tribe ceded over two hundred thousand acres of the Miami National Reserve. In return, treaty provisions issued nearly fifteen thousand acres of land in fee simple patents to individual members; see "Treaty with the Miami," 23 October 1834, in Kappler, *Indian Affairs,* Vol. 2, pp. 425-428; also see Rafert, *Miami Indians,* pp. 95, 96.

the future conveyance of lands by patent.[706] Any error of assignment, the Court held, fell directly with the federal government, thus exempting the state from further remedy to which Longlois could appeal.[707] By assigning superior title to the settler in this case, the decision threatened to undermine potentially hundreds of individual Indian land grants in Indiana made under previous treaties with U.S. government.

But while tribal land rights may have diminished under the terms of settler custom, individual Indians continued to challenge the legal inequities of pre-emption and, on occasion, their efforts proved successful. In 1855, Gabriel Godfroy successfully petitioned the Miami Circuit Court to evict Jesse Poe, a squatter, from the Godfroy family lands.[708] According to the agreement filed by Godfroy on 16 March 1855, Poe was "to have possession of the premises . . . dwelling house and corn crib until the first of May next[,] at which time deft is to give entire & absolute possession of all the said lands and tenements to the Plaintiff." In rendering judgment, the Court ruled that "Plaintiff Gabriel Godfroy [was to] have restitution of said premises" and "recover of said Defendant his costs in this behalf expended."[709]

Nine years later, however, the Supreme Court of Indiana sustained the superiority of squatters' title over Indian title. In *Sumner v. Coleman,* the Court held that while a squatter "might have been a trespasser when he entered . . . before the treaty extinguished

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[706] *Longlois,* p. 447. "The correct doctrine on the subject," Judge Blackford wrote, held that ". . . [w]here a treaty says that the title to a certain tract of land is thereby vested in a certain individual, his heirs, and assigns, the treaty operates as a grant of the land." However, where a treaty stipulates that a "section of land, at a specified point, shall be granted to a certain person, his heirs, and assigns, *by a patent from the president of the United States,* the clause amounts only to a contract that the land shall be afterwards properly located by an agent of the government, and be conveyed by a patent from the president."

[707] "It may be that the general government has not done its duty as to the claim of the complainant, but with that we have nothing to do. That government is not a party to this suit; and if it was, we have no power to enforce the performance of its contracts or duties." See *Longlois,* p. 448.

[708] *Godfroy v. Poe,* Miami Circuit Court, Order Book C (16 March 1855), p. 194. Also see Rafert, *Miami Indians* p. 147.

[709] *Godfroy* p. 195.

the *Indian* title, . . . his occupancy afterward was recognized . . . as having been legal as a pre-emptioner, . . . giving him the equitable rights of such a person."[710] The squatter in this case, Hannaniah Hewitt, had settled a tract of land belonging to the Pottawatomie Tribe early in 1832. In October of that year, the Tribe signed a treaty in which the United States "agreed to select and convey some one, but no particular section" to Chief Topenehe.[711] In 1835, "the administration at *Washington* determined that *Indian* reservations must be located on lands not settled on those seeking to appropriate them under pre-emption claims, and that locating agents should be so instructed."[712] However, sometime "[i]n 1836 or 1837, . . . [Indian agent] *Douglass* made the location for *Topenehe* . . . embracing" the section of land "of which *Hewitt* was in possession as a pre-emption claimant." "In deciding upon conflicting titles derived from the state or the *United States,*" Judge Samuel Perkins held that the squatter held "prior equity" and was "entitled to the legal title." The selection for Topenehe, on the other hand, whether made by "mistake or design," was in "violation and abrogation of an equitable title in Hewitt" and "an attempt to divest [his] vested right and title to property."[713] Whereas adverse possession would otherwise have posed conflict of title claim, the right of pre-emption vested superior title in the common settler.

While the idea of the Indians as occupants, rather than owners, of their land had become a "well-known fact" in the years following *Johnson,* the western states reinforced the

[710] *Sumner v. Coleman,* 23 Ind. 91 (1864).
[711] Ibid. For the treaty provision granting an individual reserve to Topenehe (or To-pen-ne-bee), see "Treaty with the Potawatomi," 27 October 1832, Kappler, *Indian Affairs,* Vol. 2, p. 373.
[712] *Sumner*, p. 91.
[713] Ibid. p. 92.

notion that the sources of American property law originated in common settler usage.[714] The normative force of these practices depended upon the authoritative, value-laden narratives set forth in cases like *Armstrong, Longlois,* and *Sumner,* as well as speeches such as those given by Senator Smith. Yet the legality of settler usage also depended upon the absence of pre-existing norms, which would otherwise have introduced conflict. By retrospectively portraying the western frontier as a jurisdictional "wasteland" simply awaiting "civilization," organization, and "improvement," these stories introduced normative discontinuity rather than reciprocity or recognition. Such is the myth of settler sovereignty, a myth rooted in colonization, territorial expansion, and state formation. The legal and extra-legal means by which this narrative evolved, form part of the story that remains to be told.

[714] Banner, *Indians,* p. 188, quoting an 1827 congressional committee report.

CHAPTER 3: LAW, HISTORY, AND THE ROLE OF CUSTOM: SETTLER SOVEREIGNTY AND COLONIAL CULTURE IN INDIANA

"No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning." –Robert Cover[715]

The American Revolution marked an ideological departure from British notions of sovereignty, helping redefine the concept throughout the colonial world by asserting jurisdiction in absolute, territorial terms. Guided by their own sense of proto-nationalism, British settler polities embarked upon a global campaign of legal reform during the first decades of the nineteenth century, seeking to contain the jurisdictional diversities of legal pluralism.[716] This "Empire of Uniformity," as James Tully refers to it, sought to consolidate its constitutional identity by exercising authority over a culturally homogeneous society.[717]

The means by which the settler polities exercised sovereignty differed markedly. As Laura Benton observes, "[w]hile the project of legal pluralism [in some parts of the colonial world] was slowly producing a space for the . . . state as a repository of rules about legal interaction, in [other] settings the shift to state legal hegemony took place . . . without the creation of an elaborate system of multiple legal spheres."[718] Unlike most British colonies, which governed through a decentralized hierarchy of Indigenous legal institutions, the American settler states assumed a position of direct rule over the Indian

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[715] Robert M. Cover, "Foreword: Nomos and Narrative," *Harvard Law Review,* Vol. 97, No. 1 (Nov. 1983): p. 4.
[716] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836,* Cambridge, Mass: Harvard University Press, 2010, p. 21.
[717] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity,* Cambridge: Cambridge University Press, 1995, pp. 58-98. Paul McHugh adds to Tully's analysis by remarking that "the colonial and American Leviathans became distinct Empires of Uniformity." See P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination,* Oxford: Oxford University Press, 2004, p. 129.
[718] Laura Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900,* New York: Cambridge University Press, 2002, p. 167; also see McHugh, *Aboriginal Societies,* p. 129.

tribes. The reasons for these differences depended upon the demographic and socio-economic circumstances unique to each society. British colonists in Africa and Southeast Asia sought to extract commodities and raw materials for trade in the international marketplace, but American colonists had settled, occupied arable land, and set out to recreate communities similar to those they left in Britain. Most British colonial projects depended upon an effective system of organized Indigenous labor, while the comparatively sparse population of Native peoples in North America resulted in their displacement by the settler polity.[719]

Despite their differences, British and America settler polities shared common characteristics in containing the jurisdictional diversities of colonial society. These attributes included: (1) a dominant legal ideology based on a hierarchal system or norms; (2) official criteria for recognition of customary or Indigenous law (especially in matters of property law, family law, and inheritance); and (3) rules and techniques of legal interaction.[720] The basis of these commonalities existed because of a shared history rooted in conquest and settlement, resulting in a global diaspora of language, common law culture, governmental and non-governmental institutions, household structures, land tenure, and customary law jurisprudence.[721] The continuity of common practices resulted from a burgeoning international trade and commerce, foreign diplomacy, and a global network of information exchange in legal publishing and newspapers.[722]

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[719] Ford, *Settler Sovereignty*, p. 6.
[720] See M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws,* Oxford: Clarendon Press, 1975, pp. 4, 55.
[721] Ford, *Settler Sovereignty*, pp. 3, 5, 8.
[722] See generally, Zoe Laidlaw, *Colonial Connections, 1815-1845: Patronage, the Information Revolution and Colonial Government,* Manchester, UK: Manchester University Press, 2005.

Some scholars either overlook these parallels or reject them completely. For example, anthropologist Bernard Cohn suggests that "[t]he indigenous populations encountered in North America were quickly subjugated, relocated, or decimated, and even though there continued to be, from the colonial perspective, a 'native' problem, it was a military and political one, requiring little in the way of legal or administrative innovation."[723] This chapter overturns these assumptions. Situated within a global context of Indigenous-settler relations, the following sections explore the continuities and discontinuities of colonialism in Indiana settler society. The story that emerges traces the ideas and practices that circulated throughout the colonial world, across the peripheries of empire, and into the local courtrooms, legislative chambers, and other institutions of the settler state.

Above all, the search for settler sovereignty entailed a larger narrative discourse, a rhetoric and mythos preoccupied with legal and constitutional origins. By adopting the colonial-era "birthright" principle of common law rights and privileges, the post-Revolutionary jurists set out to create a legal system independent of the imperial yoke. To suggest origin in conquest simply perpetuated England's cultural and political hegemony over North America. "[T]he English emigrants who came out to settle in America," Virginia jurist St. George Tucker wrote in 1803, "[brought] with them all the rights and privileges of free natives of England; and . . . that portion of the laws of the mother country, which was necessary to the conservation and protection of those rights."[724] Contemporary legal writers and political essayists shared these views widely,

[723] See Bernard S. Cohn, "Colonialism and Its Forms of Knowledge: The British in India" in Cohn, *The Bernard Cohn Omnibus*, New Delhi: Oxford University Press, 2004. p. 57.
[724] In the seventh edition to his *Commentaries* published in 1775, William Blackstone added an expanded discussion on the authority of English laws in the British colonies. Restating Lord Coke's distinction

and by the early nineteenth century the retrospective classification of America as a "settled" colony had become established doctrine. The British colonies quickly followed suit. Settler polities in India, West Africa, New South Wales, New Zealand, and other territories otherwise considered conquered or ceded, asserted birthright claims to the common law in their own political and constitutional discourse.[725]

Part one of this chapter discusses the testimonial restrictions on American Indians under Indiana law and policy and the debates that eventually led to reform. To depict the past and present through narrative became an instrumental means of creating normative value, doctrinal coherence, and self-referential authority. The law of evidence was critical to this process, leaving little room for legal pluralism and open dialogue. Until the late-nineteenth century, many states restricted American Indians from testifying in courts of law. Similar restrictions in the British colonies denied Indigenous peoples, as non-Christians, the credibility to provide admissible evidence.

Another feature of the settler polity's administrative scheme was the creation of "customary" law. An integral part of the colonial structure of legal pluralism, customary

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between settled and conquered/ceded colonies, Blackstone classified the "American plantations . . . [as] this [latter] sort, being obtained . . . either by right of conquest and driving out the natives . . . or by treaties." As a result, "the common law of England . . . ha[d] no allowance or authority there; they [the "natives"] being no part of the mother country, but distinct (though dependent) dominions." See William Blackstone, *Commentaries on the Laws of England,* 7th ed., Vol. 1, Oxford: Clarendon Press, 1775, pp. 107-108. Tucker's restatement of the *Commentaries,* as quoted above, served to refute as "erroneous" Blackstone's claims of America as founded in conquest; see St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia,* Vol. 1, Philadelphia: W.Y. Birch and A. Small, 1803, pp. 382-384; also see Ellen Holmes Pearson, "Revising Custom, Embracing Choice: Early American Legal Scholars and the Republicanization of the Common Law," in Eliga H. Gould and Peter S. Onuf, eds., *Empire and Nation: The American Revolution in the Atlantic World,* Baltimore: Johns Hopkins University Press, 2005, p. 101. On how Blackstone's view of the America as a conquered colony contributed to the Revolution, see Beverly Zweiben, *How Blackstone Lost the Colonies: English Law, Colonial Lawyers, and the American Revolution,* New York: Garland Publishing, Inc., 1990.

[725] See McHugh, "Common-Law Status," pp. 420-427; also see Marete Falck Borch, *Conciliation, Compulsion, Conversion: British Attitudes Towards Indigenous Peoples, 1763-1814,* New York: Rodopi, 2004, p. 223.

law—with its carefully crafted jurisdictions, separate institutions, and distinct rules based on local "traditions"—sustained the idea of a Native legal culture distinct from yet dependent upon the settler polity.[726] In English common law, judges followed a specific set of criteria to determine the legal force of custom. However, as a colonial transplant, customary law experienced fundamental problems in relation to the Native legal systems that British and American authorities sought to administer. "Each of these jurisdictions," David Bederman observes, "confronted questions as to the application and ascertainment of custom, the resolution of conflicts between customary regimes, the potential repugnancy of customary norms with common law or constitutional principles, the dynamic of codification of custom and the role of courts in that process."[727]

A key evidentiary dilemma, as Bederman points out, was "whether a customary rule should be treated as a matter of law for sole determination by a judge, or, rather, as a question of fact that must be pleaded and proven by the parties."[728] In English-based common law systems, "judicial notice" refers to a judge's recognition of something as fact without the necessity of proof by evidence. The doctrine distinguishes matters of fact from matters of law. The former may include certain historical facts, geographic facts, or, quite simply, "generally known facts."[729] Matters of law, on the other hand, refer to constitutional or public statutory law, or the prior decisions of courts (case law)

[726] Ann Marie Plane, "Customary Laws of Marriage," in Christopher L. Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America,* Chapel Hill: University of North Carolina Press, 2001, p. 209.
[727] David J. Bederman, *Custom as a Source of Law,* New York: Cambridge UniversityPress, 2010, p. 61. For an earlier overview and analysis of these "problems," see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law,* New York: Praeger, 1966, pp. 534-538.
[728] Bederman, *Custom,* 2010, p. 61.
[729] In Indiana, for example, judges have long taken notice of matters related to "public history" (*Williams v. State*, 64 Ind. 553 (1878); *Stout v. Board of Com'rs of Grant County*, 107 Ind. 343 (1886); and *Smith v. Pedigo*, 145 Ind. 361 (1896)), English common law reception (*Johnson v. Chambers,* 12 Ind. 102 (1859)), land grants (*Carr v. McCampbell,* 61 Ind. 97 (1878)), the history of canals and internal improvements (*City of Indianapolis v. Indianapolis Water Co.,* 185 Ind. 277 (1916)), county history (*Mode v. Beasley,* 143 Ind. 306 (1896)), or economic history (*Martin v. Loula,* 208 Ind. 346 (1935)).

of the same or superior jurisdiction. Such distinctions in legally plural societies have often presented sharp ideological conflict.[730] Whereas Native peoples recognized and applied their own laws and customs to matters arising internally, in most colonial legal systems the courts associated Native law with foreign law, a question of fact to be specially pleaded.[731] Similar rules of evidence operated in the states, since the courts refused to judicially notice "foreign" laws, having become "no part of the general law of the land."[732] Under this analogical reasoning, judicial recognition of Indian laws and customs followed principles of private international law or conflict of laws theory.[733]

Part two of this chapter examines the extra-legal, ethnographic foundations of customary law in societies that recognize legal pluralism. The means of ascertaining or "proving" Native customary law—whether in British colonial "native courts" or American settler common law courts—involved a larger empirical lens. British and Anglo-American jurists sought to define Native custom in a manner consistent with English common law principles of recognition; however, in realizing the practical limitations this effort entailed, legal authorities used supplemental forms of discovery or

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[730] "What are perceived as facts in one [legal] tradition may be seen as profoundly symbolic and normative in another." See H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law,* 4th ed. Oxford: Oxford University Press, p. 14.

[731] See A.N. Allott, "The Judicial Ascertainment of Customary Law in British Africa," *Modern Law Review,* Vol. 20, No. 3 (May, 1957), p. 246.

[732] "Particular customs . . . , like the statutes of other states and foreign laws, being no part of the general law of the land, must be set forth in the pleading of the party relying on them[;] [t]hey are pleaded as matters of fact; and their existence may be denied by plea. When denied, they must be proved as other facts are proved." See *Elliott v. Ray,* 2 Blackf. 31(1826).

Not until 1936, when the National Conference of Commissioners on Uniform State Laws recommended the Uniform Judicial Notice of Foreign Law Act for adoption, would American courts begin taking judicial notice of the common and statutory law of other jurisdictions. Indiana adopted the Act in 1937; see Act of 9 March 1937, *Laws of the State of Indiana,* 80th sess., pp. 703-705. The title to the act, however, is somewhat misleading as it applied only to the recognition of jurisdictions within the United States; see Arthur K. Kuhn, "Judicial Notice of Foreign Law," *American Journal of International Law,* Vol. 39, No. 1 (Jan., 1945): pp. 86-89.

[733] See, for example, Herbert F. Goodrich, "Foreign Marriages and the Conflict of Laws: Non-Christian Marriages," *Michigan Law Review,* Vol. 21, No. 7 (May, 1923): pp. 759-764, discussing American Indian marriage and divorce customs.

evidence gathering.[734] A central feature of Enlightenment-era empirical philosophy (and intellectual foundation to modern international and comparative law), legal ethnography emerged as a descriptive, analytical method of studying the norms, customs, and social structures of foreign and exotic cultures.[735] This process assisted the courts in taking cognizance of Native custom as a special legal category.

Once recorded, this knowledge could be systematically interpreted, arranged, classified, and diffused to and from other sites of epistemological inquiry and knowledge making. Archives, museums, and institutions of public learning played important parts in this process. During the early to mid-nineteenth century, the growth of professional and academic institutions in the United States and throughout the colonial world nurtured a culture of expertise in which state access to specialized knowledge formed the pragmatic basis of law and policy. As one intellectual repository of the settler state, the Indiana Historical Society (IHS) facilitated the forensic process of discovery through the collection, preservation, and diffusion of Native laws and customs.[736] Thus, as the "legal transformations accompanying colonialism" paralleled changes in other institutional "forms of knowledge and representation," an appropriate view of judicial notice necessarily entails the empirical methods of administration in the settler state.[737]

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[734] On the colonial analogies imposed on Native customary law, see A. St. J.J. Hannigan, "Native Custom, Its Similarity to English Conventional Custom and Its Mode of Proof," *Journal of African Law,* Vol. 2, No. 2 (Summer, 1958): pp. 101-115.

[735] Eve Darian-Smith, "Ethnographies of Law," in Austin Sarat, ed., *The Blackwell Companion to Law and Society,* Malden, Mass.: Blackwell Publishing, 2004, p. 545.

[736] This is a central theme in Oz Frankel's study of the nineteenth-century state's political role in the fields of knowledge and print in *States of Inquiry: Social Investigations and Print Culture in Nineteenth-Century Britain and the United States,* Baltimore: Johns Hopkins UniversityPress, 2006, especially chapter seven, "Archives of Indian Knowledge," and chapter eight, "The Purloined Indian."

[737] Quotes taken from Sally Engle Merry, "Anthropology, Law, and Transnational Processes," *Annual Review of Anthropology,* Vol. 21 (1992), p. 365.

By examining the relationship of knowledge to power, this chapter places a strong emphasis on theories of post-modernism. According to scholars such as Michel Focault, Edward Said, and Bernard Cohn, colonialism represented not so much a physical act of conquest than a form of intellectual occupation, an invasion of epistemological space or harnessing of Indigenous knowledge systems, which decidedly reconfigured the balance of power in settler society. Accordingly, these theories posit that Native customary law "was not a relic of a timeless pre-colonial past" but rather an "historical construct" of the colonial encounter itself.[738]

In many ways, these ideas hold true. Yet to examine customary law through the skewed lens of post-modernism and to label it as purely "invented tradition," ignores the complexities and ironies of colonial legal culture.[739] The myth of colonialism—as a unilateral act of conquest, instrument of domination, or means of exporting "civilization"—collapses when we examine the diversity of relations between the colonizers and colonized, including the influence of Native peoples in the design, meaning, application, and transformation of customary law.

Part three of this chapter explores the state recognition of Native marriage customs through case study analysis. Beginning with an overview of important English decisions, this section looks at how the rule of recognition evolved under imperial common law principles of continuity and the extent to which this legal philosophy provided a doctrinal framework for the common law recognition of Indian custom in the settler states. *Roche v. Washington* provides a unique window into the complexities and ironies of colonial legal culture in nineteenth-century Indiana.

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[738] Ibid. p. 364.
[739] Eric Hobsbawm and Terence Ranger, eds., *The Invention of Tradition,* Cambridge, UK: Cambridge University Press, 1992; also see Bederman, *Custom as a Source of Law,* p. 60.

Dialogical Limits to Customary Laws of Evidence: Restricting American Indian Testimony in the Indiana Courtroom

"If he is a Hindoo or a Mahometan, we adopt the form of oath he uses. But the New Zealander, the Australian, the Caffre and the Indian, have no such usage. . . . [Consequently, they are] rejected if brought into the witness box." –Testimony of Saxe Bannister, Former Attorney-General of New South Wales, 31 August 1835

The state's claim to legal jurisdiction entailed a promulgation of rules, including those concerning the practice of law and who could participate as parties, witnesses, and members of a jury.[740] Until after the Civil War, most state courts upheld statutes that barred Indians from testifying as witnesses.[741] Indiana was no exception. The state restricted American Indians, along with African-Americans, from testifying in cases involving whites until 1867.

While ideas of race and religion played a central role in this legal proscription, the question of whether to admit Native testimony at trial involved issues of greater historical depth and complexity, extending well beyond the temporal and jurisdictional boundaries of nineteenth-century U.S. law and policy as a long-standing legal inquiry into the law of the "other." With deep roots in English and Continental jurisprudence, the ancient practice of admitting testimony "according to the law by which one lives," served as a pragmatic strategy and principle of comity for dealing with any number of inter-community conflicts. Only with the rise of legal positivism, and the rules by which the principle of territorial jurisdiction governed all communities alike, would the overriding

[740] Benton, *Law and Colonial Cultures,* p. 17.
[741] Although a source of criticism and debate among federal officials during the early national period, state laws barring Indian testimony received insufficient attention for repeal until the Reconstruction era; see Gerard N. Magliocca, "The Cherokee Removal and the Fourteenth Amendment," *Duke Law Journal,* Vol. 53, No. 3 (Dec., 2003): pp. 903, 940.

concern become that of determining the validity and reliability of witness testimony based on characteristics such as race, sex, age, and religion.[742]

The recognition of personal or customary laws of evidence did not simply vanish with the assumption of state authority. In Indiana, for example, statutory and constitutional provisions sustained the principle of personal law in matters of testimony and courtroom evidence. The difference, of course, lay in the means of recognition. Although the credibility of witness testimony remained contingent upon community acceptance (as embodied in the common law jury system), the competency of witnesses depended on the external criteria of state authority.

During the late medieval period, the Romano-Canon legal tradition in Europe began to replace instruments of irrational proof, judicial torture, and other ordeals with rational forms of inquiry and critical evaluation of evidence. Witnesses played an increasingly critical role in the evolution of this complex analytical process.[743] Local custom performed an equally important function in matters of proof and evidence. England, as with the Continental nations, was a culturally plural society with multiple legal traditions during the High Middle Ages. Although the Crown held jurisdiction over administrative and judicial matters throughout the realm, outlying borough and rural courts operated according to local practice. In most borough charters, English kings entitled certain groups, communities, or towns to administer their own affairs "according to the ancient

[742] Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge*, Chicago: University of Chicago Press, 1994, pp. 2, 25.
[743] Barbara J. Shapiro, *A Culture of Fact: England, 1550-1720,* Ithaca, NY: Cornell University Press, 2000, p. 8.

law of the borough which they had in the time of our ancestors."[744] By recognizing the "ancient custom" of localities, these charters explicitly conveyed the idea that communities should be judged by their own people and according to their own laws.[745]

The same principle applied to immigrants, foreigners, trade merchants, and other distinct communities throughout England. Local jurors and witnesses (the distinction being less evident than today)—as persons most knowledgeable of their community's practices—presented evidence at trials administered by other members of the vicinage. Jewish peoples, for example, exercised jurisdiction over disputes arising among themselves (until their expulsion from England in 1290) and—while mistrust and contempt toward the Jews certainly pervaded English society—the courts recognized the *lex Judaica* in matters related to debt, petty crime, marriage, and inheritance.[746] In Christian-Jewish disputes, an 1190 royal charter required plaintiffs to call upon a witness from both religious denominations. The charter also provided that if a Jew "be summoned by anyone without a witness, [he] shall be acquitted of that summons by only an oath upon their book."[747]

By the mid-sixteenth century, testimony had become essential to English common law proceedings. However, customary local practice had assumed a position of lesser standing. Although the doctrine of *stare decisis* had not yet taken root, the gradual centralization of courts and the reduction of law to its written form, prompted concerns over how to recognize the diversity of customs in resolving conflicts that arose between members of distinct communities. Throughout the early modern period, different

[744] Constable, *Law of the Other,* p. 11, quoting King John's 1201 Charter to the Borough of Cambridge.
[745] Ibid.
[746] Ibid. pp. 16, 18.
[747] 1190 Charter of King Richard I, as quoted in Robert Chazan, ed., *Church, State, and Jew in the Middle Ages,* New York: Behrman House, 1980, p. 68; also see Constable, *Law of the Other,* pp. 18-19.

evidentiary standards emerged to assist the courts in determining the credibility and competency of witnesses. Oaths played an important part in this process. Although predating the introduction of witness testimony in trials at common law, oath-taking—intended to deter perjury or false testimony—generated a sense of authority, fidelity, and honesty in the courtroom.[748]

By distinguishing questions of law from questions of fact, judges decided the competency of witnesses to testify in trials at common law. On the other hand, courts in early modern Europe often left the jury to determine witness credibility. In drafting his "Proclamation for Jurors," published in 1607, English lawyer-philosopher Sir Francis Bacon wrote that the common law left "the discerning and credit of testimony wholly to the Juries' consciences and understandings."[749] Sir Matthew Hale, another leading seventeenth-century English jurist, agreed, insisting that jurors were "judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witnesses and the testimony."[750]

To assist juries with weighing testimony at trial, common law jurists developed indicia of witness credibility. These factors, historian Barbara Shapiro outlines, included "gender, property holding, social status, education, and expertise," as well as "the oath taken by witnesses and whether or not the testimony was hearsay" or second-hand evidence.[751] Other indicia included the witness's moral character, community reputation,

[748] Ibid pp. 12, 19-20.
[749] James Spedding, ed., *An Account of the Life and Times of Francis Bacon,* London: Trübner and Co., 1878, p. 513.
[750] Quoted by Shapiro, *Culture of Fact,* p. 14.
[751] Ibid.

and age. Children, for example, lacked the appropriate "skill and discernment" needed to testify.[752]

Religion became a particularly important value in measuring witness credibility as well. "One's reputation for piety was a relevant consideration," Shapiro adds, "and those who were 'atheistical and loose to oaths' were not to be given the same credit as 'men of good manners and clear conversation.'"[753] The role of religion would come to have a powerful impact on the admissibility of testimony from Indigenous peoples. Colonial municipal courts throughout the British Diaspora often excluded Natives as witnesses because, as "non-Christians," judges presumed they were unable to empathize with the sanctity of an oath or, as was often the argument, fear divine punishment for false testimony.[754]

In his *Institutes of the Laws of England,* Sir Edward Coke espoused the principles of Christianity as fundamental to the English common law. The only reliable oath, he held, was "an affirmation or denial, by any Christian, of any thing lawful and honest, before one or more that have authority to give the same for advancement of truth and right, calling Almighty God to witness, that his testimony is true."[755] Because non-Christian witnesses lacked the capacity for being sworn under English common law, their testimony was inadmissible.[756]

In 1744, the English Court of Chancery held in *Omychund v. Barker* that non-Christian testimony was, contrary to Coke's dictum, admissible on the grounds of

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[752] Ibid. p. 16, quoting Sir Geoffrey Gilbert, *Law of Evidence.*
[753] Ibid. p. 17, quoting Gilbert, *Law of Evidence.*
[754] Benton, *Law and Colonial Cultures,* p. 185.
[755] Coke, *The Fourth Part of the Institutes of the Laws of England* (1628), as quoted by Reginald Good, "Admissibility of Testimony from Non-Christian Indians in the Colonial Municipal Courts of Upper Canada/Canada West," *Windsor Yearbook of Access to Justice,* Vol. 23, No. 1 (2005): p. 57.
[756] Good, "Admissibility," p. 57.

established evidentiary standards.[757] The issue before the Court was whether deposition testimony, taken in the colonial province of Bengal and sworn under oath by witnesses declaring the Gentou (Hindu) faith, could be admitted at trial in England.[758] For the Court, Lord Chancellor Hardwicke rejected the defense counsel's argument that permitting the oath of an "infidel" stood at variance with the principles of English common law.[759] In practical terms, Lord Chief Justice Lee of the Court of King's Bench held that the administration of an oath followed a "positive, artificial" rule of evidence, "framed by men for their Convenience in respect to the Transaction of Business in Courts of Justice."[760] Although no assurance against perjury, Lord Chief Baron Parker of the Court of Exchequer added that the credibility of sworn testimony "must be left to the Jury."

In dissenting opinion, Lord Chief Justice Willes of the Court of Common Pleas argued that "the usual Stile" of administering an oath in English courts required that witnesses swear upon the Christian scriptures. The admission of Gentou witnesses sworn according to ceremonies of their own religion constituted a "Novelty."[761] According to Parker's reasoning, however, "[t]he Law of England [was] not confined to particular Precedents and Cases," but rather based on general principles and standards governing

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[757] Ibid. p. 56.
[758] See Ibid. pp. 57-58 for an extended treatment of the facts of the case.
[759] Ibid. p. 58. Although separate from the common law courts, the English Court of Chancery, often referred to as a "court of conscience," sought to reinforce the law of England rather than undermine it. Free from strict rules and rigid procedures, "[e]quity had come not to destroy the law, but to fulfill it." See Frederic W. Maitland, *Equity, Also, The Forms of Action at Common Law: Two Courses of Lectures,* eds. A.H. Chaytor and W.J. Whittaker, Cambridge: University Press, 1910, p. 17; also see John H. Baker, *An Introduction to English Legal History,* 4th ed., London: Butterworths LexisNexis, 2002, pp. 102-103.
[760] Good, "Admissibility," p. 58. Until the late eighteenth century, despite frequent antagonisms, chancellors often called upon common law judges for advice; see William Lindsay Carne, "A Sketch of the High Court of Chancery from its Origin to the Chancellorship of Wolsey," *Virginia Law Register, N.S.,* Vol. 13, No. 7 (Nov., 1927): p. 412. On the often-volatile relationship between the two courts, see Baker, *English Legal History,* pp. 108-109.
[761] "Evidence and Witnesses," *English Reports,* Vol. XXII: *Chancery, II,* London: Stevens & Sons, Ltd., 1902, pp. 341, 342; and Good, "Admissibility," p. 59.

the decisions.[762] These principles—seven of which Lord Chancellor Hardwicke distinguished in his opinion—justified the admission of sworn, non-Christian testimony; five of these concern this study's analysis: (1) the rule of best evidence; (2) reciprocity in matters of international commercial law; (3) utility; (4) natural justice; and (5) the law of nations, which admitted different forms of the oath to accommodate a "particular Religion."[763]

With *Omychund,* English jurists had largely discarded the distinction between Christian and "infidel" nations in recognizing the laws and customs of a conquered people. By virtue of the imperial common law principle of continuity, customary laws of evidence and testimony remained in force in the British colonies. As Attorney-General of New South Wales Saxe Bannister would later state, "no native who has not the practice in his own country of making an oath in a court of justice, should be compelled to take an oath in our courts; he should be admitted as a witness upon the same terms as regulate him in his own country."[764] Until the late-nineteenth century, however, very few colonial municipal courts applied this principle in cases involving non-Christian testimony. Reginald Good attributes this departure to a widely-circulated version of the *Omychund* case published in Atkyns' *Reports* (John Atkyns was the defendant's counsel), a summary analysis of the ruling that excluded key points in support of admitting non-Christian testimony. Early nineteenth-century English treatises on the law of evidence incorporated this diluted analysis of the case, generating strict rules that often barred

[762] Quoted by Good, "Admissibility," p. 59.
[763] Ibid. p. 60. The other two principles concerned the presumed necessity of available witnesses had the case arisen in the foreign country; and that the contract was an expression of the parties' intent and the exclusion of one's testimony over another would have deprived their mutual right to sue.
[764] Testimony of Saxe Bannister, Former Attorney-General of New South Wales, 14 March 1837, as quoted in Good, "Admissibility," p. 77.

testimony from non-Christian Natives.[765] In 1805, Judge-Advocate Richard Atkins held that Aboriginal peoples were "incapable" of legal standing before a court, because "the evidence of Persons not bound by any moral or religious Tye can never be considered or construed as legal evidence."[766] British courts tended to follow this reasoning throughout the nineteenth century. Not until the 1870s would the colonies begin to amend their legislation allowing non-Christian Natives to testify upon taking an affirmation in lieu of an oath.[767]

Whereas religious principles often determined the rule of exclusion in most of the British colonies, race played a predominant role in the Anglo-American law of evidence. Prior to the eighteenth century, the Native tribes governed themselves largely independent of the British colonists in North America. However, when cases arose involving Indian litigants, colonists struggled with the question of witness competency.[768] Early colonial laws made limited provisions. For example, a 1666 Massachusetts Bay Colony criminal statute, adopted as well in the Plymouth Colony the following year, provided "that the accusation, information, or testimony of any Indian . . . shall be accounted [for] sufficient conviction of any English person . . . suspected to sell, trade, or

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[765] Good, "Admissibility," p. 61.
[766] As quoted in Nancy E. Wright, "The Problem of Aboriginal Evidence in Early Colonial New South Wales," in Diane Kirkby and Catharine Coleborne, eds., *Law, History, Colonialism: The Reach of Empire,* Manchester, Eng.: Manchester University Press, 2001, p. 141.
[767] By the late 1830s, several colonial jurists and legislators had begun to question the effectiveness of these legal restrictions. In response, the English Parliament passed "The (Colonies) Evidence Act" on 1 May 1843, which allowed the courts to receive unsworn testimony from "Tribes of barbarous and uncivilized peoples, destitute of knowledge of God and religious belief." However, at the time of its passage and for several decades thereafter, colonial lawmakers failed to pass internal legislative measures implementing the Act. Canada and New South Wales passed legislation in 1874 and 1876 respectively, which lifted testimonial restrictions; see, generally, Wright, "Aboriginal Evidence," pp. 140-155; and Good, "Admissibility," pp. 55, 72-73.
[768] James Bradley Thayer, "A Chapter of Legal History in Massachusetts," *Harvard Law Review,* Vol. 9, No. 1 (25 April 1895): p. 3. The issue also arose in matters involving other "peculiar classes," specifically the Quakers.

procure any wine, cider, or liquors . . . to any Indian or Indians, unless such English shall, upon their oath, clear themselves from any such act."[769]

As interaction grew and disputes intensified, colonial lawmakers soon realized that the Indians "would be greatly disadvantaged if no testimony should . . . be accepted upon oath."[770] Consequently, in 1674, the Plymouth Colony "ordered that any court of this jurisdiction before whom such trial may come, shall not be strictly tied up to such testimonies on oath as the common law requires, but may therein act and determine in a way of chancery, valuing testimonies not sworn on both sides according to their judgment and conscience."[771]

By the early to mid-eighteenth century, colonial statutes regulating testimony had begun to classify Native peoples in distinct racial terms. In May of 1723, the Virginia House of Burgesses passed "An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and Indians, bond or free."[772] Because the House found the laws to be "insufficient to restrain [the slaves'] tumultuous and unlawful meetings, or to punish secret plots and conspiracies carried amongst them," lawmakers considered it necessary to extend testimonial privileges to those theretofore "not accounted legal evidence" in order to assist in "detecting and punishing all such

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[769] Quoted at Ibid. p. 6.
[770] Ibid.
[771] Ibid.
[772] Hening, *Statutes at Large,* Vol. IV (1711-1736), pp. 126-134; also see Oliver Perry Chitwood, "Justice in Colonial Virginia: Chapter III," *West Virginia Law Quarterly,* Vol. 32, No. 4 (June, 1926): pp. 289-290. Virginia legislation would later have considerable influence on the construction of Northwest Territorial and Indiana Territorial statutes; see, generally, Earl D. Bragdon, "The Influence of the Virginia Code on the Development of the Laws of Indiana Territory, 1800-1816," Master's Thesis, Indiana University, 1956; and, on testimonial restrictions, see infra, p. 237.

dangerous combinations for the future."[773] Section three of the Act provided for the issuance of a commission, "impowered and required to cause the offender to be publicly arraigned and tried . . . and to take for evidence . . . the oath of one or more credible witnesses, or such testimony of Negroes, Mulattos, or Indians, bond or free."[774] In an attempt to ensure a greater degree of testimonial reliability, the Act further declared that "such Negroes, Mulattoes, or Indians, not being Christians, . . . may be under the greater obligation to declare the truth."[775] Such persons "found to have given a false testimony," were to "be ordered by the said court to have one ear nailed to the pillory . . . and then the said ear to be cut off." Moreover, "every such offender" was to receive "thirty-nine lashes . . . on his or her bare back, at the common whipping post."[776]

In May of 1732, the Virginia House of Burgesses passed an act "in relation to the benefit of Clergy . . . and to disable certain Persons . . . to be Witnesses."[777] Section four of the Act provided "[t]hat when any negro, mulatto, or Indian whatsoever, shall be convicted of any offence within the benefit of clergy, judgment of death shall not be given . . . but he or she, shall be burnt in the hand in open court, by the jailor, and suffer such other corporal punishment, as the court shall think fit to inflict."[778] In such cases, however, greater testimonial restrictions applied to Indians and African-Americans. The Act acknowledged that "negros, mulattos, and Indians, [had] lately been . . . allowed to

[773] Hening, *Statutes,* IV, p. 126.
[774] Ibid. p. 127.
[775] Ibid.
[776] Ibid. The Virginia House Of Burgesses passed a similar Act in 1748; see Hening, *Statutes at Large,* Vol. VI (1748-1755), pp.104-107.
[777] Ibid. pp. 325-327. The "benefit of Clergy" plea in colonial Virginia entered legal practice from the criminal common law of England. The plea served as a type of motion in arrest of judgment in which the court declared a lesser sentence for first-time offenders only; see generally Jeffrey K. Sawyer, "'Benefit of Clergy' in Maryland and Virginia," *American Journal of Legal History,* Vol. 34, No. 1 (Jan., 1990): pp. 49-68; and Linda Rowe, "The Benefit of Clergy Plea," *Colonial Williamsburg* [online], http://research.history.org (accessed 6 October 2010).
[778] Hening, *Statutes,* IV, p. 326.

give testimony as lawful witnesses in the general court, . . . when they . . . professed themselves to be christians, and [were] able to give some account of the principles of the christian religion." However, "forasmuch as they are people of such base and corrupt natures, that the credit of their testimony cannot be certainly depended upon, and some juries have altogether rejected their evidence," sections five and six restricted their testimony "[f]or preventing the mischiefs that may possibly [have] happen[ed] by admitting such precarious evidence."[779] Twelve years later, however, the assembly amended these provisions. "[W]hereas many free negros, Indians, and mulattoes, avoid the paiment of their just debts . . . to the great loss and prejudice of honest creditors," a 1744 act provided that "any free negro, mulatto, or Indian, being a christian, shall be admitted, in any court of this colony, or before any justice of the peace, to be sworn as a witness, and give evidence, for or against any other negro, mulatto, or Indian, whether slave or free, in all causes whatsoever, as well civil as criminal."[780]

By the early nineteenth century, racial characteristics had clearly distinguished the criteria used in U.S. courts to bar Indian testimony. Western state and territorial laws often classified Indians with other racially-defined groups with diminished legal standing. As Deborah Rosen notes, "[a]lthough the separate and distinct political status of Indian tribes might have served as the original rationale for laws excluding Indians from voting and serving on juries, by the nineteenth century the exclusion was applied indiscriminately both to Indians who retained a tribal affiliation and to those who did not, signaling clearly the underlying racial reason."[781]

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[779] Ibid. pp. 326-327.
[780] Hening, *Statutes,* Vol. V (1738-1748), pp. 244-245.
[781] "Similarly," Rosen adds, "although early rules prohibiting Indians from testifying in Court might have been based formally on the fact that, as non-Christians, they were perceived as unable to take an oath, the

Statutes rendering Indian witnesses legally incompetent prevailed during the early national and antebellum period. In 1803, Indiana incorporated this legal disability into its territorial code. Meeting at their fourth session, Governor William Henry Harrison and the judges adopted portions of the Virginia and Kentucky codes in passing a supplementary act to a law regulating "the practice of the General Court upon Appeals and Writs of Error, and other purposes."[782] Section twenty-one of the Act stipulated that "[n]o negro, mulatto or Indian shall be a witness except in the pleas of the United States against negroes, mulattoes or Indians, or in civil pleas where negroes, mulattoes or Indians, alone shall be parties."[783]

After 1816, Indiana lawmakers preserved these legal disabilities in the state code with minor variations in statutory language.[784] However, because of complex legal definitions or ambiguous statutory construction, the courts often had to decide whether or not to admit Indian testimony. In 1837, the Indiana Supreme Court considered the issue at length in *Harris v. Doe.*[785] The case originated in the Allen County Circuit Court as an action of ejectment by plaintiffs Barnett and Hannah against defendant Harris and others

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laws did not make any exception for Christian Indians even after many Indians had converted." Deborah Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880,* Lincoln: University of Nebraska Press, 2007, p. 109.

[782] Act of 20 September 1803, in Francis S. Philbrick, ed., *Laws of Indiana Territory, 1801-1809,* Collections of the Illinois State Historical Library, v. 21, Springfield, Ill: Trustees of the Illinois State Historical Library, 1930, pp. 33-42. The Act was "Adopted from the Virginia and Kentucky Codes."

[783] Ibid. p. 40. Having passed to the second stage of government in 1805, the popularly-elected territorial Legislature re-adopted this provision with the same terms in 1807; see Act of 17 September 1807, Ibid. p. 452.

[784] See, for example, *Revised Laws of Indiana: Adopted and Enacted by the General Assembly,* 8th sess. (1824), p. 290; *Revised Laws of Indiana: Adopted and Enacted by the General Assembly,* 15th sess. (1831), p. 407; *Revised Statutes of the State of Indiana,* 27th sess. (1843), p. 718; and Act of 14 February 1853, *Laws of the State of Indiana,* 37th sess., p. 60. The 1824 code revision replaced "pleas of the United States" with "pleas of the State." In addition, whereas the statutory language defining these persons by racial classification and blood quantum existed in a separate but adjacent section in the territorial laws, these definitions were incorporated into the same section after 1816. The 1853 statute was somewhat more concise in its language and adjusted the blood quantum levels in determining eligibility: "No Indian, or person having one-eighth or more of negro blood, shall be permitted to testify as a witness in any cause in which any white person is a party in interest."

[785] *Harris v. Doe on the Demise of Barnett,* 4 Blackf. 369 (1837).

for a particular tract of land. The tract in question had originally been granted to Miami Indian Francis Lafontaine under the 1818 Treaty of St. Mary's.[786] Some time thereafter, Lafontaine conveyed the land by deed to Barnett and Hannah. However, sections of the treaty contained legal descriptions "so ambiguously expressed as to leave it doubtful on which side of the *St. Mary's* river the land [was] situate[d]."[787] Since Lafontaine had died, "[Miami Chief John B.] *Richardville,*" to whom the Treaty granted an adjacent tract, "was permitted to give evidence as a witness." Among other grounds, Harris objected to Richardville testifying as a material witness (an objection overruled by the trial court). Harris argued that "*Richardville* was an Indian, and, therefore, not competent as a witness under the statute of this state."[788]

In sustaining the lower court's ruling, Judge Charles Dewey wrote that "[t]he objection would not be valid were it formed on fact." However, "[w]e are not informed by the record that the witness was an Indian." While conceding that the "treaty of St. Mary's [gave] him [Richardville] the description of 'principal chief of the *Miami* nation of Indians,'" this, Dewey concluded, "could be considered only as presumptive evidence of the fact assumed, and is rebutted by the fact of his being admitted to testify by the Court below, which acted on the inspection of the judges." By upholding the trial court's admission of *prima facie* evidence of Richardville's racial identity, Judge Dewey held that it was "not new in the history of the Indian tribes, that a white man should be their chief." The Court's opinion, while exhibiting the racial dimensions in which nineteenth-

[786] For discussion of the 1818 Treaty of St. Mary's see supra, pp. 168-169. Francis Lafontaine had a son by the same name. The elder Francis died sometime in 1831 or 1832; see Bert Anson, "Chief Francis Lafontaine and the Miami Emigration from Indiana," *Indiana Magazine of History,* Vol. 60, No. 3 (Sept., 1964): pp. 248-249.
[787] *Harris,* p. 369.
[788] Ibid. p. 370.

century judges often framed their analyses and rulings, illustrates the flexibility and discretion it sometimes used in accommodating Indian rights. Moreover, the state's assertion of racial difference as grounds for legal separation and denial of the Indians' capacity as witnesses diminished as the cultural divide narrowed. Because of their mixed ancestry, many of the Miami successfully negotiated their ethnic identity to overcome legal disabilities. In local communities where Indians and settlers interacted regularly, cultural proximity often provided the latter with the credibility needed to litigate and testify in courts of law.[789]

Judges in Indiana and throughout the Old Northwest often consulted the widely circulated justice of the peace manuals, which contained various prerequisite criteria regulating the admissibility of witness testimony. Edited by practitioners of the state and local bench and bar, these manuals included summaries of the current statutory and case law, collections of forms for civil and criminal proceedings, as well as annotations and commentary. Published periodically, the guides serve as an index to the shifting legal landscape. In an 1845 edition to *The Indiana Justice,* the editor summarized the relevant statutory provisions rendering "Negroes, mulattoes, and Indians" incompetent as "witnesses in courts of justice in this State."[790] "Such is the provision of the Statute," he added, "though the policy, or reason on which it rests, cannot so readily be perceived."[791] By commenting on the ambiguous origins of the legislation, the editor may have suggested to the reader a measure of judicial discretion or flexibility in interpreting the law.

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[789] In comparison to other settler societies, see Benton, *Law and Colonial Cultures,* p. 109.
[790] George Van Santwood, ed., *The Indiana Justice: A Treatise on the Jurisdiction, Authority, and Duty of Justice of the Peace in the State of Indiana, in Civil and Criminal Cases,* Lafayette: Corydon Donnavan, Printer, 1845, p. 361.
[791] Ibid.

In another justice of the peace manual published in 1846, the editors outlined the rules of evidence and procedure in relation to courtroom testimony, taking into consideration the judicial recognition of "peculiar" customs:

> All evidence must be given under the sanction of an oath or affirmation. The usual mode of administering oaths in this state, is for the witness to stand and hold up his right hand, while the proper officer repeats the oath to him. The affirmation is administered in the same manner, except that the witness does not hold up his hand. It is left to the option of the witness whether he will testify under the sanction of an oath or affirmation. Whenever the courts are satisfied that any person offered as a witness, has a *peculiar mode of swearing* other than by holding up the hand the *court may adopt such mode of swearing* such person. Every person believing in any other than the Christian religion may be sworn according to the *peculiar ceremonies* of his religion, if there be any such ceremonies.[792]

In a restatement of *Blackstone's Commentaries,* the editors added that "[a] Mahomedan may be sworn upon the Alcoran; and a Gentoo according to the custom of India, and their evidence may be received even in criminal cases."[793]

While not necessarily reflective of Indiana's demographic composition, the editors' quotations above reflect the state's tolerance for customary laws of evidence and testimony.[794] Article ten, section four of Indiana's 1816 Constitution provided that "[t]he

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[792] W.W. Wick and L. Barbour, eds., *A Treatise on the Law Relating to the Powers and Duties of Justices of the Peace and Constables, and on Actions Cognizable in Justices' Courts, in the State of Indiana,* Indianapolis: Charles B. Davis & William A. Day, 1846, p. 463 [emphasis added].

[793] Ibid. In the fifth edition to his *Compendium of the Law of Evidence* (a standard reference for the Anglo-American bench and bar), English barrister Thomas Peake classed witnesses by their moral character, "the notice [of] which the law takes of their religious principles or prejudices." "Sir *Matthew Hale,*" to whom Peake referred, ". . . seems to have been of opinion that *infidels* might, in some cases, be examined [emphasis in original]." Under these circumstances, as Peake related "the credit of such a testimony" was to be "left to the jury." Citing *Omychund v. Barker* as the pivotal case in the modern law of evidence relating to non-Christian witnesses, Peake held Lord Hardwicke and his colleagues to have established "the general principle . . . that the testimony of all infidels, who are not atheists, was to be received." The primary question that evolved from subsequent cases, Peake noted, was whether or not the witness "believed the sanction of an oath, the being of a Deity, and a future state of rewards and punishments" as binding on his or her conscience to tell the truth. See Thomas Peake, *A Compendium of the Law of Evidence,* 5th ed., London: J. & W.T. Clarke, 1822, pp. 136-139.

[794] In other jurisdictions throughout the Old Northwest, the Courts occassionally excluded non-Christian Indians from testifying. In 1823, the question arose before the Michigan Territorial Court at Michilimackinac as to whether non-Christian testimony presented at the murder trial of a Chippewa Indian

manner of administering an oath, or affirmation, shall be as is most consistent with the conscience of the deponent, and shall be esteemed the most solemn appeal to God."[795]

Subsequent code revisions preserved the spirit of this fundamental law. For example, chapter forty of Indiana's 1843 *Revised Statutes* expanded upon these provisions in the administration of oaths and affirmation of witnesses, the relevant sections of which stipulated as follows:

> Sect. 253. Every person who has conscientious scruples against taking any oath, shall be permitted, instead of swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury.
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> Sect. 254. Whenever the court shall be satisfied that any person offered as a witness has any peculiar ceremony of swearing, other than by holding up the hand, the court may adopt such mode of swearing such person.
>
> Sect. 255. Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies. . . .
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> Sect. 257. No want of belief in the existence of a Supreme Being who will punish false swearing, shall be considered necessary in any court, or before any justice of the peace, to the competency of any witness; nor shall his belief or disbelief of such, or any other matters of religious faith, be held to affect his competency; but the same shall only go to the credibility of the witness, and for that purpose may be given in

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should be admitted. In *U.S. v. Matwaywaygezhic*, the Court interrogated three Indian witnesses on their religious convictions and beliefs in life after death. Nowkogezhicequay, the Indian widow of the accused's victim, "[b]elieve[d] those who are good go to a *good place* after death, and those who are bad, to a bad one." Satisfied with this reply, the Court allowed her to testify "under this obligation to tell the truth," and the jury was to "give such weight to it as they conceive[d] it entitled to" However, the Court rejected the admission of testimony from two other Indians. Mucoóchahn stated that he did "not know whether there [was] a Great Spirit or not—he has never seen him—does not know him." Rather, the deponent admitted that "[h]e seldom makes feasts—Does not know where his forefathers have gone—he did not see them go any where—Will not answer whether he would expect to be punished if he should tell a lie about [the] affair" under consideration. The father of the deceased, simply referred to in the court record as "[a]n old Indian," stated that he "Believes there is a Great Spirit [and] [w]hen he was young he used to pray to him when in trouble, want &c—but now he is old, he does not think it necessary." Moreover, the deponent did "not know there [was] a good place or bad place to which we go after death," but rather believed that "there is neither." See *U.S. v. Matwaywaygezhic* (1823), in Elizabeth Gaspar Brown, "Judge James Doty's Notes of Trials and Opinions: 1823-1832," *American Journal of Legal History,* Vol. 9, No. 1 (Jan., 1965): pp. 29, 30.

[795] Indiana State Constitution (1816), artic 10, sec. 4.

> evidence to enable the jury or other . . . triers of the facts to judge of such credibility.
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> Sect. 258. No witness shall be required to answer any question touching such belief or disbelief, but he may state the same or not, at his option.[796]

Delegates to the 1850 Indiana Constitutional Convention canonized these principles of tolerance in the state's new Bill of Rights. Article one, section seven of the 1851 Constitution provided that "[n]o person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion."[797] Section eight specified "[t]he mode of administering an oath or affirmation, shall be such as may be most consistent with, and binding upon, the conscience of the person to whom such oath or affirmation may be administered."[798]

Whatever moderation and forbearance Indiana law and policy had demonstrated toward an individual's religious affiliation or customary practices, racial and ethnic boundaries continued to define rules of courtroom evidence. It was not until the late 1850s that state lawmakers seriously debated removing Indian and African-American testimonial disabilities. By statute of 1853, "[n]o Indian, or person having one-eighth or more of negro blood [was] permitted to testify as a witness in any cause in which any white person [was] a party in interest."[799] Between 1859 and the repeal of this statute in

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[796] *Revised Statutes of the State of Indiana* (1843), pp. 718-719. Additional clauses, however, may have qualified these provisions in determining witness credibility or competency. Section 259 specified that none of the "preceding sections shall be construed to prevent the examination of any one offered as a witness, who is a person apparently of a weak intellect . . . for the purpose of ascertaining his or her mental or moral capacity, or knowledge of the civil and moral obligations of an oath or affirmation." Or more broadly, "[i]n all questions affecting the credibility of a witness, his general moral character may be given in evidence."

[797] Indiana State Constitution (1851), art. 1, sec. 7.

[798] Indiana State Constitution (1851), art. 1, sec. 8.

[799] Act of 14 February 1853, *Laws of the State of Indiana,* 37th sess., p. 60. However, in *Woodward v. The State* (6 Ind. 395 (1855)), the question before the Indiana Supreme Court was whether "a person upon whom a crime has been committed [is], in any sense, a party in the cause prosecuted by the state against the

1867, the Indiana House and Senate considered several bills affecting the legal rights of Indian and African-Americans. The legislative history—detailed at length in the short-lived *Brevier Legislative Reports*—documents the shifting and oftentimes discordant political ideologies of state lawmakers on the issue.[800]

On 21 January 1859, during the General Assembly's fortieth regular session, Senator Daniel Hill, a Republican from Randolph County and member of the Society of Friends, presented a memorial on behalf of the religious organization, "praying for the repeal of that portion of our laws which denies to colored persons the right to testify as witnesses in any cause in which a white person is a party in interest."[801] When Democratic Senator James Slack, an attorney from Huntington County, moved to table the petition, he "withdrew the motion at the insistence of several Senators." Senator Walter March, a Republican from Delaware County and former judge, "thought it would be well to let negroes testify, and that there was no danger in allowing juries to determine . . . the credibility of their testimony." Although Slack "was willing to extend courtesy to any reasonable extent," he believed "the people of Indiana were almost as a unit upon the subject" and that it would be "a waste of time to consider the matter" further. However,

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criminal." "If so," the Court held, "neither the state nor the defendant can call, in such cases [where the person assaulted was white], a colored witness, for the exclusion is general to all parties." However, since the State, rather than the victim, filed the indictment against the accused Woodward ("a colored man"), the Court interpreted the 1853 statute as excluding the former "as a person of any particular color." Thus, the Court ruled that "[a] negro is competent to testify, under the act of 1853, on the trial of a criminal charge against a negro."

[800] Published between 1858 and 1887, the *Brevier Legislative Reports* contain a rich documentary record of the Indiana General Assembly's proceedings and debates as well as the state governors' veto messages and addresses. Biographical facts for state legislators are taken from Rebecca A. Shepard, et al., eds., *A Biographical Directory of the Indiana General Assembly,* Vol. 1: *1816-1899,* Indianapolis: Select Committee on the Centennial History of the Indiana General Assembly; Indiana Historical Bureau, 1980.

[801] Indiana, *Brevier Legislative Reports: Embracing Short-Hand Sketches of the Journals and Debates of the General Assembly of the State of Indiana* [hereinafter cited as *Brevier Reports*], Vol. II (1859), p. 61. The Society of Friends, whose members resided in Indiana, Ohio, Pennsylvania, and Iowa, held their annual meeting for several years in Richmond, Indiana. From the late 1850s to the late 1860s, the Society was instrumental in the repeal of this law in Indiana and other states where similar legal disabilities had been imposed on Indians and African-Americans.

upon renewing his motion to lay the petition aside, the Senate rejected his proposal by a vote of twenty-seven to ten.[802]

Three days later, Representative William Jeffries introduced the same memorial to the House of Representatives, which it referred to the Committee on Rights and Privileges.[803] On Thursday of the following week, pursuant to the Committee's recommendation, Jeffries introduced House Bill 196, seeking to repeal the 1853 statute.[804] Jeffries, a Republican from Wayne County, "had hoped [the issue] would not be made a party question" and, in defending the measure, reminded the House of the fact that "many of the greatest rascals . . . went unwhipped of justice because of the existence of this act." Representatives James Blythe and William K. Edwards, both members of the Know-Nothing Party, moved to reject the bill and a majority of the House concurred.[805]

On 7 February, Mr. Walter March introduced Senate Bill 117, which admitted "all parties to a suit to be witnesses, with one or two exceptions," and recommended its passage.[806] Following an initial round of debate, Republican Senator Charles D. Murray offered an amendment, stipulating that the measure should "not be considered as rendering competent as witnesses any Indians, mulattoes, or negroes." Senator James Conner, a Republican representing Kosciusko and Wabash Counties, objected to the clause prohibiting Indians from testifying, for "[h]e had some forty Indian constituents who were highly educated, and did not like to see them classed with negroes." Conner, an attorney and former judge himself, offered an amendment, providing "that in all cases

[802] Ibid.
[803] Ibid. p. 71.
[804] Ibid. p. 127.
[805] Ibid.
[806] Ibid. p. 141.

where either the plaintiff or the defendant, by reason of any legal disability, shall not be allowed to testify; then . . . the opposite party shall not be allowed to testify." Despite a series of ineffectual motions to lay the bill aside, the Senate ordered Conner's amended version of the bill engrossed.[807] Without concurrence from the House, however, both versions of the bill died.

At the forty-first General Assembly in 1861 (regular session), Indiana legislators revisited the issue of testimony and three bills came up for consideration. During the afternoon session on Saturday, 2 March, Representative Moses Jenkinson, a Democrat from Allen County, introduced House Bill 327, with provisions to "enfranchise Indians as witnesses."[808] Representative Martin Bundy of Martin County, a Republican, proposed an amendment to the bill, stipulating that "[n]o Indian or person having one-eighth or more negro blood shall be allowed to testify . . . unless the matter in suit shall have originated on contract between such person of mixed blood and such white person, in which case it shall be lawful for both parties to testify."[809] However, the House voted to table the bill for consideration at a later time.

That afternoon, Democratic Representative Horace Heffren of the Judiciary Committee, presented Mr. Speaker Cyrus Allen's Evidence Bill (H.R. 133), which provided that "any competent person may testify in his own behalf, and compel the other party to testify; and the witness shall be regarded only as to his character for credibility."[810] Further provisions stated "that where a person is excluded on account of

[807] Ibid.
[808] *Brevier Reports,* Vol. IV (1861), p. 328.
[809] Ibid.
[810] Ibid. p. 329.

mixed blood, his opponent in the contest shall also be excluded." The bill was agreed to and, by motion of Mr. Heffren, was made a special order for the following Monday.[811]

When the General Assembly reconvened, debate over Speaker Allen's evidence bill commenced. In response to those provisions concerning "mixed blood" witnesses, Democratic Representative Cutler Dobbins moved to amend the measure, stipulating "that nothing herein shall be so construed as to repeal the act of 1853."[812] With Dobbins' amendment, the bill passed its final reading in the House. On 8 March, Senator Horatio Newcomb, a Republican and former mayor of Indianapolis (1849-1851), returned the bill on behalf of the Judiciary Committee, recommending its passage.[813] The bill passed the Senate by a vote of twenty-eight to sixteen. However, as a result of developing national events, the House took no further action during the legislative session. When President Abraham Lincoln declared the Union blockade of Confederate ports the following month, the commencement of the Civil War diverted significant time and resources away from Indiana lawmakers. It would be another four years before the General Assembly reconsidered further statutory amendments on Indian testimony in the courts.

Following the Civil War and federal Reconstruction Acts, several states either introduced statutory exemptions to Indian testimonial restrictions or repealed these disabling laws altogether.[814] Indiana policymakers stepped up their efforts to follow suit. On 17 January 1865, Representative Hiram Prather, a Republican from Jennings County, "presented the memorial of sundry citizens . . . 'praying for repeal of all constitutional

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[811] Ibid.
[812] Ibid. p. 336. The senate introduced a similar bill (S. 5), which, upon the motion of Representative Richard Nebeker, the House "laid it on the table" on 4 March 1861. "[I]f the Senate should fail to pass the House bill, [Nebeker] desired to be able to call upon their bill at any time."
[813] Ibid. p. 360.
[814] See Rosen, *American Indians,* p. 122.

and statute laws which divest negroes and mulattoes of their natural rights, and which impair their evidence in courts of justice, and embarrass their efforts in the cause of education.'"[815] The House, in turn, referred the petition to the Committee on Rights and Privileges. The same day, Representative William W. Foulke, a Wayne County Republican and member of the Society of Friends, introduced House bill twenty-five "for an act to repeal the act" of 1853.[816]

Debate over Representative Foulke's bill commenced the following Thursday. Having barely survived a preliminary motion to table the measure by a margin of only four votes, legislative debate gained further momentum as the issue signaled a divisive turn for both the House and Senate in the struggle for civil and political rights. Republican Representative Robert Boyd, for example, "while . . . willing to do what was proper to elevate the negro race, . . . was not willing to place them on an entire equality with white men."[817] On the other hand, Representative Fletcher Meredith, also a Republican, supported the bill "because as prosecutor he had found cases in which the existing legal disability . . . had covered up crime." After a series of contentious remarks from other members of the House, Representative John T. Burns successfully referred the bill to the Committee on Rights and Privileges for further consideration.[818]

Although the Committee failed to return a report on House Bill twenty-five during the regular legislative session, they submitted a report on 3 March 1865 pursuant to Representative Prather's memorial of 17 January. The Committee was divided, with a

[815] *Brevier Reports,* Vol. VII (1865), p. 64.
[816] Ibid. The *Brevier Report* mistakenly refers to Rep. Foulke's bill as H.R. 28 on this page.
[817] Ibid. p. 122.
[818] Ibid.

majority proposing to table the petition. The minority, led by Representative Burns, recommended further action:

> That whereas, the Constitution of the United States, guarantees that the citizens in each State shall be entitled to all the privileges and immunities of the citizens in the several States, and the Declaration of Rights, both of the United States and this State, assert that all men are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness, and the blood and services of men of all complexions have been blended on the common altar of our country, in support of our civil and religious institutions, and the peace, happiness, and prosperity of our nation.
>
> Therefore we recommend to the General Assembly of the State of Indiana, that justice, humanity, and respect to the civil and religious rights of all men, demand the passage of a joint resolution, striking from our Constitution . . . the thirteenth article thereof, and that all laws rendering Indians and negroes incompetent witnesses in courts of justice, ought, in accordance with the spirit of the present age, to be repealed during the present session of this General Assembly.[819]

Having been tabled, however, neither the majority nor minority reports received further consideration by the House.[820] The Indiana legislature failed to pass either a statutory or constitutional amendment repealing Indian and African-American legal disabilities during the regular session in 1865. Yet the opportunity would soon present itself again that year.

On 13 November 1865, Indiana state legislators convened for a special legislative session. In his address to the General Assembly, Governor Oliver P. Morton explained the need to resume governmental business:

> [T]he condition of parties in this State during the last four years, and the public excitement incident to a state of war, unfitting . . . to some extent, the minds of men for the calm consideration of subjects or ordinary legislation, have all contributed to prevent the adoption of legislative

[819] "House Committee Report on Negro Disabilities," in Charles Kettleborough, *Constitution Making in Indiana: A Source Book of Constitutional Documents with Historical Introduction and Critical Notes,* Vol. II, 1851-1916, Indianapolis Historical Commission, 1916, pp. 59-60.
[820] Ibid.; also see Indiana, *House Journal,* 1865, p. 758.

> measures which the progress of the State and the welfare of the people would seem to demand.[821]

Of the several bills introduced during the extra session, legislation providing for greater legal equality before Indiana's courts remained a priority.[822] However, as previous debates and the 1865 House Committee Report had revealed, the subject of court testimony polarized the General Assembly. At the time of the Governor's message to the legislature during the previous session "Indiana and Illinois [were] the only free States whose statute books [were] dishonored by the retention of a law so repugnant to the spirit of the age, and the dictates of common sense."[823] However, Illinois had since repealed this discriminatory law, leaving Indiana "the only State in the North that retain[ed] it."[824] With Congress and other state legislatures debating measures guaranteeing civil rights, the time was critical for Indiana lawmakers to follow suit.

During the session, Republican Senator Thomas Ward introduced Senate Bill 219, entitled "An Act defining who shall be competent witnesses in a Court or judicial proceeding in this State."[825] The bill provided that "[a]ll persons of competent age, without distinction as to color or blood and not otherwise by law rendered incompetent, shall be competent witnesses to testify in any proceeding or suit, civil or criminal, in any court in this State." This provision, however, stipulated "[t]hat no negro or mulatto who has come, or who shall hereafter come into this State in violation of the Thirteenth Article

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[821] Message of Governor Oliver P. Morton, delivered 14 November 1865, in Indiana, House of Representatives, *Journal of the House of Representatives of the State of Indiana,* 44th special sess. (1865), p. 12.

[822] Additional civil rights measures demanding legislative reform during the extra session included free and equal education in the Indiana common school system. Governor Morton recommended "that the laws be so amended as to require an enumeration to be made of the *colored* children of the State, and such a portion of the School Fund as may be in proportion to their number, be set apart and applied to their education by the establishment of separate schools." See Ibid. pp. 33-34.

[823] Ibid. p. 35.

[824] Ibid.

[825] *Brevier Reports,* Vol. VIII (1865), p. 5.

of the [Indiana] Constitution . . . shall . . . be competent to testify as a witness in any case in which a white person shall be a party in interest."[826] On 1 December 1865, after its referral from the Senate, Mr. Joseph Milligan (Republican) of the Committee on Rights and Privileges returned the bill, urging its passage.[827] Democratic Senator George Brown, a member of the Committee but absent from a meeting where he intended to prepare a minority report, asked "to have the matter passed over until he could have more time to prepare his report."[828] The Senate agreed to his motion and made the bill a special order for the following Tuesday.

On the same day state senators tabled Senate Bill 219, Representative Calvin Cowgill, a Republican from Wabash County, returned the Judiciary Committee's majority report on "Mr. Foulke's Indian and Negro testimony bill [H.R. 25]" with amendments.[829] In addition to revising the bill's title, the Committee recommended inserting the following clause: "And so much of all other laws as render persons incompetent to testify in the Courts on account of color; and . . . [that] [t]he testimony of no person shall be discredited on account of negro, Indian or mixed blood, but creditability shall be determined by the Court and jury, etc."[830]

On the morning of Tuesday, 5 December, Senator Thomas Bennett gave an impassioned speech on Senate Bill 219. "In the first place," the Republican from Union

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[826] Article 13, section 1 of the 1851 Indiana Constitution provided that "[n]o negro or mulatto shall come into or settle in the State, after the adoption of this Constitution." Section 4, in turn, vested power in the General Assembly to "pass laws to carry out the provisions of this article." Senator Thomas Bennett introduced a bill (S. 204) similar to Sen. Ward's, entitled "An Act in relation to witnesses and repealing all laws in conflict therewith." While Bennett's bill passed to a second reading, it does not appear to have been engrossed by the Senate; see *Brevier Reports,* Vol. VIII, p. 22.
[827] Ibid. p. 130.
[828] Ibid.
[829] Ibid. p. 133.
[830] Ibid.

County began, "I do not consider this a political, or at least a party question."[831] "Neither," he declared, "do I consider it a negro question." Rather, "when stripped of all prejudice it is purely a question of justice or judicial policy."[832] However, Bennett admitted paradoxically "that Divine Providence has so ordained human affairs that one race of people may be in many respects the superior of another." "[T]he noble Anglo-Saxon blood of which we boast our origin, is the superior of the African, the Indian, the Esquimaux, or the Sandwich Islander."[833] "Yet all this," he continued, "is no justification to that people who would deprive these inferior races of their God-given rights, or in any way prevent them from attaining to the highest state of civilization and humanity within their power."[834]

In support of the bill, Senator Bennett outlined the "two classes of rights that a man may possess—natural rights, or those given by the Creator of all men, and conventional rights, or those conferred by men upon grounds of policy."[835] The first of these:

> every man should possess in their fullest extent, and as they were given him by the great law of God, no human statute should deprive him of them. These great rights were re-enacted in that other great instrument, second only to the holy writ, in the memorable language that "all men are created equal, and endowed with certain inalienable rights, among which are life, liberty, and the pursuit of happiness." . . . Under our present law, a colored man is deprived of all these natural rights. He cannot enforce his contracts, because he cannot testify to them. A white man may impose on him in a thousand ways and there is no redress.[836]

[831] Ibid. p. 282.
[832] Ibid.
[833] Ibid.
[834] Ibid.
[835] Ibid. pp. 282-283.
[836] Ibid. p. 283.

On the other hand, while "it may be said that the admission of a negro to testify would tend to give him political, or social equality," the parity of conventional rights "between whites and negroes cannot be so easily effected." "I believe," the Senator stood firm, hoping to quell the fears of his colleagues, "that I can concede to him [the negro] all the rights that I enjoy, and yet be in no danger of the dreaded equality that seems to haunt the minds of some people."[837] With respect to the right to testify freely in court, Bennett held that "justice to the negro, justice to the white man, and justice to the State, require[d] this bill to become law."[838]

At two o'clock that same afternoon, Senator George Brown, a Democrat from Wells County, submitted his minority report and addressed the Senate at length on the pending legislation:

> The bill contemplates such a change of the existing law in relation to witnesses as will permit *Indians* and *Negroes* to testify, without any restrictions in the Courts of this State. So far as the former race is concerned the law would have but little practical effect, and it probably was not suggested by any considerations in behalf of that fast receding but interesting people. The philanthropy that could, through so many long years, sleep over any rights that might be deemed to have been withheld from the red man would not now awaken to so keen a sense of his supposed wrongs. We may, therefore, quite properly consider the bill with reference to the negro.[839]

Following an extended oration on the supposed "inferiority" of the "black race" as well as the "unfavorable circumstances under which they have been placed," Brown concluded that the bill under consideration was "subversive" and "contrary to the spirit of

[837] Ibid. pp. 283-284.
[838] Ibid. p. 284.
[839] Ibid. pp. 148-149.

our government."[840] Following a series of further proceedings and remarks from the floor, the Senate agreed to Mr. Daniel Van Buskirk's motion to postpone the bill.

At seven o'clock the following evening, the House took up Representative Faulk's bill (H.R. 25) for reconsideration on the third reading.[841] Representative Samuel Buskirk, a Democrat and former Monroe County prosecuting attorney, moved to recommit the bill with stipulations providing "that the privileges granted by this act shall not extend to . . . or be enjoyed by any negro or mulatto who has come into the State since the adoption of the present Constitution."[842] Standing to oppose Mr. Buskirk's tender, former Senator Horatio Newcomb reminded the House that "[t]he object of the bill was to get at the truth in courts of Justice." "This bill proposes to admit the Indian and negro to testify," Newcomb argued, "no more for the benefit of the negro than for [other] parties in interest," the constitutional basis upon which the proposal rested stipulating "that no special law shall regulate practice in the Courts." Following an extended round of debate, Republican Representative Jon Sim moved to vote on the bill with Mr. Buskirk's instructions. Rejecting this motion, the House voted to pass Mr. Faulk's bill without amendment.

In the end, the Indiana legislature made only limited concessions. On 20 December, the General Assembly enacted Senate Bill 219, providing that "all persons of competent age, without distinction as to color or blood and not otherwise by law rendered incompetent, *shall* be competent witnesses to testify in any proceeding or suit, civil or

[840] Ibid. p. 149.
[841] Ibid. p. 163.
[842] Ibid.

criminal, in any Court in this State."[843] However, a proviso added "[t]hat no negro or mulatto who has come, or who shall hereafter, come into this State in violation of the Thirteenth Article of the Constitution of the State, shall . . . be competent to testify as a witness in any case in which a white person shall be a party in interest."[844]

The following spring, the Indiana Supreme Court issued an opinion that prompted further change in the law. In *Smith v. Moody,* the Court held that Article Thirteen of the state constitution—which provided, in part, that "[a]ll contracts made with any negro or mulatto coming into the State . . . shall be void—as well as supplementary acts passed thereafter, was "repugnant" to the U.S. Constitution's Privileges and Immunities Clause.[845] Reciting the U.S. Civil Rights Act of 1866 in full (including the provision guaranteeing the admission of court testimony from all citizens "of every race and color"), Chief Justice Robert Gregory, in writing for the Court, declared that Indiana's fundamental law violated the U.S. Constitution. Although the legal issues dealt specifically with the citizenship rights of African-Americans residing in Indiana, the results of the case affected the rights and privileges of American Indians as well. In response to the Court's decision declaring article thirteen "null and void," Governor Oliver Morton, in his address to the General Assembly on 11 January 1867, "respectfully recommend[ed] that as an act of public decency it be formally repealed and wiped out."[846]

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[843] Act of 20 December 1865, *Laws of the State of Indiana, Passed at the Called Session of the General Assembly*, p. 162 [emphasis in original].
[844] Ibid.
[845] *Smith v. Moody*, 26 Ind. 299 (1866).
[846] Message of Governor Oliver P. Morton, delivered 11 January 1867, in Indiana, *Documents of the General Assembly of Indiana, Pt. 1,* 45th reg. sess., p. 24.

Although the Indiana General Assembly failed to take immediate action on amending the state constitution, legislators repealed several related acts.[847] On 30 January 1867, Mr. Bennett reintroduced Senate Bill 29, along with a majority report from the Judiciary Committee, recommending its passage.[848] Democratic Senator James L. Mason submitted his minority report, recommending the bill's "indefinite postponement" on the grounds that "it would have a tendency to thwart the ends of justice." In rejoinder, Senator Bennett argued that "[p]recisely the same bill [had been] passed last session," with the new proposal simply omitting any distinction between a "constitutional negro" and an "unconstitutional negro" on the question of testimony. Following an ineffectual motion by Democratic Senator Bayleas Hanna to lay the bill on the table, the Senate concurred with the majority report and ordered the bill engrossed for its third reading.[849] On 1 February 1867, the Senate passed Senate Bill 29.[850] The House followed suit on 9 March and two days later the Indiana legislature adopted "[a]n Act defining who shall be competent witnesses in any court or judicial proceeding in this State, and to repeal all laws and parts of laws in conflict" thereof.[851] The measure provided, in part, that "*every person* of competent age may be a witness in any civil or criminal cause or proceeding."[852] Sixty-four years after its first territorial act rendered Indians and African-Americans incapable of testifying in court, Indiana had finally repealed this legal disability.

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[847] See Earl E. McDonald, "The Negro in Indiana Before 1881," *Indiana Magazine of History,* Vol. 27, No. 4 (Dec., 1931), pp. 301-302.
[848] *Brevier Reports,* Vol. VIII, p. 126.
[849] Ibid.
[850] Ibid. p. 141.
[851] Act of 11 March 1867, *Laws of the State of Indiana,* 45th reg. sess., pp. 225-227; for the House passage of S. 29, see *Brevier Reports,* Vol. VIII, p. 444.
[852] Ibid. p. 225 [emphasis added].

The Indiana debates were part of a larger national dialogue among lawmakers concerning the civil rights status of African-Americans and other minorities during the Civil War and Reconstruction era. The constitutional privilege to testify in a court of law was a major issue in these deliberations. While the legal status of African-American freedmen drew greater attention, American Indians figured prominently in these debates as well.

On 8 February 1864, U.S. Senator Charles Sumner of Massachusetts introduced Senate Bill 99 "[t]o secure equality before the law in the courts of the United States."[853] As they stood at the time of Sumner's proposal, federal statutory provisions stipulated that "the laws of the State in which the court shall be held shall be the rule of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and in admiralty."[854] This framework afforded the states unchecked authority in applying racially discriminatory statutes barring testimony in federal courts of law.

On 29 February, Senator Sumner reported the bill, which had been referred to the Select Committee on Slavery and Freedmen, without amendment. "Under these injunctions," Sumner's Report read, "it was very easy, if not natural, for the courts of the United States to adopt the law of evidence in the States where they were respectively held; and thus the incapacity of colored testimony in those States where it prevailed, became a rule of evidence in the national tribunals."[855] In a letter to Senator Sumner dated 24 January 1864, Chief Justice John Appleton of the Maine Supreme Court wrote

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[853] *A Bill to Secure Equality before the Law in the Courts of the United States,* S. 99, 38th Cong., 1st sess., *Senate Bills and Resolutions,* 8 February 1864.
[854] Act of 16 July 1862, 37th Cong., 2nd sess., ch. 189, *Statutes at Large*: pp. 588-589, as quoted in Committee on Slavery and the Treatment of Freedmen, *Report to Accompany Bill S. No. 99,* 38th Cong., 1st sess., 1864, S. Rep. 25 [hereinafter cited as S. Rep. 38-25], p. 1; also see Magliocca, "Cherokee Removal," p. 940.
[855] S. Rep. 38-25, p. 1.

in support of the pending bill "[a]s it appertain[ed] to the domain of jurisprudence rather than of politics."[856] "[T]he laws of the several States are at variance as to the admissibility of witnesses," the judge opined, and "[i]n some there are exclusions enormous in extent and disastrous in result."[857] With respect to the Indians, Appleton noted, "the original occupants of the soil are denied by the higher civilization, which has wrested from them their lands, even the capacity to be heard as witnesses in the courts of those who now occupy and enjoy them."[858]

While criticizing the lack of uniformity in federal rules of evidence, the greater objection for Sumner was "[i]n lending the sanction of the United States, even indirectly, to an exclusion founded on color," by which "all the people have been made parties to an injustice."[859] In addition to proscribing the testimony of "free negroes" and "mulattos," many states also excluded evidence given by "Indian slaves," "free Indians," "mestizos," and "persons of mixed blood descended from negro and Indian ancestors, to the [third or] fourth generation inclusive."[860]

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[856] Ibid. p. 18; also published as John Appleton, "Equality Before the Law in the Courts of the United States," *Law Magazine and Law Review, or, Quarterly Journal of Jurisprudence, 3rd Ser.,* Vol. 17, No. 1 (1864): pp. 137-157. Following quotations in the above text are taken from the published journal article rather than the Committee Report.

[857] Appleton, "Equality Before the Law," p. 138.

[858] Ibid. For a turn-of-the-century judicial perspective on the integrity of Indian testimony, see "Notes [Indians as Witnesses]," *Albany Law Journal,* Vol. 61 (3 March 1900): p. 143.

[859] S. Rep. 38-25, p. 2.

[860] For a summary of state laws, including Delaware, Maryland, Virginia, Kentucky, North Carolina, Tennessee, South Carolina, Georgia, Alabama, Mississippi, Florida, Missouri, Arkansas, Louisiana, and Texas, see Ibid. pp. 2-6. Of those statutes listed in Sumner's report, the States of Louisiana, Arkansas, Missouri, South Carolina, and Delaware made no express provisions for the exclusion of Indian testimony. In Mississippi, by Act of 19 January 1830, "free Indians [were] placed on the same footing as white persons and consequently [could] testify." See Ibid. p. 5. In South Carolina, "there appears to have been no statute expressly excluding the testimony of a slave against a white person[;]" however, a colonial statute, "custom," and at least two state judicial decisions restricted "free negroes, mulattoes, and mestizoes," as well as "free Indians and slaves" from testifying in court; see Ibid. pp. 4-5. For those states without express provisions restricting Indian testimony, it is important to consider that some states may have permitted Indian slavery, in which case Indians may not have been permitted to testify under this status (although most states appear to have made the distinction between Indian and African slaves).

From the "examples of history," Sumner traced the proscriptive rule's evolution, which found "its prototypes in other countries and times, kindred in character to the persecution of the Moors in Spain, and to the cruelty which for ages pursued the Jews everywhere."[861] From the exclusion of non-Christian testimony to a presumption based on race and color alone, "it can need no argument," he held, "to establish the unreasonableness of a disqualification which, according to the confession of its partisans, attaches to the shading of the human skin, especially in view of the terrible injustice which is its natural consequence."[862]

Although Senate bill 99 failed to pass during the thirty-eighth Congress, provisions under the Civil Rights Act of 1866 stipulated that all U.S. citizens, "of every race and color," were to "have the same right, in every State and Territory . . . , to make and enforce contracts, to sue, be parties, and *give evidence,*" under the "full and equal benefit of all laws and proceedings . . . as is enjoyed by white persons."[863] While the Act provided potentially discriminatory grounds by "excluding Indians not taxed," the "more important point," as Gerard Magliocca points out and which the Indiana legislative history illustrates above, "is that Congress and the States took actions confirming that these rights were related."[864]

Despite the state and federal repeal of existing legal disabilities, local authorities may not have been so quick to respond or implement these changes. For example, an 1871 Indiana justice of the peace manual failed to reflect the new state law on court testimony, providing instead "[t]hat where a negro, Indian, or person excluded on account

[861] Ibid. pp. 12-13.
[862] Ibid. pp. 14-15, 16.
[863] Act of 9 April 1866, 39th Cong., 1st sess. ch. 31, *Statutes at Large*: p. 27 [emphasis added]; also see Magliocca, "Cherokee Removal," pp. 940-941, n. 342.
[864] Magliocca, "Cherokee Removal," p. 941.

of mixed blood is a party to a cause, his opponent shall also be excluded."[865] An 1877 edition of the same manual acknowledged that "[f]ormerly neither Indians nor negroes were competent witnesses against a white person, but now no man is incompetent on account of race, color, or previous condition of servitude." However, in the same section, the editor emphasized "that there is a wide difference between the competency of a witness and his credibility," suggesting to the reader a considerable degree of discretion in whether or not to admit testimony from certain persons into evidence.[866]

Testimony aside, the law of evidence remained prejudicial to American Indian interests and provided little opportunity for normative dialogue. Rather than finding an equitable forum to litigate their claims, the burden of proof often presented a formidable hurdle for Indians to overcome. Because of the predominantly oral character of Indian legal tradition, evidence of their customary practices possessed little probative force in the courts. Thus, in determining the authority of Indian laws and customs, judges looked beyond the courtroom to other sites of normative and empirical inquiry.

Crafting (Indian) Custom: An Ethnographic View of Judicial Notice in Indiana

In English common law, William Blackstone distinguished between *lex scripta* and *lex non scripta,* or written and unwritten law. The latter, he posited, included the "General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification," as well as the "Particular customs; which for the most part affect only the inhabitants of particular districts."[867] For judges to

[865] David M'Donald, ed., *A Treatise on the Law Relating to the Powers and Duties of Justices of the Peace and Constables, in the State of Indiana,* Cincinnati: Robert Clarke & Co., 1871, p. 117.
[866] Asa Iglehart, ed., *A Treatise on the Law Relating to the Powers and Duties of Justices of the Peace and Constables in the State of Indiana,* Cincinnati: Robert Clarke & Co., 1877, p. 117.
[867] William Blackstone, *Commentaries on the Laws of England,* 3rd ed., Vol. 1, Oxford: Clarendon Press, 1768, p. 67.

acknowledge the "particular customs," which stood at variance with the common law of the Realm, a specific standard of proof had to be met. Formalized over the course of the sixteenth and seventeenth centuries, a recognition test required that a certain usage exhibit at least four prerequisite characteristics: antiquity; continuity; certainty; and reasonableness. The first of these conditions required that a usage should have existed from time immemorial, or from a "time whereof memory of man runneth not to the contrary."[868] The cutoff date for establishing "immemoriality" was 1189 A.D., the year marking the death of King Henry II, the English monarch traditionally considered as the founder of the English common law.[869] The continuity requirement, in turn, held that a usage should have been observed and exercised by the vicinage without interruption. The certainty and reasonableness criteria held, respectively, that a usage could not be doubtful nor conflict with what the common law deemed practical and sensible.[870]

English settlers throughout the British Diaspora, including those in North America, carried with them their own ideas of custom in forging a legal culture independent of, yet amenable to, England's Imperial Constitution. The locally-variable nature of the English common law adapted to the unique circumstances of the British colonies and, over time, community custom gradually established itself as settled law.[871]

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[868] Ibid. p. 76.
[869] In 1275, the English Parliament enacted the Statute of Westminster, which stipulated that everything after 1189 was within legal memory and could not, therefore, have been considered "immemorial."
[870] Blackstone expanded upon these criteria by adding that a particular custom must also have been "*peaceable,* and acquiesced in; . . . *compulsory,* and not left to the option of every man;" and "*consistent* with each other: one custom cannot be set up in opposition to another." See Blackstone, *Commentaries,* 3rd ed., Vol. 1, pp. 77, 78.
[871] The relationship between English law and colonial law was particularly unclear and problematic for British settlers in North America. Colonial charters and letters patent often contained provisions stipulating that the laws be "agreeable" with or "not contrarie or repugnant to the Laws" of England. However, the ambiguity inherent in these clauses created considerable uncertainty and debate over the authority of Royal prerogative versus the extent to which the settlers carried with them the "immemorial rights" of the common law. Although the scope of English law applicable in the British colonies depended largely on their conquered/ceded/settled status, by the early seventeenth century, many English jurists spoke of the

Yet the idea of custom played a much broader role in the formation of colonial society. While the settlers introduced relevant parts of the English law to govern their relations among themselves, the imperial common law of continuity—admitted to a greater or lesser extent throughout the colonial British Empire—created a unique and enduring system of legal pluralism.[872] Unless royal prerogative dictated otherwise, colonial courts presumed the existing *lex loci* to continue in force and acknowledged the existence of a hybrid or dual legal system. In territories with local laws suitable to the British settlers, the existing legal system formed part of the colonial municipal law; otherwise, local laws and customs existed as a distinct normative structure independent of the settler polity. In either case, contemporary law of nations theory applied on relatively equal terms to both Christian and non-Christian polities, providing a sufficient enough legal basis for the British to recognize and negotiate with "infidel" nations for certain territorial and jurisdictional rights.[873]

While the British Empire prided itself on the legal diversity of its imperial constitution, the colonial pluralist order rested upon settler assumptions of Anglo-European superiority and civilizing duty.[874] As Indian-settler relations deteriorated

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colonists' "birthright" to the English law abroad in their dealings *inter se.* "[T]he law of England," Francis Bacon argued in *Calvin's Case,* ". . . operateth over the world." See J. Spedding, R.L. Ellis, and D.D. Heath, eds., *The Works of Francis Bacon,* Vol. 7, London: Longmans & Co., 1879, p. 651. The scholarship on these debates is diverse and extensive; for an overview see Zechariah Chafee, Jr., "Colonial Courts and the Common Law," *Proceedings of the Massachusetts Historical Society, 3rd Series,* Vol. 68 (Oct., 1944-May, 1947): pp. 132-159; William B. Stoebuck, "Reception of English Common Law in the American Colonies," *William and Mary Law Review,* Vol. 10, No. 2 (Winter, 1968): pp. 393-426; Peter Charles Hoffer's bibliographic essay in *Law and People in Colonial America,* rev. ed., Baltimore: Johns Hopkins University Press, 1998, pp. 167-173; Mary Sarah Bilder, "English Settlement and Local Governance," in Michael Grossberg and Christopher Tomlins, eds., *Cambridge History of Law in America,* Vol. 1: *Early America (1580-1815),* New York: Cambridge University Press, 2008, pp. 96-103.

[872] Mark D. Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," *Osgoode Hall Law Journal,* Vol. 33, No. 4 (Winter, 1995): pp. 791-792.

[873] McHugh, *Aboriginal Societies,* pp. 86-87.

[874] Ibid. p. 108.

during the late seventeenth century, the jurisdictional reach of colonial authorities extended beyond the settler polity. Although growing tensions failed to prompt British claims to absolute sovereignty, colonial officials took several measures to ensure that the scope and character of recognition conformed to British standards of justice.

By the early 1700s, the legal topography across New England had become thoroughly Anglicized. While most Indians continued to be "Govern'd by Law's [sic] of their own making," many others had conformed to settler laws and customs.[875] As Indigenous peoples came increasingly within the jurisdictional orbit of the settler state, they became subject to a legal system largely unfamiliar with their personal laws and customs. Unlike the English courts, which followed specific rules of recognition, no particular set of legal criteria directed the colonial courts in determining which customs were to be acknowledged or rejected.[876] Early seventeenth-century Imperial common law established the general rule of repugnancy, that is the judicial right to abrogate local customs considered *malum in se* or abhorrent to Christian morals. However, in American colonial society, this tenet provided a less than effective model for Indian-settler relations.[877] With few exceptions, the rule of repugnancy served not as a pretext for the

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[875] Sarah Kemble Knight, *Journal of Madam Knight* [1704], Boston: Small, Maynard & Co., 1920, p. 39, as quoted by Katherine Hermes, "'Justice Will Be Done Us': Algonquian Demands for Reciprocity in the Courts of European Settlers," in Christopher L. Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America,* Chapel Hill: University of North Carolina Press, 2001, p. 143. For a discussion of Indian adoption of English legal customs, see Hermes, "'By Their Desire Recorded': Native American Wills and Estate Papers in Colonial Connecticut," *Connecticut History,* Vol. 38, No. 2 (March, 1999): pp. 150-173; and Ann Marie Plane, "Colonizing the Family: Marriage, Household and Racial Boundaries in Southeastern New England to 1730," Ph. D. Diss., Brandeis University, 1995, pp. 186-187.

[876] Occasionally, however, Indian litigants invoked English common law rules of custom to strengthen their claims in court. In one 1746 Rhode Island case, a Narragansett Indian, Mary, or Oskoosooduck, testified to the tribe's rule of inheritance, "which Custom was practiced by said Tribe ever since my Remembrence, and Done by the Information I had from the Antients of said tribe, they always practiced so ever Time out of Mind." See Plane, "Colonizing the Family," p. 174.

[877] Legal scholars trace the repugnancy rule to fifteenth- and sixteenth-century Romano-Canon legal tradition; see John D.M. Derrett, "Justice, Equity, and Good Conscience," in James N. Anderson, ed., *Changing Law in Developing Countries,* New York: F.A. Praeger, 1963, p. 114. In 1608, the Irish Court of

judicial abrogation of "infidel" customs but as a premise for British settlers to exempt themselves from non-Christian laws.[878]

Nevertheless, the colonial courts took an active role in shaping Indian customary law. The English idea of custom as ancient, immemorial, and unchanging, led many colonial magistrates to believe that general characteristic usages among Native peoples could be ascertained and applied. Yet while British notions of customary law provided a convenient legal framework for the colonial courts, recognition depended upon the Anglicization and reconfiguration of Indian "tradition" to fit jurists' understanding of the issues, an inherently imperfect process of rendering native laws and customs familiar to the vernacular of the common law. To ensure certainty and accuracy in ascertaining and applying Native customary law, the only practical solution, colonial administrators believed, was the reduction of oral tradition to written and codified form. This process entailed a broad range of empirically based methods of investigation, including interviews with tribal elders, the distribution of questionnaires, census taking, and other forms of normative inquiry.[879]

By the late eighteenth century, legal ethnography had become the *modus operandi* for government officials throughout the British colonial world. British India provides

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King's Bench applied English rules of recognition to local custom in *The Case of Tanistry* (80 Eng. Rep. 516 (1608)), declaring the Irish "Brehon law" of inheritance to be "void at common law." Also see discussion of *Calvin's Case,* supra, pp. 53-54. On the significance of Irish-Indian analogies in the context of English colonizing discourse, see Nicholas P. Canny, "The Ideology of English Colonization: From Ireland to America," *William and Mary Quarterly, 3rd Series,* Vol. 30, No. 4 (Oct., 1973), pp. 575-598; Liam Séamus O'Melinn, "The Imperial Origins of Federal Indian Law: The Ideology of Colonization in Britain, Ireland, and America," *Arizona State Law Journal,* Vol. 31, No. 4 (Winter, 1999): pp. 1207-1275; and McHugh, *Aboriginal Societies,* pp. 70-73.

[878] See Shaunnagh Dorsett, "Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs in New Zealand in the 1840s," *Journal of Legal History,* Vol. 30, No. 2 (Aug., 2009): p. 187. For an exception, see discussion of *Barkham's Case* at supra, n. 183 and corresponding text, which effectively illustrates the repugnancy rule's futility in colonial North America.

[879] T.O. Elias, "The Problem of Reducing Customary Laws to Writing," in Alison Dundes Renteln and Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of Lex Non Scripta,* Vol. 1, Madison: University of Wisconsin Press, 1994, pp. 325-330.

one of the most well-known and thoroughly studied models of this empirical approach to colonial legal administration.[880] In 1772, the British Parliament appointed Warren Hastings to India's newly-created office of the Governor-General. Hastings, an established diplomat and commercial agent for the East India Company, believed that an in-depth knowledge of Indian culture, laws, and customs was the most appropriate means for structuring the administrative apparatus of the British colonial state.[881] His Judicial Plan of 1772 embodied this philosophy of legal relativism by assuring the Hindu and Muslim inhabitants that their "personal laws" would be preserved and respected. Section twenty-three of the Plan provided:

> That in all Suits regarding Inheritance, Marriage, Caste, and all other Religions Usages or Institutions, the Laws of the Koran with respect to *Mahometans* and those to the Shaster with respect to *Gentoos,* shall be invariably adhered to: On all such Occasions, the Moulavie or Brahmins shall respectively attend and expound the Law, and they shall sign the Report, and assist in passing the Decree.[882]

This model of "indirect" rule, Hastings intended, would enable Native law and custom to retain a degree of normative integrity. In essence, the theory was that "Indians should be governed by Indian principles, particularly in relation to law."[883]

Above all, Hastings' Plan reflected a larger paradigm of colonial rule. In India, the relation of knowledge to power became critical to British hegemony.[884] In theory, the

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[880] See, for example, Robert Travers, *Ideology and Empire in Eighteenth Century India: The British in Bengal,* New York: Cambridge University Press, 2007.
[881] Cohn, "Colonialism," pp. 60, 61.
[882] A Plan for the Administration of Justice, Extracted from the Proceedings of the Committee of Circuit, 15 August 1772, in G.W. Forrest, ed., *Selections from the State Papers of the Governors-General of India,* Vol. II: *Warren Hastings,* Oxford: B.H. Blackwell, 1910, pp. 295-296.
[883] McHugh, *Aboriginal Societies,* p. 129; Cohn, "Colonialism," p. 26.
[884] Hastings made this view clear in a 1784 letter to Nathaniel Smith, the Company's chairman of the Court of Directors:

> Every accumulation of knowledge and especially such as is obtained by social communication with people over whom we exercise dominion founded on the right of conquest, is useful to the state . . . it attracts and conciliates distant affections; it lessens the weight of the chain by which the

extensive social, political, economic, legal, and cultural milieu of India had to be identified, transcribed, categorized, published, and bound before it could be effectively governed.[885] Legal scholarship flourished under this model and colonial officials embarked upon a comprehensive study of Native languages, history, laws, customs, social institutions, religions, and family governance structures. Historians, travel writers, census takers, ethnographers, and mapmakers—agents of empire— rendered India a vast discursive space, believing that they "had a particular role to play in mediating between the colonial subjects and rulers."[886] Over time, the British constructed a vast literary apparatus of Indian grammars, dictionaries, treatises, and translations of important Native

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> natives are held in subjection; and it imprints on the hearts of our countrymen the sense of obligation and benevolence. . . . Every instance which brings their real character home to observation will impress us with a more generous sense of feeling for their natural rights, and teach us to estimate them by the measure of our own. But such instances can only be obtained in their writings: and these will survive when the British dominion in India shall have long ceased to exist, and when the sources which once yielded wealth and power are lost to remembrance.

See letter of Warren Hastings to Nathaniel Smith dated 4 October 1784, as quoted in Cohn, "Colonialism," p. 45.

[885] Cohn elaborates on this "larger colonial project" by outlining a set of "investigative modalities," a comprehensive, categorized set of inquiries which included "the definition of a body of information that is needed, the procedures by which appropriate knowledge is gathered, its ordering and classification, and . . . how it is transformed into usable forms such as published reports, statistical returns, histories, gazetteers, legal codes, and encyclopedias." See Cohn, "Colonialism," p. 5, 21-22.

By the late nineteenth century, systematized bodies of knowledge, such as history and ethnography, assisted the colonial courts in the adjudicatory process and often became requisites of legal procedure in official state handbooks on evidence. For example, the Indian Evidence Act of 1872 outlined several "facts" of which the colonial courts were to take judicial notice; these included matters related to "public history, literature, science or art." Under the same provisions, the courts were likewise required to "take judicial notice of all laws or rules having the force of law . . . in any part of British India," which included not only the "statute law but also of all recognized legal customs." "To ascertain the law," the Indian Evidence Act provided that "the Courts may refer to appropriate books or documents of reference," including "sworn translations of little known Sanskrit embodying Hindu law together with the *futwas* or opinions of pundits." See Sir Henry Stewart Cunningham, ed., *The Indian Evidence Act (No. 1 of 1872): As Amended by Act XVIII of 1872, Together with an Introduction and Explanatory Notes,* Madras: Higginbotham and Co., 1872, p. 112; also see Syed Ameer Ali and John G. Woodroffe, *The Law of Evidence Applicable to British India,* Calcutta: Thacker, Spink & Co., 1898, pp. 385-386; and Kunal Parker, "Interpreting Oriental Cases: The Law of Alterity in the Colonial Courtroom," *Harvard Law Review,* Vol. 107, No. 7 (May, 1994): p. 1712, n. 4. Ali and Woodroffe's *Law of Evidence* cataloged several ethnographic and historical texts that had acquired authoritative status in the colonial courts. These included Elphinstone's *History of India;* Wigram on *Malabar Law and Custom;* Grant Duff's *History of the Mahrattas;* Hough's *History of Christianity in India;* Colebrooke's *Remarks on the Husbandry of Bengal;* and Maine's *Ancient Law*; see Ali and Woodroffe, *Law of Evidence* pp. 389-390.

[886] Cohn, "Colonialism and its Forms of Knowledge," p. 11.

manuscripts. Some of these works served as general guidebooks while others summarized the extensive administrative and legal systems of the Mughal Empire.[887]

Yet British India was not unique in its intellectual colonization of Native laws, "customs," and life ways. Knowledge gathering in the New World had long been part of the Europeans' colonizing repertoire. In addition to gaining a vast geographic knowledge of the North American continent, French explorers and Jesuit priests such as Samuel de Champlain, Gabriel Sagard, and Louis Nicolas recorded extensive information on the tribes they encountered during their travels. While the accumulation of such knowledge often resulted from curiosity of the exotic "other," French colonial administrators sought to better understand their potential Indian allies (or enemies) for purposes of social adaptation, military strategy, diplomacy, or religious conversion.[888]

The British in North America expanded upon this empirical tradition. Observational fieldwork among the Indians became an indispensible medium of normative inquiry. Travelers and explorers went to great lengths in documenting the "laws," "customs," and "traditions" of the North American Indigenous inhabitants, often focusing on matters of property and inheritance, criminal justice, marriage, and domestic governance. "They claim no property in lands," Robert Beverly observed of the Virginia tribes in 1705, yet understood their title to be held "in common to a whole nation."[889] Nearly half a century prior, Andrew White documented "the Naturall Disposition of the

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[887] For the latter, see for example, Nathaniel Halhed, *A Code of Gentoo Laws, or, Ordinations of the Pundits: From a Persian Translation, Made from the Original Written in the Shanscrit Language,* London: [s.n.], 1776; Arthur Steele, *Summary of the Law and Custom of Hindoo Castes: Within the Dekhun Provinces Subject to the Presidency of Bombay, Chiefly Affecting Civil Suits*. Bombay: Courier Press, 1827.
[888] See Library of Congress and Bibliothèque Nationale de France, "Exploration and Knowledge: Knowledge of the Indians," *France in America,* available at http://international.loc.gov/intldl/fiahtml/, accessed 2 November 2010.
[889] Robert Beverly, *The History and Present State of Virginia,* London: R. Parker, 1705, p. 178.

Indians which Inhabite the parts of Maryland" and "their manner of living."[890] In matters of inheritance, he wrote, the Indian husband "leaves all that he hath to his wife . . . and she is to keepe the children until the sons come to be men . . . and the daughters until they have husbands."[891] Indian marriage—often described as a union contracted in a "state of nature"—stood in stark contrast to English or European forms of matrimony. "The Indians allow of polygamy," wrote Jonathan Carver in 1766, "and persons of every rank indulge themselves in this point," the custom being "more prevalent among the nations which lie in the interior parts."[892] Like many of his contemporaries, Carver saw Indian divorce as an impersonal and informal matter as well. "The Indian nations differ but little from each other in their marriage ceremonies," he noted, "and less in the manner of their divorces."[893] The consensus among colonial commentators held that either party could dissolve the union voluntarily by simply leaving or by taking another partner. "When from any dislike a separation takes place," Carver observed, ". . . they generally give their friends a few days notice of their intentions, and sometimes offer reasons to justify their conduct."[894]

Early narratives and travel accounts such as these gave birth to the concept of Indian "custom," a theoretical construct that not only explained social differences

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[890] Andrew White, *A Relation of Maryland: Together, with a Map of the Country, the Conditions of the Plantation, His Majesties Charter to the Lord Baltimore, Translated into English,* London, 1635, p. 25.
[891] Ibid. p. 28.
[892] Jonathan Carver, *Travels through the Interior Parts of North America, in the Years 1766, 1767, and 1768,* 3rd ed., London: C. Dilly, 1781, pp. 367, 369.
[893] Ibid. p. 369. These observations became part of a larger empirical commentary on the qualitative aspects of Indian domestic governance and family organization; see Carole Shammas, "Anglo-American Household Government in Comparative Perspective," *William and Mary Quarterly,* Vol. 52, No. 1 (Jan., 1995): pp. 109-115.
[894] Ibid. p. 370. John McIntosh, another North American explorer, expressed similar sentiments nearly eighty years later, writing that Indian marriage "contracts are binding no longer than both parties are willing." See McIntosh, *Origin of the North American Indians: With a Faithful Description of Their Manners and Customs, Both Civil and Military, Their Religions, Languages, Dress, and Ornaments,* New ed., New York: Nafis & Cornish, 1843, p. 119.

between European settlers and Native peoples but also shaped distinct normative realms and special legal categories cognizable by the colonial courts. Over time, the ethnographic collection of custom created a valuable legal commodity, a form of scientific evidence that colonial administrators claimed to be objective and authoritative in the process of discovering and applying Native "customs," adjudicating claims, and forming judicial presumptions.[895]

During the mid- to late-eighteenth century, colonial courts frequently turned to ethnographic sources for resolving legal controversies involving Indian litigants. For example, because common law rules of succession departed from Indigenous ideas and practices of property holding and inheritance, colonial magistrates relied on evidence of customary land tenure to adjudicate property disputes. In one case involving members of the Narragansett Tribe of southwest Rhode Island, colonial agents "Went into Connecticut Government and there got Evidences from the Sachems and Ancient Indians for to Prove . . . [the] Heir" to a particular tract of land. The "Evidences" were later "Carried to a Co[u]rt of Enquiry Held . . . in Kings Town [Rhode Island]."[896]

After 1763, the Crown found itself with a larger, more culturally diverse demographic of Catholic and non-Christian peoples under its rule. Colonial officials set out to adjust and reorganize the administration of justice accordingly. Rather than assert full territorial sovereignty, the Crown sought to expand its jurisdictional rights without

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[895] See Plane, *Colonial Intimacies,* pp. 7-8; Plane, "Customary Laws of Marriage: Legal Pluralism, Colonialism, and Narragansett Indian Identity in Eighteenth-Century Rhode Island," in Tomlins and Mann, *Many Legalities*, pp. 211-212; and Darian-Smith, "Ethnographies of Law," p. 549. On the late eighteenth- and nineteenth-century development of Anglo-American judicial presumptions regarding non-Christian marriages as polygamous or potentially polygamous, see G.W. Bartholomew, "Recognition of Polygamous Marriages in America," *International and Comparative Law Quarterly,* Vol. 13, No. 3 (July, 1964): pp. 1033-1068.

[896] Deposition of William Champlin dated 5 September 1743, in *C. Ninegret v. S. Clark,* action of appeal, Rhode Island Superior Court of Judicature, as quoted in Plane, "Customary Laws," p. 184.

entirely displacing local laws and customs. The Royal Proclamation of 1763 introduced English law into the colony of Quebec. However, the instrument made no express abrogation of the existing *lex loci*.[897] Moreover, colonial administrators made no pretense of asserting jurisdiction over the affairs of the Indigenous tribes of the interior region, whom the Proclamation recognized as independent polities. Rather, the conventions of continuity and consent proceeded along diplomatic lines, cultivated through formal treaty relations and supplementary measures.[898]

By recognizing that Native peoples had no formal institutions or legal systems akin to the Europeans, Royal instructions directed colonial governors to study and respect Native forms of government. For example, Governor James Murray of Quebec was to inform himself "with the greatest Exactness of the Number, Nature and Disposition of the . . . Indians, of the manner of their Lives, and the Rules and Constitutions by which they

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[897] Colonial officials initially suggested that judicial recognition of local customs follow criteria similar to those required for the recognition of particular customs in England. British Secretary Lord Hillsborough wrote to Lt. Governor Guy Carleton that "Justice should be administered agreeably to them, according to the Modes of administering Justice in the Courts o[f] Judicature in this Kingdom, as is the Case in the County of Kent, and many other parts of England, where Gavel-kind Borough-English and several other particular customs prevail." See letter of Hillsborough to Carleton, dated 6 March 1768, in Adam Shortt and Arthur G. Doughty, eds., *Documents Relating to the Constitutional History of Canada* [hereinafter cited as *DRCHC*], *1759-1791,* Vol. 1, Ottawa: Printed by J. de L. Taché, 1918, p. 297. However, law officers of the Crown subsequently rejected this view, suggesting instead that the laws of the "antient Colony" continued in force not as particular customs but as part of the general municipal law; see Report of Attorney and Solicitor General Regarding the Civil Government of Quebec, dated 14 April 1766, in *DRCHC,* Vol. 1, p. 255; and Walters, "Golden Thread," p. 726. This opinion dealt largely, though not exclusively, with French-Canadian property law; however, considering contemporary and earlier colonial practice, similar rules likely applied to matters involving Indian customary law. As Mark Walters argues, in discussing measures leading up to Sir William Johnson's Plan of 1764, "[a]lthough this bill was not enacted, reference to the local legislation of particular colonies confirms that the idea of acknowledging statutorily the continuity of existing Aboriginal customary laws and governments was far from novel." See Mark D. Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," *Osgoode Hall Law Journal,* Vol. 33, No. 4 (Winter, 1995): p. 798 (for examples, see nn. 53-62 and accompanying text).

[898] McHugh, *Aborignal Societies,* pp. 104-105. As McHugh notes, "[t]hese treaties were regarded as so important that some of them made their way into the [Georg Friedrich von] Martens treaty series. See for example, Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe; With a List of the Principal Treaties, Concluded Since the Year 1748 Down to the Present Time,* trans. William Cobbett, Philadelphia: Published by Thomas Bradford, printer, 1795, p. 355.

are governed or regulated."[899] Such instructions—reflecting contemporary law of nations theory—suggest the jurisdictional integrity and normative force that British officials often attributed to tribal customary law systems.[900]

During the Confederation and early national periods, United States policy toward the Indian tribes was largely an extension of British practice. Despite settler claims to full territorial sovereignty (a major impetus to the American Revolution), the federal government initially demonstrated its commitment to the doctrines of continuity and consent. Early treaties, while including clauses for the cession of Indian lands, continued to respect tribal jurisdiction and customary rights to property.[901] Other measures, including the federal trade and intercourse acts as well as the Northwest Ordinance, upheld British principles embodied in the Royal Proclamation."[902]

American territorial expansion—as with European imperial acquisition of overseas colonies—brought forth the need for greater knowledge of the local inhabitants, their laws, customs, and institutions of self-government.[903] President Thomas Jefferson recognized the importance of such measures. With the French cession of Louisiana to the

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[899] Instructions to Governor Murray dated 7 December 1763, *DRCHC,* Vol. 1, p. 199.

[900] Tully, *Strange Multiplicity,* p. 121. Although Royal instructions served primarily as "instruments of political control, having no legal effect," colonial governors faced being recalled from their posts or other consequences for failing to comply; see David B. Swinfen, "The Legal Status of Royal Instructions to Colonial Governors," *Juridical Review,* Vol. 13 (1968): pp. 22, 26.

[901] See discussion of the 1795 Treaty of Greenville, supra, pp. 105-106, n. 339. On the effects of revolution, independence, and state succession on the continuity (or discontinuity) of treaties, see D.P. O'Connell, *State Succession in Municipal Law and International Law,* Vol. 2: *International Relations,* Cambridge: Cambridge University Press, 1967, pp. 90-91; and Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties,* Oxford: Oxford University Press, 2007, pp. 141-147.

[902] McHugh, *Aborignal Societies,* p. 143.

[903] In a 1789 letter to President George Washington, Northwest Territorial Governor Arthur St. Clair realized that lawmaking for "so great an extent of Country" demanded knowledge of the inhabitants' "many different Habits and Customs." However, little appears to have been accomplished in the years that followed; see Letter of Governor Arthur St. Clair to President George Washington dated [?] Aug. 1789, in Clarence E. Carter, ed., *The Territorial Papers of the United States,* Vol. 2: *The Territory Northwest of the River Ohio, 1787-1803,* Washington: U. S. Gov't Printing Office, 1942, p. 204.

United States by Treaty of 30 April 1803, Jefferson, like many of his contemporaries, realized that the American legal system would have limited effect in the newly-acquired territory.[904] The diversity of local laws and customs would continue in force until expressly repealed by legislative act. Just prior to treaty ratification, Jefferson forwarded a questionnaire to local New Orleans merchant Daniel Clark, inquiring specifically as to the laws then in force in the territory. Having received the details he sought, Jefferson submitted this information to Congress in "An Account of Louisiana," a summary analysis that provided the statutory basis for the rule of recognition in the territory.[905]

Following U.S. possession, Louisiana Territorial Governor William Claiborne issued a proclamation assuring the inhabitants that "all laws and municipal regulations, which were in existence at the cessation of the late Government, [shall] remain in full force."[906] Subsequent congressional acts provided that all laws in force at the time of territorial cession were to "continue in force, until altered, modified, or repealed by the legislature."[907] Until Louisiana exercised its legislative prerogative, the courts often

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[904] For full-text of the Treaty with annotations, see Hunter Miller, ed., *Treaties and Other International Acts of the United States of America,* Vol. 2: *Documents 1-40: 1776-1818,* Washington: Government Printing Office, 1931, pp. 498-511. On earlier American accommodations with the French, see chapter one, part three.

[905] See Donald Juneau, "The Light of Dead Stars," *American Indian Law Review,* Vol. 11, No. 1 (1983): pp. 26-27.

[906] As quoted in ibid. p. 28. For the Congressional act enabling territorial possession, see Act of 31 October 1803, 8th Cong., 1st sess. ch. 1, *Statutes at Large*: p. 245.

[907] See Act of 26 March 1804, 8th Cong., 1st sess. ch. 38, *Statutes at Large*: p. 287; and Act of 2 March 1805, 8th Cong., 2nd sess. ch. 23, *Statutes at Large*: p. 322. The former measure, which divided the newly-acquired territory into the District of Louisiana and the Territory of Orleans, vested all legislative powers in a respective governor (one in each jurisdiction), who, along with the advice and consent of a legislative council, possessed the authority to "alter, modify, or repeal the laws which may be in force at the commencement of this act." William C.C. Claiborne served as the Territory of Orleans' only governor, and William Henry Harrison served as governor of the Louisiana District; see supra, pp. 114-118 for a discussion of Harrison's brief tenure. Under the Act of 2 March 1805, Congress established the Territory's representative legislature. Louisiana became a state on 4 June 1812.

applied French and Spanish law in forming the rule of decision in cases involving French and Spanish claims.[908]

As the architect of the 1804 Lewis and Clark expedition, Jefferson undertook similar investigative strategies in relation to the western Indian tribes. The expedition—extending from the interior region of the continent to the Pacific Northwest—served largely as a reconnaissance mission for gathering the necessary evidence to establish future discovery claims for the United States. Yet Jefferson understood these entitlements as a mere right of pre-emption by which to exclude competing European states from territorial claims rather than a unilateral declaration of sovereignty over tribal lands. The doctrine of discovery, as Jefferson regarded it, conferred no express right to abrogate the laws and customs of the Indian tribes; the law of nations still applied.[909]

In order to strengthen ties with the tribes, Jefferson understood the value of studying their history, economy, culture, systems of government, and international relations.[910] In his letter of instructions to Lewis and Clark dated 20 June 1803, Jefferson emphasized these objectives. The establishment of commercial, legal, and political

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[908] See, for example, *Caiserques v. Dujarreau,* 1 Mart. 7 (Orleans 1809); and (following statehood) *Cottin v. Cottin,* 5 Mart. 93 (La. 1817). Even with the enactment of the 1825 Civil Code, which repealed "the Spanish, Roman and French laws" in force at the time of cession, the Louisiana Supreme Court later ruled that "the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of the courts of justice." See *Reynolds v. Swain,* 13 La. 193 (1839).

[909] Following the Purchase, Jefferson proposed a U.S. Constitutional amendment authorizing territorial acquisition. His draft expressly guaranteed to the western tribes their "rights of occupancy in the soil, and of self-government." As quoted in Robert J. Miller, "The Doctrine of Discovery in American Indian Law," *Idaho Law Review,* Vol. 42, No. 1 (2005): p. 85. "[W]e do not consider you as another nation," Jefferson wrote to the Ottawa, Chippewa, Pottawatomie, Wyandot, and Shawnee nations several years later, "but as part of us, living indeed under your own laws, but having the same interests with us." See Letter of Thomas Jefferson to Chiefs of the Ottawas, Chippewas, Powtewatamies, Wyandots, and Shawanese [sic], dated 31 January 1809, in Andrew Lipscomb, ed., *The Writing of Thomas Jefferson,* Vol. 16, Washington, D.C.: Thomas Jefferson Memorial Association, 1903.

[910] p. 87, 92. While Miller's article provides a concise overview of the discovery doctrine in North America, I disagree with the extent to which he associates the expedition as a manifestation of claims to complete "sovereign power and real property rights over the Indian nations." Although notions of sovereignty had certainly shifted toward settler self-interests, the western tribes still retained a large degree of autonomy in exercising their customary rights and powers of territorial jurisdiction.

intercourse with the Indians "renders kno[w]le[d]ge of these people important," he wrote.[911] Like the British governors of the post-expansionist colonial era, Lewis received explicit instructions from Jefferson to acquaint himself, "as far as a diligent pursuit" of his journey admitted:

> with the names of the nations & their numbers; the extent & limits of their possessions; their relations with other tribes or nations; their language, traditions, monuments; their ordinary occupations in agriculture, fishing, hunting, war, arts, & the implements for these; their food, clothing, & domestic accommodations; the diseases prevalent among them, & the remedies they use; moral and physical circumstance which distinguish them from the tribes they know; peculiarities in their laws, customs & dispositions; and articles of commerce they may need or furnish, & to what extent.[912]

Moreover, by "considering the interest which every nation has in extending & strengthening the authority of reason & justice among the people around them," Jefferson considered it "useful to acquire . . . kno[w]le[d]ge . . . of [their] state of morality, religion, & information," as a means of enabling "those who endeavor to civilize & instruct them, to adapt their measures to the existing notions & practices of [the Indians]."[913] Based on Jefferson's proposed questionnaire, Lewis and Clark spent considerable time observing, collecting, and recording Indian vocabularies, tribal customs, and other data they considered pertinent, paying close attention to land use and concepts of property among the Indians they encountered.[914]

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[911] Jefferson's Instructions to Meriwether Lewis, dated 20 June 1803, in Donald Jackson, ed., *Letters of the Lewis and Clark Expedition, With Related Documents, 1783-1854,* Vol. 1, Urbana: University of Illinois Press, 1978, p. 62.
[912] Ibid. Compare with Instructions to Governor James Murray of Quebec, quoted at supra, pp. 269-270.
[913] Ibid. p. 63.
[914] Miller, "Doctrine of Discovery," p. 93.

Jefferson's ethnographic model, however, appears to have generated little if any interest among state and territorial lawmakers during the early national period.[915] Unlike the French and Spanish laws and customs that judges recognized and applied following U.S. territorial acquisition, similar efforts failed to accommodate the principle of continuity toward the American Indian tribes. In large part, this disparity resulted from the fact that Indian customary law continued to exist predominantly in oral form, a particularly challenging idea for western lawmakers to comprehend.[916] Moreover, the enormous task of recording and codifying Indian customs would demand more time and resources than most frontier administrators had at their disposal.

Lewis Cass, Michigan Territorial Governor from 1813 to 1821, set out to reconcile this knowledge gap by advocating the merger of Indian law and policy with the organized and methodical collection of Native laws and customs. In 1820, Cass organized an expedition of the Old Northwest and upper Great Lakes region with the intention of locating the source of the Mississippi River. Although failing in his primary endeavor, the expedition provided ample opportunity for studying the region's Indigenous inhabitants. Drawing upon this experience, Cass envisioned an applied model of frontier ethnography. Like Warren Hastings in India before him, Cass believed that an authoritative knowledge of Native laws and customs was necessary to implement an effective system of civil administration and cross-cultural justice.[917]

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[915] As legal historian Elizabeth Gaspar Brown notes: "At the very period when priceless information could have been gathered concerning the aborigine, his laws and customs, the settlers and administrative officials apparently failed to proceed along these lines of inquiry." Elizabeth Gaspar Brown, "Lewis Cass and the American Indian," *Michigan History,* Vol. 37 (Sept., 1953): p. 286.

[916] There were, of course, exceptions to this form of Indian law, the most notable of which was the Cherokee Code; see *Laws of the Cherokee Nation: Adopted by the Council at Various Periods: Printed for the Benefit of the Nation,* Tahlequah, C.N.: Cherokee Advocate Office, 1852.

[917] "Here was a man," as Brown describes Cass, "given the legal training of the early nineteenth century, burdened with the problems of civil administration of an area comprising more than the present states of

In 1823, Cass published an elaborate questionnaire entitled *Inquiries, Respecting the History, Traditions, Languages, Manners, Customs, Religion, &c. of the Indians, Living Within the United States.*[918] Cass intended this document to be a model census for state and territorial officials to conduct a comprehensive demographic inventory of the American Indian tribes throughout the region.

In crafting his *Inquiries,* Cass sought to identify the legal and political basis upon which the North American Indigenous peoples maintained their systems of self-government. His survey—systematically arranged under extensive subject headings—focused on such issues as whether the tribes had "any particular body of counsellors," "any mode of compelling the payment of a debt," "anything like a redress of civil injuries," or if "councils [were] called to deliberate upon questions of internal policy, or . . . the administration of law."[919] Other topics included "Marriage, and its incidents," "Family Government [and] Social Relations," religion, languages, and "General Manners and Customs." On the subject of "International law and relations," Cass expressed particular interest in whether one tribal nation acknowledged the sovereignty of

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Michigan and Wisconsin, charged with the responsibility of acting as *ex officio* superintendent of Indian affairs in which capacity his jurisdiction extended over the subagencies of Ohio, Indiana, and Illinois, who in spite of all the pressure and responsibility was able to devise a set of inquiries which touch on every significant aspect of the Indian mind, the moral habits of the tribes, their institutions and laws, and their customs and traditions." See Brown, "Lewis Cass," pp. 287-288. The influence of Cass's work can be seen in the decisions of Michigan Territorial Judge James Duane Doty, a close colleague of the Governor and secretary journalist of the 1820 expedition. For Doty's field notes and observations of the regional tribes during his expedition, see "The Journal and Letters of James Duane Doty," in Mentor L. Williams, ed., *Schoolcraft's Narrative Journal of Travels: Through the Northwestern Regions of the United States Extending from Detroit Through the Great Chain of American Lakes to the Sources of the Mississippi River in the Year 1820,* East Lansing: Michigan State University Press, 1992, pp. 401-460.

[918] Lewis Cass, *Inquiries, Respecting the History, Traditions, Languages, Manners, Customs, Religion, &c. of the Indians, Living Within the United States,* Detroit: Sheldon and Reed, 1823. Apparently, Cass's *Inquiries* were originally printed in two separate pamphlets. The combined reprint included a revised subject arrangement which allowed for broad circulation.

[919] Cass, *Inquiries,* pp. 4, 5. In attempting to provide a holistic desciption of another culture, ethnographers typically used standardized lists or questionnaires with extensive subject headings such as those noted above; see Darian-Smith, "Ethnographies of Law," p. 549.

another.[920] Questions such as these permeated early nineteenth-century legal and political discourse, which sought to determine whether or not the tribes fit within the paradigm of contemporary law of nations theory and, if so, whether they should be treated as equal sovereigns in the young Republic's developing field of international law.

As late as the 1820s, the idea of the tribes as distinct sovereign nations possessing jurisdictional integrity continued to sustain the colonial model of legal pluralism. Yet shifting social attitudes and emerging legal doctrine—developments manifestly latent in Cass's own work—had begun to undermine the reciprocal framework of a universal *jus gentium*. By using American and European legal systems as a normative standard by which to measure and compare tribal modes of governance, Cass's initial sense of accommodation quickly gave way to ethnocentric superiority and disdain. According to Cass, the European-modeled settler states possessed the most advanced institutions of government; the Indian tribes, in contrast—often characterized as living in a "state of nature"—fell at the bottom stages of civilization. Premised upon eighteenth-century Enlightenment theory, this staged, evolutionary, or stadial view of humanity held that all cultures and societies could be measured or ranked hierarchically relative to their internal level of development.[921] Ideas, institutions, and civilizations "could be seen as progressing through stages to some end or goal" or, on the other hand, perceived in a state of "regression, decay, and decadence."[922] Having found little common ground

[920] Ibid. p. 18.
[921] Tully, *Strange Multiplicity,* pp. 64-65; McHugh, *Aboriginal Societies,* p. 122.
[922] Cohn, "Colonialism," p. 55.

between settler norms and tribal customs, Cass eventually concluded that the Indians "have but little property, less law, and no public offences."[923]

Particularly influential in this ideological shift was the emergence of legal positivism. The early nineteenth-century work of Jeremy Bentham and John Austin posited law as the sole command of the nation-state, a sovereign entity vested with exclusive jurisdictional authority, personal as well as territorial. The product of reason and political will, law emanated from above, not from the sundry masses below. This top-down rather than bottom-up model of lawmaking critically undermined the normative authority of community usage.

With exclusive authority vested in the state, legal positivism created a normative threshold, a fixed point from which to interpret and build upon a nationally relevant doctrinal past. As in other substantive areas of jurisprudence, the American "reception" of the English common law carried with it the power to reconfigure custom's doctrinal scope. In particular, the idea of a uniquely American common law—founded well within legal memory—conflicted with the principle of "immemorial" status. Thus, like many states, Indiana excluded the "antiquity" requirement from Blackstone's four-prong test. It was "not essential that usage should be shown to be so ancient 'that the memory of man runneth not to the contrary,'" but merely "long-continued, uniform, and generally known."[924] By fixing the "cutoff" date of legal memory to the year 1607, Indiana

[923] Lewis Cass, "Indians of North America," *North American Review,* Vol. 22, No. 50 (Jan., 1926): p. 53, as quoted by Brown, "Lewis Cass," p. 8. Despite these conclusions, Cass's interest in studying Indigenous society never abated.

[924] See *Morningstar v. Cunningham*, 110 Ind. 328 (1887) for former quote and *Cox v. O'Reiley*, 4 Ind. 368 (1853) and *Harper v. Pound,* 10 Ind. 32 (1857) for latter quote.

established its own temporal context in which to recognize custom.[925] No longer would the state have to rely upon the uncertain traditions of an obscure, remote past. Rather, the distinctively "modern" events in American legal history—narrowly defined by an English colonial heritage of common law rights and privileges—provided Indiana citizens with a strengthened sense of unity through shared institutions and traditions.[926]

With the early nineteenth-century development of precedent and *stare decisis,* the idea of formal, binding law began to alter the fundamental character of custom as immutable authority.[927] The centralization of courts, the idea of political consensus, and the positivization of law through written constitutions, codes, and published case decisions rendered the peculiar, unwritten, or informal usages of the locality legally ineffectual.[928] Whereas the assemblage of diverse customs had formed an "ancient constitution," that "motley of overlapping legal and political jurisdictions" reflective of pre-Westphalian stateless societies, the sovereign state's new "modern" constitution

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[925] The Indiana "reception statutes" passed between 1807 and 1852 acknowledged the English common law and supplementary acts of the British Parliament dating to 1607. Several other states have similar statutes dating to this year, reflecting the significance attributed to the English settlement at Jamestown; see Ray F. Bowman, III, "English Common Law and Indiana Jurisprudence," *Indiana Law Review,* Vol. 30, No. 1 (1997): p. 14, n. 25. Other common law jurisdictions throughout the British colonial world made similar modifications: India (1773); New Zealand (14 Jan. 1840); Hong Kong (1843); Gold Coast [Ghana] (1874); Fiji (1875); Sierra Leone (1880). In most cases the cutoff date for legal memory reflected the year colonial officials established the first supreme court or made significant changes to the constitutional law of the state; see J.N. Matson, "The Common Law Abroad: English and Indigenous Laws in the British Commonwealth," *International and Comparative Law Quarterly,* Vol. 42, No. 4 (Oct., 1993): p. 754; and Parker, "Oriental Cases," p. 1715, n. 13.

[926] See Pearson, "Revising Custom," p. 108.

[927] "[I]n a government like ours," wrote Ohio attorney John Milton Goodenow in 1819, "whose foundation is in written and positive law; untrammeled by custom or tradition . . . what is not written or published is not law." John M. Goodenow, *Historical Sketches of the Principles and Maxims of American Jurisprudence,* Steubenville, Ohio: Printed by James Wilson, 1819, p. 41, as quoted by Bederman, *Custom,* p. 39.

[928] "The mere innate power of the Courts cannot create a usage. They can only adjudge, when satisfied by proof, that a usage exists, or has acquired, by its existence, the force of law. 'A custom denies its force from the tacit consent of the legislature and the people, and supposes an original actual deed or agreement.' It follows, therefore, there can be no custom in relation to a matter regulated by law." See *Michigan Southern and Northern Railroad Co., v. Bivens,* 13 Ind. 227 (1859), quoting Blackstone, *Commentaries,* Vol. 2, [yr?], pp. 30, 31.

stood upon principles of uniformity, consent, and equality.[929] Any peculiar usage at variance with this philosophy departed from and conflicted with the common law of the land.[930]

By mid-nineteenth century, custom had assumed an entirely new meaning in American jurisprudence. By shedding its "immemorial" status, custom—once considered a legitimate source of normative authority and fundamentally linked with the common law—had simply become a stage in law's complex evolution.[931] Rather than symbolizing the "authoritative expression of the agreement of the people," custom had become a peripheral, degraded category, classified instead as the "*de facto* habits acquired by engaging in the practices and institutions of one's society, from the most primitive and least reflective to the most civilised and enlightened."[932]

As the informal or unwritten law became increasingly associated with the "savage" or "primitive" state, custom deserved little if any attention among contemporary jurists and political theorists. Instead, as a pre-historic relic, an artifact of ancient law, custom was something to be preserved for the archive and annals of history. In the introductory note to his *Inquiries,* Cass elaborated on the pressing need for such measures:

> The time for collecting materials to illustrate the past and present condition of the Indians, is rapidly passing away. The inquiries, which

[929] Tully, *Strange Multiplicity,* p. 66. Accordingly, the state's "constitution and judicial decisions" became "hostile to local legislation and local customs." See *Harper v. Pound,* 10 Ind. 33 (1857).
[930] "Were the courts, by their decisions, to encourage the growth of these local usages originating in . . . mistaken ideas of law, they might become as great an evil, a source of as much want of uniformity in the law, as was the local legislation of the past—an evil supposed to be eradicated from our political system by the new constitution." See *Cox v. O'Riley,* 4 Ind. 368 (1853). The "policy of the state [was] to have all her localities a unit—the same law and the same rule of decision prevailing everywhere throughout." See *Harper,* p. 33.
[931] Kunal M. Parker, "Context in History and Law: A Study of the Late Nineteenth-Century American Jurisprudence of Custom," *Law and History Review,* Vol. 24, No. 3 (Fall, 2006): p. 482.
[932] Tully, *Strange Multiplicity,* pp. 88-89.

> have heretofore been directed to this subject, have produced much authentic information; but it relates rather to the more prominent traits of Indian character, than to the constitution of their minds, or their moral habits.[933]

This sense of urgency corresponded with increasingly common settler views that associated national progress with the Indians' inevitable cultural demise. Consequently, efforts to record vestiges of the "vanishing race" met with mounting enthusiasm. As historian Oz Frankel notes, "[j]ust as the American Indian was expected to disappear, a new fascination with Indian artifacts, history, mythology, and customs emerged."[934]

Having denied American Indians equal standing under the law of nations, the task at hand lay in restructuring the historical and legal basis of Indian-settler relations. The centuries-long conquest of the North American continent provided a vast historical archive for early nineteenth-century legal and political theorists to justify their jurisdictional encroachment and extension of sovereign authority over Native lands. The "paper empires," which European nations had constructed from an array of papal bulls, royal commissions, letters patent, trade grants, and treaties purported to convey land title and extensive governmental rights to the settlers.[935] However, most of these imperial instruments entailed self-imposed juridical limits to absolute sovereignty. To substantiate settler claims to territorial jurisdiction required evidence of the Indians as culturally, intellectually, and morally inferior. Although the revolutionary radicals had declared independence in the east, the search for settler sovereignty unfolded in the trans-Appalachian west.

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[933] Cass, *Inquiries,* p. 2.
[934] Oz Frankel, *States of Inquiry*, p. 236.
[935] Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America", in John McLaren, A.R. Buck and Nancy E. Wright, eds. *Despotic Dominion: Property Rights in British Settler Societies,* Vancouver: University of British Columbia Press, 2005, p. 52.

During the first three decades of the nineteenth century, scores of frontier representatives conducted nationally coordinated inventories of Indian land tenure, customs, and life ways. "Everywhere," notes American literary scholar Roy Harvey Pearce, "the facts of Indian life were being gathered and disseminated."[936] Indian agents, western explorers, frontier envoys, and "wilderness scholars"—often under official government instructions—gathered extensive data on the tribes.[937] Others, such as missionaries, travel writers, artists, antiquarians, and ethnologists, thoroughly documented their interactions with and observations of American Indians.[938]

Pursuant to instructions from Governor Lewis Cass, Indian agent Charles C. Trowbridge conducted a census of the Indiana Miami and Shawnee Tribes between 1824 and 1825.[939] The contents of Trowbridge's report, modeled after Cass's ethnographic template, documented tribal systems of government, incidents of war and peace, customs related to birth, death, and marriage, family governance, religion, general manners, hunting, and tribal lore.

While rich in ethnographic detail, the census served as a reconnaissance project for gathering data and local knowledge prior to treaty negotiations, a diplomatic scheme that had become increasingly instrumental in the acquisition of tribal lands. The

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[936] Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind,* Rev. ed., Berkeley: University of California Press, 1988, p. 106.
[937] Ibid. The term "wilderness scholar" is taken from Richard G. Bremmer, *Indian Agent and Wilderness Scholar: The Life of Henry Rowe Schoolcraft,* Mount Pleasant, Mich.: Clarke Historical Library, Central Michigan University, 1987. For a general discussion of contemporary literature that evolved from this empirical research, see "The Widening of Horizons," in Robert E. Spiller, et al., eds., *Literary History of the United States,* 4th ed., rev. Macmillan Co., 1974, pp. 646-648.
[938] As one early twentieth-century legal scholar noted, missionaries during the 1800s "collected the greater part of the records concerning native social life, [which] became the material for sociological and juristic analysis." See Leonard Adam, "Modern Ethnological Jurisprudence in Theory and Practice," *Journal of Comparative Legislation and International Law*, Vol. 16 (1934): p. 223.
[939] The University of Michigan published Trowbridge's census and manuscript report in 1938; see Charles Trowbridge, *Meearmeear Traditions,* ed. Vernon Kinietz, Occasional contributions from the Museum of Anthropology of the University of Michigan, No. 7, Ann Arbor: University of Michigan Press, 1938.

assignment arose from Cass's concern over resolving a territorial dispute between the Miamis and the neighboring Wyandots, suggesting the importance of identifying the proper tribe with whom to negotiate land cessions in order to avoid future inter-tribal disputes and potentially costly and drawn-out treaty revisions. In directing attention to those sections of his report that described "the successive migrations of the Miamies," Trowbridge advised Governor Cass that nothing indicated "their having once resided upon Fox river or at Detroit." Nor, according to his sources, had "the Indians, in any instance, marked the boundaries of their hunting lands."[940]

Like British colonial officials, U.S. Indian agents relied on Native informants to provide information. Indians often collaborated, albeit judiciously and on their own terms. For example, Miami Chief Le Gros "enabled [Trowbridge] to obtain some further information" on "several subjects," which included Miami language systems, tribal migration patterns, contemporary marriage practices, and an historical account of regional, inter-tribal alliances.[941]

In the end however, it was Trowbridge, not his informants, who decided what information was pertinent. When Trowbridge interviewed his Indian subjects and recorded their "customs" and "traditions," he was not interested in accommodating their normative perspectives. Rather, the Indian agent sought to capture and preserve evidence of a "vanishing" Indian past. "From creators of the middle ground," Richard White observes, "from people who strove to maintain the necessary understanding of a common

[940] Letter of Trowbridge to Cass, dated 6 March 1825, as quoted in Ibid. pp. 2-3. Other sections of the report included "observations upon the Miami language[,] a tabular list of the names, in that dialect, of the surrounding nations, and also a statement exhibiting the affinities of other languages to the Miami." Based on this description, Trowbridge's interest in Indian languages appears to have been a form of linguistic mapping by which to document the geographic interactions among the regional tribes.
[941] Ibid. p. 2.

world, the Algonquians had become objects of study in a world of white learning." Rather than finding an opportunity for normative dialogue, the Indians were "left to sit and relate jumbled and isolated facts in answer to a white man's odd questions although, but a short time before, those facts had been part of a common world shared with white men."[942]

From this process of information gathering emerged a growing public sphere of interest. The information revolution of the early-nineteenth century marked an expanding infrastructure of subscription libraries, bookshops, museums, and historical societies.[943] The Indian presence in particular, Oz Frankel observes, "generated a tremendously diverse market of knowledge."[944] Private and institutional collectors sought frontier travel journals, missionary reports, Indian vocabularies and grammars, tribal lore, and captivity narratives. The spirit of intellectual enterprise and the drive for knowledge diffusion and narrative (re)construction prompted efforts among antiquarians and ethnographers to collect and preserve tangible evidence from the "rapidly receding past."[945]

In the years following American independence, historical societies proliferated and spread westward in tandem with other settler institutions, serving a central

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[942] Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, Cambridge: Cambridge University Press, 1991, pp. 519-520, 522, discussing Trowbridge's 1824 interview with Tenskawatawa, the Shawnee religious leader also known as "The Prophet."
[943] For an assessment of early library development and access to books, see J. Robert Constantine, *The Role of Libraries in the Cultural History of Indiana*, Bloomington, Ind.: Indiana Library Studies, 1970; and Michael H. Harris, "The Availability of Books and the Nature of Book Ownership on the Southern Indiana Frontier, 1800-1850," Ph.D. Dissertation, Indiana University, 1971.
[944] Frankel, *States of Inquiry*, p. 238.
[945] See generally Lee Clark Mitchell, *Witnesses To a Vanishing America: The Nineteenth-Century Response*, Princeton, N.J.: Princeton University Press, 1981 pp. 151-178.

"democratic role in the development of the new and expanding republic."[946] The successful conclusion to the American Revolution had led the fledgling country to examine and reassess its past in order to create its own historical identity. Whiggish historians exalted the story of American progress and achievement, creating new historical narratives that took on great importance in the larger process of nation building and state formation.[947]

By the 1820s, a distinctly "western" historical identity had emerged, founded upon a new mythology of origins crafted by the region's cultural elite.[948] Historical society organizers often held the region's settler-pioneers in the highest regard. In 1830, for example, James Hall of the Antiquarian and Historical Society of Illinois proclaimed in his Independence Day speech that "[t]he first settlers brought with them . . . the spirit and the principles of the revolution."[949] By "erecting states, forming constitutions, and enacting laws," western settlers constructed from scratch the foundations of republican government.[950] Ostensibly, this course of events had all been accomplished in a

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[946] Terry A. Barnhart, "'A Common Feeling': Regional Identity and Historical Consciousness in the Old Northwest, 1820-1860," *Michigan Historical Review,* Vol. 29, No. 1 (Spring, 2003): pp. 41, 51. During the early nineteenth century, historical societies served in a quasi-official capacity prior to the establishment of state archives. Early nineteenth-century historical societies were, by and large, organized as private institutions; however, state governments often recognized them as institutions of public benefit and frequently provided appropriations and public space for their collections, see Leslie W. Dunlap, *American Historical Societies, 1790-1860,* Madison, Wisc.: Cantwell Printing Co., 1944, especially her chapter on "State Relations and Finance," pp. 48-64; on the public and state administrative functions of early historical societies see Julian P. Boyd, "State and Local Historical Societies in the United States," *American Historical Review,* Vol. 40, No. 1 (Oct., 1934): pp. 30-31.

[947] Lawrence H. Leder, "Early Nationalist Historians: An Introduction," in Lawrence H. Leder, ed., *The Colonial Legacy,* Vol. IV: *Early Nationalist Historians,* New York: Harper & Row, 1973., pp. 167, 188; also see Barnhart, "Common Feeling," pp. 51, 53-54, 59.

[948] Ibid. p. 40.

[949] "Fourth of July, Oration by James Hall," *Illinois Intelligencer,* 10 July 1830, as quoted by Barnhart, "Common Feeling," p. 53.

[950] James Hall, *Letters from the West: Containing Sketches of Scenery, Manners, and Customs, and Anecdotes Connected with the First Settlements of the Western Sections of the United States,* London: H. Colburn, 1828, p. 8, as quoted by Barnhart, "Common Feeling," p. 53.

wilderness of "uninhabited," "unreclaimed," and "tenantless" lands.[951] In effect, the historical myth of the Old Northwest as *terra nullius* rendered the American Indians invisible (or at least vanishing). Correspondingly, the focus of attention that Indians often received characterized them as living yet primitive monuments of the past, making them the principal objects of study for historical societies.

The State of Indiana played a central role in constituting this new regional identity. On 11 December 1830, attorney John Hay Farnham met with several members of the state legislature at the Marion County Courthouse to form the Indiana Historical Society (IHS) and draft its constitution. The following month, the General Assembly passed an act to incorporate the Society.[952] At its inaugural meeting the Society stressed "the importance and necessity of collecting and preserving the materials for a comprehensive and accurate history of [the] country," which were "of an ephemeral and transitory nature, and in the absence of well directed efforts to preserve them are rapidly passing into oblivion."[953] The "cardinal objects of the Society," honorary member Francis Vigo wrote to Farnham, included the collection of "all interesting information respecting the aborigines, and the habits and manners, customs and curiosities of the native inhabitants."[954]

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[951] Barnhart, "Common Feeling," p. 55, quoting terms used by Hall in his annual address to the Society in 1827.

[952] Lana Ruegamer, *A History of the Indiana Historical Society, 1830-1980,* Indianapolis: Indiana Historical Society, 1980, p. 25; Act of 10 January 1831, *Special Acts of the State of Indiana,* 15th sess., p. 62. In the Spring of 1830, Congress passed an act authorizing the distribution of printed facsimilies of the diplomatic correspondence of the American Revolution and copies of the House and Senate journals to state and federal repositories as well as "each incorporated university, college, historical or antiquarian society and athenaeum." See Act of 26 May 1830, 21st Cong., 1st sess. ch. 107, *Statutes at Large*: p. 407.

[953] Indiana Historical Society, "Proceedings of the Indiana Historical Society, 1830-1886 [hereinafter IHS, *Proceedings*]," in *Indiana Historical Society Publications,* Vol. I, No. 1, Indianapolis: The Bowen-Merrill Co., 1897, p. 9.

[954] Letter of Francis Vigo to John Hay Farnham dated 20 December 1830, as quoted in Ruegamer, *History*, p. 36. Historical societies laid the foundation for much of the work later associated with the federal government and other national organizations involved with the study of American Indians. The

Like many of its counterparts in other states, the Indiana Historical Society promoted "useful knowledge," a reflection of contemporary American society's identification of scholarship as broadly utilitarian.[955] From this "whiggish" or "presentist" approach to the past, history as a general body of knowledge (rather than a distinct academic discipline) entailed less of an objective, scientific method of inquiry than a pragmatic field of analysis. Like the common law tradition, in which the past (precedent) guided judges in "discovering" and applying the relevant authority to resolve issues, history was a moral compass, providing normative direction in a contemporary world.[956] "[T]he past controls the present, and the present the future," Andrew Wylie remarked in a lecture delivered before the Indiana Historical Society in 1831. By

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Smithsonian Institution, founded as "an establishment for the increase and diffusion of knowledge among men," opened in 1846. From its inception, the Institution dedicated significant time and resources researching Indian vocabularies, collecting Native artifacts, and gathering information on Indigenous peoples across the globe; see generally, Frank H.H. Roberts, "One Hundred Years of Smithsonian Anthropology," *Science*, New Series, Vol. 104, No. 2693 (9 Aug. 1946): pp. 119-125. In 1847, Congress commissioned Henry Rowe Schoolcraft to lead an exhaustive research project documenting the Indian tribes in the United States, focusing largely on those throughout the western states. Over the course of the next decade, Schoolcraft—a geographer, ethnologist, Indian agent, and self-proclaimed "Indian Historian to Congress"—completed a six-volume set covering his subjects; see Henry Rowe Schoolcraft, *Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States: Collected and Prepared under the Direction of the Bureau of Indian Affairs, Per Act of Congress of March 3d, 1847*, 6 Vols., Philadelphia: Lippincott, Grambo, 1851-57.

[955] See James D. Watkinson, "Useful Knowledge? Concepts, Values, and Access in American Education, 1776-1840," *History of Education Quarterly,* Vol. 30, No. 3 (Autumn, 1990): p. 351. Article II of the Indiana Historical Society's founding constitution states in full: "The objects of this society shall be the collection of all materials calculated to shed light on the natural, civil, and political history of Indiana, the promotion of useful knowledge, and the friendly and profitable intercourse of such citizens of the state as are disposed to promote aforesaid objects." See IHS, *Proceedings,* p. 10.

[956] "It was not until the second half of the nineteenth century, with the positivization of the academy and legal thought and the professionalization of legal practice, that law and history became regarded as distinct modes of thought." See McHugh, "Common-Law Status," p. 395. For further analysis of these intellectual gray areas, see John Phillip Reid, "Law and History," *Loyola of Los Angeles Law Review,* Vol. 27, No. 1 (Nov., 1993): pp. 193-224. Many early Indiana judges and lawyers assumed the role of local historians in their larger capacity as civil servants. For an introductory discussion of lawyers as historians during the early national period, see Michael Griffith and Chet Orloff, "Historical Societies and Legal History," *California Western Law Review,* Vol. 24, No. 2 (1987-1988): pp. 355-357.

"giv[ing] us insight into our own nature," he emphasized, "it is to history that the world is, in a great degree, indebted for whatever sense of morality prevails in it."[957]

By looking to the past for its practical relevance and moral lessons, historians crafted a prescriptive narrative that played a powerful role in settler society. Stories of origin and progress provided a conceptual framework for interpreting significant events and forming value judgments, all of which gave meaning, stability, and legitimacy in the creation of the expanding Republic. Yet these narratives left little room for inter-cultural dialogue. Nineteenth-century works such as John Dillon's *A History of Indiana,* William H. English's *Conquest of the Northwest,* and Jacob Piatt Dunn's *Indiana: A Redemption from Slavery* (all three authors were active IHS historians) included dramatic historical narratives that juxtaposed epic themes of western expansion and national progress with tales of Indian depravity and decline.[958]

The role of historical and ethnographic research changed the fundamental view of law's relationship to society. What emerged, as a normative counterpoint to "modern" law's civilizing thesis, was the idea of "legal primitivism." With the publication of Henry Sumner Maine's *Ancient Law* in 1861, a new genre of legal literature materialized, reflecting the deeply-entrenched ethnocentric narrative and stadial view of human

[957] Andrew Wylie, "The Uses of History," Discourse Delivered Before the Indiana Historical Society at its Annual Meeting, 11 December 1831, in *Indiana Historical Society Publications,* Vol. 1, No. 3, Indianapolis: The Bowen-Merrill Co., 1897, pp. 81, 82, 90.

[958] John B. Dillon, *A History of Indiana from its Earliest Exploration by Europeans to the Close of the Territorial Government in1816: Comprehending a History of the Discovery, Settlement, and Civil and Military Affairs of the Territory of the U.S. Northwest of the River Ohio, and a General View of the Progress of Public Affairs in Indiana from 1816 to 1856*, Indianapolis: Bingham & Doughty, 1859; William Hayden English, *Conquest of the Country Northwest of the River Ohio, 1778-1783; And Life of Gen. George Rogers Clark,* 2 vols., Indianapolis, Ind., and Kansas City, Mo., Bowen-Merrill Co., 1896; Jacob Piatt Dunn, Jr., *Indiana: A Redemption from Slavery,* Boston: Houghton, Mifflin and Co., 1888. For a particularly ethnocentric and disparaging example, also see John B. Dillon's 1848 speech on the Miami Indians, a spoken eulogy in which he painted "a long and mournful picture of [the Tribe's] ignorance, superstition, war, barbarity and the most debasing intemperance." Dillon, "The National Decline of the Miami Indians," Lecture delivered before the Indiana Historical Society, May 23, 1848, published in *Indiana Historical Society Publications,* Vol. 1, No. 4, Indianapolis, The Bowen-Merrill Co., 1897, p. 140.

civilization rooted in Enlightenment-era philosophy and European colonizing discourse.[959] Comparative, empirical, and inductive in method, this brand of scholarship often began with a survey and analysis of extra-legal sources, an assortment of contemporary and historical evidence gleaned from ethnographic narratives, travel accounts, expedition journals, and missionary records. As the factual configuration of this data filtered through the juridical lens of the common law, the courts developed increasingly stringent rules, standards, and criteria in determining the continuity of tribal laws and customs.[960]

As the pre-modern paradigm of plural, customary-based jurisdictions faded under the positive law, the conventions of continuity and consent lost their doctrinal footing in

[959] Steven Wilf, "The Invention of Legal Primitivism," *Theoretical Inquiries in Law,* Vol. 10, No. 2 (July, 2009): p. 487. There are several published editions of Maine's work, which is fully entitled *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas.* The influence of Maine's work (he was British) on American legal thought cannot be overstated. As lawyer and Harvard law professor James Bradley Thayer would later suggest, "Maine's book, like that of Darwin in a different sphere, at about the same time, created an epoch." James Bradley Thayer, *Legal Essays,* Boston: Boston Book Company, 1908, p. 379. For similar work in the U.S., see Lewis H. Morgan, *Ancient Society: Or, Researches in the Line of Human Progress from Savagery Through Barbarism to Civilization,* Chicago: C.H. Kerr, 1877; Major J. W. Powell, "On Primitive Institutions," *Report of the Nineteenth Annual Meeting of the American Bar Association* (Saratoga Springs, N.Y., 19-21 Aug. 1896): pp. 573-593; and Karl Llewellyn and and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence,* Norman: University of Oklahoma Press, 1941.

[960] McHugh, *Aboriginal Societies,* p. 10. Although McHugh's analysis relates to modern developments, by the early nineteenth century, the importance of history (and, to a lesser extent, ethnography) in law had become particularly germane in the context of Indian claims litigation, a process which required the reconstruction of relevant historical facts and an analysis of their authority in the process of adjudication. Chief Justice John Marshall arguably led the way by composing an extensive history of Indian-settler relations in *Johnson v. M'Intosh;* see discussions in Elizabeth Mertz, "The Uses of History: Language, Ideology, and Law in the United States and South Africa," *Law & Society Review,* Vol. 22, No. 4 (1988): pp. 674, 678-679 ("[T]he history [Marshall] forges yields the legal balance of rights to land with which the opinion concludes." And in subsequent legal decisions, "the use of history emerges full-blown, with much of the text of the opinion constituting a story of the history of the tribe and treaty in question. The telling of this story is a charter for the interpretation to be accomplished in the opinion; from the history will flow the result."); and Eric Kades, "The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands," *University of Pennsylvania Law Review,* Vol. 148, No. 4 (April, 2000): p. 1098 ("[Marshall] devoted almost half of his opinion to laying out the historical record" documenting the nature of Indian title.). Although state courts rarely cited extra-legal sources when dealing with issues related to Indian "customary" law, judges occasionally revealed their forensic tendencies. In 1860, the Supreme Court of Missouri, in attempting to clarify conflicting testimony over Indian marriage and divorce customs, referred to facts that were "well established by historians and travellers." See *Johnson v. Johnson's Adm'r,* 30 Mo. 79 (1860). Also see *Buchanan v. Harvey,* 35 Mo. 276 (1864), in which the Court decided a similar case, referring to "the authority of [Henry Rowe] Schoolcraft."

American jurisprudence. Treaties became mere private contracts and Indian customary law became subject to strict evidentiary standards.[961] By limiting the scope of dialogue and legal pluralism, the recognition of Indian customs became a discretionary process of "fitting in" or translating the "other's" claims, evidence, and history into the framework of a dominant settler narrative.[962]

From Recognition to Repugnancy: *Roche v. Washington,* State Sovereignty, and the Judicial Abrogation of Indian Marriage Customs

The most common form of recognition involving Native customs related to matters of family law. Accordingly, legal scholars often characterize the colonial or state recognition of Native marriage customs as a "functional," "practical," or "equitable" form of comity.[963] However, because Native customs departed in many respects from the municipal laws of which the common law courts took notice, judges used different rules and standards to determine whether or not the rule of recognition applied. In deciding the validity of Native marriage customs, both British and American courts resorted to private international or conflict of laws principles.[964] In short, recognition depended on two

[961] McHugh, *Aboriginal Societies,* p. 119; and Tully, *Strange Multiplicity,* p. 136.
[962] Eric H. Reiter, "Fact, Narrative, and the Judicial Uses of History: *Delgmuukw* and Beyond," *Indigenous Law Review,* Vol. 8, No. 1 (2010): p. 74.
[963] See Campbell McLachlan, "The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm: A Review Article," *International and Comparative Law Quarterly* vol. 37, no. 2 (April 1988): p. 373; T. Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction Between English and Local Laws in the British Dependencies,* London: Stevens & Sons, Ltd., 1962, pp. 110-115; and Lona N. Laymon, "Valid-Where-Consumated: The Intersection of Customary Law Marriages and Formal Adjudication," *Southern California Interdisciplinary Law Journal,* Vol. 10, No. 2 (Spring, 2001): pp. 368-369. The scholarship of Ann Marie Plane provides the most comprehensive treatment of legal recognition involving Native marital customs in colonial America. In addition to works cited above, also see Plane, "Legitimacies, Indian Identities, and the Law: The Politics of Sex and the Creation of History in Colonial New England," *Law & Social Inquiry,* vol. 23, no. 1 (Winter 1998): pp. 55-77.
[964] "Our courts of justice recognize as valid all marriages of a foreign country, if made in pursuance of the forms and usages of that country; and there is no reason why a marriage made and consummated in an Indian Nation should be subject to a different rule of action." *Morgan v. M'Ghee,* 24 Tenn. 13 (1844). Also see Herbert F. Goodrich, *Handbook on the Conflict of Laws,* St. Paul, Minn.: West Publishing Co., 1927, p. 269-271; "Notes of Recent Decisions: Indian Marriages and Inheritance," *American Law Review,*

evidentiary criteria: the capacity of the husband and wife to marry subject to the *lex domicilii*, or law of the parties' habitual (rather than temporary) domicile; and the validity of the marriage pursuant to the *lex loci contractus* (referred to less formally as the *lex loci celebrationis*), or law of the place where the parties entered into marital agreement.[965]

Also known as the "valid-where-consummated" doctrine, this pragmatic approach to recognizing foreign (or, as the case may be, domestic customary) laws of marriage is a fundamental and ancient rule of comity in private international law with deep roots in Anglo-American jurisprudence.[966] "As to the constitution of the marriage," U.S. Supreme Court Justice Joseph Story succinctly wrote in 1834, "as it is merely a personal, consensual contract, it must be valid every where, if celebrated according to the *lex loci.*" "[W]ith regard to the rights, duties, and obligations," he added, ". . . the law of the domicile must be looked to."[967] However, despite this otherwise straightforward dictum, the courts established various exceptions to the rule, thus qualifying its universal application in conflict of law cases.

Some of the earliest English cases dealing with these issues involved the recognition of marital customs celebrated among Jewish peoples domiciled in England.[968]

Vol. 24, No. 1 (Jan.-Feb., 1890): pp. 149-151; "Editorial: Validity of Foreign Marriages," *Harvard Law Review,* Vol. 25, No. 4 (Feb., 1912): pp. 374-375.

[965] See Hooker, *Legal Pluralism,* p. 91.

[966] See John Westlake, *A Treatise on Private International Law: Or the Conflict of Laws, With Principal Reference to its Practice in the English and Other Cognate Systems of Jurisprudence,* London: W. Maxwell, 1858, pp. 315-330.

[967] Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic: In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments,* Boston: Hilliard, Gray, and Co., 1834, p. 102. For a modern analysis of the rule, see Laymon, "Valid-Where-Consumated."

[968] In 1753, the English Parliament passed Lord Hardwicke's Marriage Act. The first secular measure of the state to formalize maritial practices, the Act created what British historian Stephen Parker describes as "the largest gap that has existed in English history between legal and social definitions of marriage." See Parker, "The Marriage Act 1753: A Case Study in Family Law-Making," *International Journal of Law and the Family,* Vol. 1 No. 1 (April, 1987): p. 133. Jews and Quakers, however, were exempted from the Act's provisions.

In *Lindo v. Belisario,* the issue confronting the ecclesiastical court involved "a question of marriage of a very different kind, between persons governed by a peculiar law of their own, and administered to a certain degree by a jurisdiction established among themselves—a jurisdiction competent to decide upon questions of this nature with peculiar advantage, and with sufficient authority."[969] In recognizing the normative dilemma before him, Lord Stowell expressed apprehension "in applying the general principles of the law of marriage," which, he believed, may have proven unfounded and "highly inexpedient" in relation to the laws and customs of a quasi-sovereign people. "On the other hand," he debated rhetorically, "if I am to apply the peculiar principles of the Jewish law . . . I may run the hazard of mistaking those principles, having a very moderate knowledge of that law."[970] From either approach, Stowell risked making a decision that would "affect a very numerous and respectable body of people."[971] By considering the rights and obligations between a husband and wife in pragmatic terms, Stowell defined marriage as "a contract according to the law of nature, antecedent to civil institution, and which may take place . . . whenever two persons of different sexes engage

[969] *Lindo v. Belisario,* 161 Eng. Rep. 530-531 (1795). The footnotes to the reported case elaborate on the quasi-sovereign status of Jewish peoples in England: "They appear to have been brought here in considerable numbers by William I., from Rouen [in] 1070. They were considered as merchant strangers and were allowed to have *medietatem linguæ Judæorum.* . . . They also had the power of excommunicating their own members. Special justices were appointed "*ad custodiam Judæorum*," whose decisions, in certain cases were *secundum legem et consuetudinem Judaismi.* . . . On the Restoration, Charles II. promised them protection and the use of their religion, and an Order of Council issued to that effect." See *Lindo,* pp. 530-531, n. (italics added for Latin phrases). For further historical analysis of Jewish sovereignty and legal pluralism in England, see G.W. Bartholomew, "Application of Jewish Law in England," *University of Malaya Law Review*, Vol. 3, No. 1 (July, 1961): pp. 83-111.

[970] Ibid. p. 531.

[971] Ibid. Also see *D'Aguilar v. D'Aguilar,* in which a woman sought the dissolution of her marriage—having been celebrated "according to the rites of the Jewish nation"—on the grounds of her husband's cruelty and adultery. Lord Stowell held "the doctrine to be that all persons who stand in relation of husband and wife in any way the law allows, as by a foreign marriage, or by a domestic marriage not contrary to law, have claim to relief on the violation of any matrimonial duty." *D'Aguilar v. D'Aguilar,* 162 Eng. Rep. 748, 749 (1794).

by mutual contracts to live together."[972] Referring to several sources of persuasive authority—secular and ecclesiastical, Jewish and Christian—in formulating his opinion, Stowell refused to draw sharp jurisdictional boundaries and offered a flexible definition of marriage amenable to England's diverse cultural polities.[973]

Beyond the domestic realm, English courts faced an unprecedented wave of litigation in response to Britain's expanding colonial empire during the late-eighteenth and early-nineteenth centuries. These cases covered a broad range of international law issues, including rules of imperial conduct, the status of colonies, and the Crown's constituent powers in conquered or ceded territories abroad.[974] As the British Diaspora grew, questions arose with greater frequency concerning the extent to which the English common law governed the settlers internally. In *Ruding v. Smith,* the question of colonial status determined whether or not English marriage law applied to English subjects married at the Cape of Good Hope immediately following British conquest.[975] Whereas the *lex loci* (Dutch law) would otherwise have applied under the doctrine of continuity, Lord Stowell held that the rule had been "expressed in very general terms [and therefore] is undoubtedly subject to exceptions."[976] While it was "true . . . that English decisions have established [the] rule, that a foreign marriage, valid according to the law of the place where celebrated, [was] good everywhere else," precedent had "not *é converso* established, that marriages of British subjects . . . [contrary] to the general law of the

[972] Ibid. p. 535; also see Dennis Fitzpatrick, "Non-Christian Marriage," *Journal of the Society of Comparative Legislation*, Vol. 2, No. 2 (1900): p. 372.
[973] For further analysis of England's legally plural heritage, see Alec Samuels, "Legal Recognition and Protection of Minority Customs in a Plural Society in England," *Anglo-American Law Review,* Vol. 10, No. 4 (1981): pp. 241-256.
[974] See McHugh, *Aboriginal Societies,* p. 113.
[975] *Ruding v. Smith,* 161 Eng. Rep. 774 (1821).
[976] Ibid. p. 778, as quoted by Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia,*" *Queen's Law Journal,* Vol. 17, No. 2 (Summer, 1992): p. 375, n. 73.

place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England."[977] Although the British settlers may have governed themselves independently of the *lex loci,* the introduction of English law and the classification of British South Africa as a settled colony was not an express abrogation of local law and custom. The rule of recognition, Stowell opined, "treats with tenderness, or at least toleration, the opinions and usages of a distinct people."[978]

Although British colonial practice demonstrated a great degree of tolerance toward Native marriage practices, the long-standing rule that customs not be "repugnant" or contrary to principles of "natural justice, equity, good conscience, or public policy" occasionally served as a pretext for judicial abrogation.[979] As the nineteenth century advanced, judges placed greater emphasis on distinguishing Christian from non-Christian marriages in determining the rule of recognition. In *Warrender v. Warrender,* Lord Brougham held that the rule extended "no further than to the ascertaining of the validity of the contract, and the meaning of the parties" as to its construction.[980] While marriage was "one and the same thing substantially all the Christian world over," it was "important to observe," Brougham held in *obiter,* "that we regard it as a wholly different thing—a different status from Turkish or other marriages among infidel nations—because we clearly never should recognise the plurality of wives and consequent validity of second marriages, standing the first, which . . . the laws of those countries authorize and

[977] *Ruding,* p. 781.
[978] *Ruding,* p. 779.
[979] See Matson, "Common Law Abroad," p. 761; Sally Engle Merry, "Legal Pluralism," *Law & Society Review,* Vol. 22, No. 5 (1988): p. 870; and Bederman, *Custom,* 2010, pp. 62-63.
[980] *Warrender v. Warrender,* 6 Eng. Rep. 1239 (1835), as quoted by Fitzpatrick, "Non-Christian Marriage," p. 374.

validate."[981] In short, *Warrender* created an exception to the *lex loci contractus* rule by rendering void all polygamous marriages, regardless of whether or not the law of the parties' domicile permitted such practices. [982]

In many ways, the principles established by the foregoing decisions shaped the rule of recognition in American jurisprudence, notably the classification of polygamous marriages as an exception to the valid-where-consummated doctrine.[983] However, the U.S. courts departed from English precedent and British colonial practice in one important respect. In cases involving American Indian laws and customs, the distinct political status of the tribes constrained the courts from unilaterally declaring such marriages void. Rather, in an "almost unanimous line of decisions" throughout the nineteenth century, the courts consistently recognized Indian marriages—contracted within tribal jurisdiction, according to tribal laws and customs, whether potentially polygamous or polygamous in fact—as legally valid.[984]

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[981] Ibid.

[982] In 1866, the English Court of Probate and Divorce applied Lord Brougham's dicta in *Hyde v. Hyde and Woodmansee.* This case involved an English couple, John Hyde and Lavinia Hawkins, who had emigrated to the Utah Territory and exchanged vows of marriage "according to the rites and ceremonies of the Mormons." Hyde later "renounced the Mormon faith" during an overseas missionary trip, whereupon "[a] sentence of excommunication was pronounced against him . . . and his wife was declared free to marry again." When he petitioned the Court for marital dissolution on the basis of his wife's adultery, Lord Penzance—expressing doubts as to "whether the union of man and woman as practised and adopted among the Mormons was really a marriage"—held that the Court could "not properly exercise any jurisdiction over such unions." To justify the Court's refusal of appeal, Penzance offered a definition of a legally valid union, which, "as understood in Christendom," was "the voluntary union for life of one man and one woman, to the exclusion of all others." Although the marriage in question was monogamous, Lord Penzance refused recognition by assuming the *lex loci contractus* permitted polygamy when, in fact, Mormon custom, not Utah territorial law, merely tolerated the practice. See *Hyde v. Hyde and Woodmansee*, L.R. 1 P. & D. 130 (1866).

[983] See cases cited in P.H. Vartanian, "Recognition of Foreign Marriage as Affected by the Conditions or Manner of Dissolving it Under the Foreign Law, or the Toleration of Polygamous Marriages," *American Law Reports,* Vol. 74 (1931): pp. 1533-1540.

[984] See Goodrich, "Foreign Marriages," p. 761, n. 61 and corresponding text. Some states went so far as to recognize Indian marriage customs by express legislation. In New York, for example, an 1849 statute declared that "[a]ll Indians who . . . contract marriage, according to the Indian custom or usage, and shall

Despite the façade of legal comity, recognition of tribal marriage customs veiled the extent to which the American courts acted out of self-interest, often denying Indian litigants legal standing under the rule. By acknowledging tribal laws and customs, recognition not only undermined Indian jurisdictional autonomy (recognition did not preclude regulation) but also represented the maintenance of clear ethnic and cultural boundaries.

When it came to regulating Indian marriages, state lawmakers, rather than federal officials, bared the real teeth. Vested with the formal authority to define domestic relations law, state judges and legislators decided the validity of marriage, its incidents and obligations, the grounds for marital dissolution, and the consequences that resulted from divorce or spousal death.[985]

Despite the common law hostility toward local custom, the doctrine of tribal sovereignty limited the states from extending their common law jurisdiction in full. As long as the tribes possessed title to their lands, their laws and customs continued in force among themselves.[986] Within their own communities, tribal marriage and divorce practices varied considerably. Until the late nineteenth century, with the exception of a small minority of Catholic Miamis, the Tribe celebrated nearly all marriages according to Indian custom. Miami chiefs, rather than clerics or secular state officials, typically

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cohabit as husband and wife, are and shall be deemed and held to be lawfully married, and their children legitimate." Moreover, Indian marriages "solemnized by peace makers within their jurisdiction," were to be acknowledged with "like force and effect as if by a justice of the peace." See Act of 11 April 1849, *Laws of the State of New York,* 72nd sess., p. 577.

[985] Nancy F. Cott, *Public Vows: A History of Marriage and the Nation,* Cambridge, Mass.: Harvard University Press, 2000, pp. 27-28.

[986] The Indiana Supreme Court occasionally recognized this principle of legal dualism: "They [the Miami Indians] settle their troubles among themselves without resorting to our courts. Their tribal organization still remains. They still hold their councils for the same purposes as in former times, and are governed by their ancient customs." See *Me-shing-go-me-sia and Another v. The State and Another,* 36 Ind. 310 at 313 (1871).

performed marital rites. Sometimes the marriages entailed arrangements made by a tribal elder, other times not. "The manner of getting married is different in tribes," Charles Peconga, or Po-cong-yah, acknowledged in 1873. "Some marry by coming and living together and some by ceremony."[987] Historian Stewart Rafert describes one eighteenth-century practice among the Miami:

> A young man's father announced his son's intentions by having a female relative deliver various gifts—kettles, guns, skins, meat, cloth—to the cabin of the young woman. If the young woman accepted the gifts, she in turn led a group bearing gifts to the young man's family. The mutual acceptance of these gifts constituted the marriage.[988]

The reciprocal, often elaborate exchange of gifts indicated sincere intent and good will among the parties and their extended families.

Miami men observed monogamy as well as polygamy, the latter practice indicating wealth and elevated status within the tribal community. Family relations and kinship systems varied from clan to clan. In 1873, Thomas F. Richardville (grandson of the Miami chief, John B. Richardville) stated that:

> [i]t was the custom for the man to go to the home of the woman and stay a few week[s] and then take her home, or if he concluded to stay he would stay with the woman, not go back to his band but would remain with the band that she was in.[989]

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[987] Testimony of Po-cong-yah, alias Charles Peconga, 14 May 1873, as quoted in Lamoine Marks and Stewart Rafert, eds., *Testimony Pursuant to Congressional Legislation of June 1, 1872 Taken Before the Commission Appointed by the Secretary of the Interior to Make Partition of the Reserve Granted to Me-Shin-Go-Me-Sia in Trust for His Band by the Seventh Article of the Treaty of November 28th 1840 between the United States and the Miami Tribe of Indians* [hereinafter "Miami Testimony"], Newark, Del.: S. Rafert, 1991, p. 3.

[988] Stewart Rafert, *The Miami Indians of Indiana: A Persistent People, 1654-1994,* Indianapolis: Indiana Historical Society Press, 1996, p. 17.

[989] Testimony of Thomas F. Richardville, 28 May 1873, "Miami Testimony," pp. 191-192.

The most important rule among the Tribe was the prohibition of marrying within the immediate kin group. Known as exogamy, this practice helped to maintain cultural integrity, political autonomy, and strong inter-tribal relations.[990]

Divorce among the Miami entailed little to no formal process. A husband or wife could dissolve the marriage on any number of grounds; physical abuse, cruelty, or general ill conduct being the most common.[991] Informal divorce among the tribe did not, however, suggest a low standard of morality. Rather, community norms and sanctions—not unlike those found in European settler enclaves—regulated spousal conduct. For example, in the event that children were involved, the Tribe expected the father to provide support "in the same manner as he would have done had the divorce not taken place."[992]

Recognition of Indian marriage customs was not only a matter of judicial comity. Principles of accommodation and reciprocity also existed in the day-to-day legal transactions conducted outside of the courtroom, illustrating the extent to which local authority sustained the normative standard. For example, the Miami observed polygamy well after removal and, according to historian Stewart Rafert, "local whites seemed to accept this . . . custom and incorporated it into legal practices." On one occasion, William Godfroy, son of the late Chief Francis Godfroy, "sold a parcel of land in 1868 [and] . . . the Miami County recorder duly requested the 'X' marks of both wives."[993]

Yet instances such as these occurred only so long as they did not interfere with state interests. The legal validity of Indian marriage customs depended on the unique

[990] Rafert, *Miami Indians,* pp. 135-136.
[991] Ibid. pp. 17, 136.
[992] Report of Indian agent Charles Trowbridge to Gov. Lewis Cass, dated 6 March 1825, quoted in Trowbridge and Kinietz, *Meearmeear Traditions,* p. 44.
[993] Rafert, *Miami Indians,* p. 135.

circumstances of each case and how recognition impacted the larger economic framework of marital incidents such as property ownership or inheritance rights. In fact, most non-criminal state cases involving American Indians reflected a common thread of property law, and the courts typically involved themselves only when such interests were at stake.

In *Wells and Wells v. Thompson,* the Supreme Court of Alabama ruled that an Indian divorce was invalid on the grounds that it had occurred off tribal land, thus Creek law and custom failed to apply.[994] The case involved Mary Wells, a Creek Indian who divorced her white husband, William, after he had abandoned her for another woman. When William sold Mary's property after her death, their children challenged his claim to legal ownership and right to convey. Because the Court rejected Creek jurisdiction (and hence their divorce customs), the decision upheld William's claim to rightful inheritance and lawful conveyance.[995]

In *Morgan v. M'Ghee*, the Supreme Court of Tennessee held that an Indian marriage was valid within the limits of the state.[996] The issue at bar concerned the capacity of Margaret Morgan, a Cherokee woman, to sue as *femme sole* for purposes of dividing property following a separation from her husband. By acknowledging their marriage, but failing to treat the separation as a legitimate divorce, the Court refused to acknowledge Morgan's petition for marital dissolution, thus denying her capacity to sue independent of her husband.[997]

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[994] *Wells and Wells v. Thompson,* 13 Ala. 793 (1848).
[995] See Bethany Ruth Berger, "After Pocahontas: Indian Women and the Law, 1830 to 1934," *American Indian Law Review,* Vol. 21, No 1 (1997): p. 40.
[996] *Morgan v. M'Ghee* 24 Tenn. 13 (1844).
[997] Berger, "After Pocahontas," p. 38.

Typically, once the legislative prerogative of the state extended its municipal laws and legal institutions over the local community, the courts rebutted the presumption of the local law's continuity as a distinct municipal system. In other cases, however, the courts presumed the continuity of the *lex loci* when state legislation failed to expressly abrogate pre-existing laws and customs.

In *Wall v. Williamson,* the Alabama Supreme Court considered the validity of a promissory noted executed by Delilah Wall, a Choctaw woman of mixed French heritage whose husband had departed west during removal several years prior.[998] The principal question before the court centered on the validity of marriage and divorce law among the Choctaw nation, given the common law rule barring married women from entering into contracts. For the Court, Judge George Goldthwaite held that "[t]he validity of the marriage may possibly have been denied upon the impression, that having been contracted within the territorial limits of the State, it cannot be affected by Choctaw usages or customs, though both parties were of that tribe, and resident within its bounds." However, in "consideration of the peculiar relation which these Indian tribes bear to the States," the question remained as to "whether, at the time of this supposed marriage, the laws and usages of the Choctaw tribe had been abolished or superseded," or, on the other hand, "whether they composed a distinct community, governed by their own chiefs and laws."[999]

By recognizing the lack of any state statute having stipulated otherwise, the Court acknowledged the tribe's sovereignty as well as the integrity of their laws and customs under the doctrine of continuity:

[998] *Wall v. Williamson,* 8 Ala. 48 (1845); also see Berger, "After Pocahontas," p. 35.
[999] *Wall,* p. 49.

> It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror. The mere acquisition, whether by treaty or war, produces no such effect. It may therefore be considered, that the usages and customs of the Choctaw tribe continued as their law, and governed their people, at the time when this marriage was had. The consequence is, that if valid by those customs, it is so recognized by our law.[1000]

However, the Court made it equally "clear that the same effect must be given to a dissolution of the marriage, by the Choctaw law."[1001] Although Delilah had executed the note prior to her husband's departure, the Court considered the instrument as valid on the grounds "that by the laws and customs of the Choctaws, the husband, by his marriage, takes no part of his wife's property."[1002] "A necessary consequence of this peculiarity," the Court ruled, "is that the wife must have the capacity to contract, for otherwise she would be incapable, in many instances, to preserve or protect her property." By acknowledging Choctaw divorce customs, the Court effectively dispossessed Delilah of any protections the common law would otherwise have afforded her as a *femme couvert.*

In contrast to the outcome in *Wall,* a widely reported Quebec case decided in 1867 exemplifies the continuity doctrine's equitable application in recognition of Native law and custom. In *Connolly v. Woolrich,* the Quebec Superior Court upheld the validity of a marriage contracted under Cree customary law between William Connolly, a wealthy Hudson's Bay Company trader, and his Cree wife Susanne Pas-de-nom.[1003] In 1830, Connolly abandoned Susanne (with whom he had six children) after nearly thirty years of marriage, retired to Montréal and—according to Catholic rites as recognized under Quebec law—married Julia Woolrich, a white woman. When Connolly died in 1849, his

[1000] Ibid.
[1001] Ibid. p. 50.
[1002] Ibid. p. 48.
[1003] *Connolly v. Woolrich,* 11 L.C. Jur. 197 (1867).

will left Julia and their two children his entire estate. Following Julia's death fifteen years later, Connolly's children by Susanne sued for what they believed to be their lawful inheritance. The respondents, in turn, challenged the validity of the first marriage, arguing that the introduction of the English common law into the territory by the Royal Charter of 1670 had nullified Cree customary law. The court disagreed.

In his decision, Judge Samuel Monk acknowledged not only Connolly's marriage to Susanne but also the Cree law as governing authority, pursuant to the *lex loci contractus* rule. Even if the French and English settlers had carried their laws with them, Monk questioned whether or not the "territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated—that they ceased to exist when these two European nations began to trade with the aboriginal occupants[.]" To the contrary, Monk considered it "beyond controversy that they did not—that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives."[1004]

Yet *Connolly* stood out as a unique instance of inclusiveness and normative accommodation in Canadian and American common law courts.[1005] The reciprocity and community pragmatism that sustained the colonial-era fur trade had all but vanished during the first quarter of the nineteenth century. As settler society became increasingly endogamous, marital rites (and the laws that validated them) gravitated more and more

[1004] As quoted in Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada," *American Journal of Comparative Law,* Vol. 32, No. 2 (Spring, 1984): p. 367; and Walters, "Golden Thread," p. 716. For an extended treatment of the case in context, see Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence,* Toronto: University of Toronto Press, 1998, pp. 169-173.
[1005] Monk's decision was upheld on appeal to the Quebec Court of Queen's Bench in 1869 (see *Johnstone v. Connolly,* 17 R.J.R.Q. 266). However, in 1881, the Superior Court of Quebec departed from this precedent in *Fraser v. Pouliot,* holding that British sovereignty had, in fact, abrogated Cree customary laws of marriage; see *Fraser v. Pouliot,* 7 Q.L.R. 149 (1881), as discussed in McHugh, *Aboriginal Societies,* p. 157.

toward European (particularly English) norms.[1006] As waves of American settlers flooded the continental interior following the War of 1812, they carried with them not only their laws and customs, but their moral and community values and ideas of family life and domestic governance as well.

In the fall judicial term of 1824, the first local grand jury gathered at the Michigan Territorial District Court at LaBaye (modern-day Green Bay, Wisconsin) to present thirty-eight bills of indictment before Judge James Duane Doty. Several of the town's leading male inhabitants faced charges of fornication and adultery. Most pleaded guilty to avoid fines and further public embarrassment; two, however, stood trial in defense of their moral integrity. A witness before the grand jury later recounted their defense: "Their plea was, that they were legally married, had lived a great many years with their wives, and had large families of children—that their marriages had been solemnized according to the customs of the Indians." "The court," however, "took a different view of the legality of those marriages, and fined those two men fifty dollars each and costs."[1007]

One of the two defendants was John Lawe, an English-born resident of LaBaye. In lifelong defiance of Judge Doty's ruling, Lawe would never acknowledge his guilt, nor would he "legitimize" his union before a justice of the peace as he lived happily with his part-Ojibwa wife, Therese Rankin, until her death in 1842.[1008] But Doty's opinion was a harbinger of cultural change along the western frontier, an expression of Anglo-American legal pretension in the first term of the newly-created territorial district court, in front of

[1006] Sylvia Van Kirk, "From 'Marrying-In' to 'Marrying-Out': Changing Patterns of Aboriginal/Non-Aboriginal Marriage in Colonial Canada," *Frontiers: A Journal of Women Studies,* Vol. 23, No. 3 (2002): p. 5.
[1007] Col. Ebenezer Childs, "Recollections of Wisconsin Since 1820," in Lyman C. Draper, ed., *Collections of the State Historical Society of Wisconsin,* Vol. IV, Madison: Wisconsin Historical Society Press, 1906, p. 167.
[1008] Jacqueline Peterson, "Prelude to Red River: A Social Portrait of the Great Lakes Métis," *Ethnohistory,* Vol. 25, No. 1 (Winter, 1978): p. 42.

the first grand jury at the largely French-speaking town of LaBaye. As historian Jacqueline Peterson relates:

> What Lawe saw passing was a unique lifeway—an occupational subculture and regional community which had, for more than a century, enjoyed a sympathetic relationship with the native inhabitants of the Great Lakes. Choosing to accommodate rather than confront, the old residents of LaBaye and elsewhere challenge the historical assumption that mediation was impossible, that the cultures of Indian and EuroAmerican societies were irreconcilable, and that the wholesale destruction of the former was inevitable. . . . [T]heir adaptive lifeway serves to illustrate that roles and responses alternative to those adopted by the vast majority of Anglo-Americans were at least feasible, if not permanently viable.[1009]

"LaBaye" Peterson adds, during the mid- to late-eighteenth century, "was not an exceptional instance of community formation far beyond the line of supposed 'White' settlement."[1010] Unfortunately, Judge Doty's decision was not the only one among the courts of the Old Northwest that failed to appreciate this context.

The story of William Conner provides an interesting example of shifting norms, complex social dynamics, and cross-cultural domestic relations of early nineteenth-century Indiana frontier life. In 1801, William and his brother John settled among the Delaware Indians to establish a trading post along the White River (near present-day Noblesville). Having immersed themselves in Indian culture and adopted Native customs, both brothers married Delaware women, William having several children with his wife Mekinges.[1011]

After nearly two decades as resident trader, Indian agent, interpreter, and cultural mediator, William Conner's private life inevitably came into conflict with the public affairs of a growing settler state. Less than two years following the 1818 Treaty of St.

[1009] Ibid.
[1010] Ibid. p. 43.
[1011] John Lauritz Larson and David G. Vanderstel, "Agent of Empire: William Conner on the Indiana Frontier, 1800-1855," *Indiana Magazine of History*, Vol. 80, No. 4 (Dec., 1984): pp. 306, 308.

Mary's, which stipulated the terms of Delaware removal, Conner petitioned Congress for a tract of land where he resided "for the purpose of raising his family (half breeds)."[1012] His request having been tabled in the House, Conner, intent on staying in Indiana, witnessed his family's departure west in 1820. Although difficult to determine the reasons underlying his decision to remain behind, Conner nevertheless quickly adjusted to settler society. Within a year, he married Elizabeth Chapman, a young settler with whom he lived on their farm until his death. When Conner died intestate during the summer of 1855, he left a small fortune as well as two families. Upon receiving news of their father's death, his children by Mekinges petitioned the Hamilton County Court for their share of their father's assets. However, by refusing to acknowledge the marriage between William and Mekinges as legally valid, the Court rejected their claims of rightful inheritance.[1013]

In the decade leading to the Civil War, growing partisan controversy and regional conflict over the character of American civil institutions brought marriage to the forefront of political debate. When the Mormon Church in the Utah Territory publicly declared plural marriage as a Divine mandate in 1852, the practice quickly became a source of national embarrassment, compelling Congress to intervene.[1014] In the debate over polygamy, the "peculiar institution" of slavery was never far from Congress's attention.

[1012] Petition of William Conner to Congress as quoted in Ibid. p. 312. Article 1 of the Treaty of St. Mary's stipulated that the Delaware were to "cede to the United States all their claim to land in the state of Indiana." Contingent upon their removal, the U.S. agreed to provide the tribe with lands west of the Mississippi in addition to monetary compenstation and annuities; see "Treaty with the Delawares, 1818," in Charles Joseph Kappler, ed., *Indian Affairs: Laws and Treaties:* Vol. 2, "Treaties," Washington: Govt. Print. Office, 1903, pp. 170-171.

[1013] Larson and Vanderstel, "Agent of Empire," pp. 313, 328.

[1014] Premised on the Congressional power to regulate marriage in the federal territories, the Morrill Bill, introduced in 1860, sought to criminalize polygamy in these jurisdictions. In 1862, President Abraham Lincoln signed the bill into law; see Act of 1 July 1862, 37th Cong., 2nd sess., ch. 126, *Statutes at Large*: pp. 501-502; also see Cott, *Public Vows,* pp. 72-75.

Adding to what had already become a highly divisive regional issue, northern Republicans disparaged southern slaveholders' denial of legal marriage to slaves as a moral aberration of the sacred rite.[1015]

Without becoming the center of federal policy debate like polygamy and slavery, contemporary political rhetoric placed Indian marital customs in the same category of licentious practices that threatened the social, moral, and political integrity of the expanding nation. Reflecting the parlance of the day, both state and federal lawmakers likened plural marriages to "concubinage" and "barbarism," while Mormon women became "bound slaves" or "Indian squaws."[1016] Consequently, when the state courts considered the issue of Indian marriages, judges often painted a picture of Native customs as "barbarous," "repugnant," or "immoral."[1017] However, to the extent that these views served as a basis for judicial abrogation, they were tempered by the early U.S. rejection of imperial conquest theory. Although occasionally referred to in obiter, the courts rarely invoked Lord Coke's "infidel" exception to the continuity doctrine; to do so would have undermined the colonial-derived birthright theory of America as a settled territory.[1018] To avoid these issues, judges typically grounded their opinions in the rhetoric of federalism and states' rights, rather than the dicta of conquest and abrogation.

[1015] Cott, *Public Vows,* pp. 75-76. Drawing analogies to polygamy, Sen. Charles Sumner addressed Congress in 1860 on the "Barbarism of Slavery," emphasizing the institution's "complete abrogation of marriage." See quotes in Ibid. p. 74.

[1016] Selection of quotes from Ibid. pp. 76, 113.

[1017] Many state courts recognized only those customs considered compatible with the prevailing moral standards or culturally dominant social mores of settler society. In Indiana, "proof [would] not be heard of a usage . . . contrary to . . . good morals." See *Van Camp Packing Co. v. Hartman*, 126 Ind. 177 (1890). For an extended analysis of this rule in the United States, see John D. Lawson, *The Law of Usages and Customs, with Illustrative Cases,* St. Louis: F.H. Thomas & Co., 1881, pp. 58-62.

[1018] An exception is the 1835 Tennessee case of *State v. Foreman,* in which Chief Justice John Catron held that the Cherokees were a conquered nation "and the rule [of abrogation] laid down in Calvin's case . . . applied to them." *State v. Foreman,* 16 Tenn. 270.

In the November, 1862 term, the Supreme Court of Indiana held that "a marriage between two remaining members of the [Miami] tribe, according to the native customs, [was] . . . contrary to the laws of that State" and therefore invalid. The principle question before the Court was "[w]hether the Indian tribes within the United States [were] in any case independent civilized nations, so as to require their marriage laws or customs to be recognized in the State Courts."[1019]

The case arose from a suit for partition of lands filed by Francis Washington against John Roche on 11 June 1858 in the Huntington County Circuit Court. Roche, an Irish immigrant who settled in Huntington County in 1834, had worked as a canal laborer, assistant surveyor, and county treasurer. In 1844, he took a clerical position with the Indian trading post located at the Forks of the Big and Little Wabash Rivers. Here the young pioneer established a working relationship with Francis Lafontaine, proprietor of the trading house and recently-appointed Chief of the Miami Tribe following the death of John Richardville in 1841. Nearly two years after their acquaintance, Lafontaine made Roche his business partner.[1020]

When Lafontaine died in 1847 during a return trip from the Kansas Territory, Roche served as administrator of the late Chief's estate. In this capacity, Roche acted as guardian over Lafontaine's six children, allocated treaty annuities to members of the Indiana Tribe, and helped to settle the trading debts of several individual Indians. "In effect," historian Bert Anson observes, "John Roche was the acting chief of the Miami

[1019] "Supreme Court of Indiana, November Term, 1862, John Roche vs. Francis Washington," *American Law Register (1852-1891),* Vol. 11, No. 3, New Series Volume 2, (Jan., 1863): p. 170. The published case citation, referred to infra, is *Roche v. Washington,* 19 Ind. 53 (1862).
[1020] Bert Anson, "John Roche—Pioneer Businessman," *Indiana Magazine of History,* Vol. 45, No. 1 (March, 1959): pp. 48-50; also see Anson, "Chief Francis Lafontaine and the Miami Emigration from Indiana," *Indiana Magazine of History,* Vol. 60, No. 3 (Sept., 1964): p. 254.

Indians."[1021] During this time, Roche's economic status rose exponentially. By 1852, as sole proprietor of the trading house, he had acquired nearly forty thousand dollars in financial assets. According to Anson's research, Roche purchased over one thousand acres of land between 1850 and 1855.[1022] Like other speculators in the region, Roche's dealings in land inevitably led him to negotiate purchases directly from members of the Miami Tribe, which led to the litigation with Francis Washington during the summer of 1858.

Washington—the grandson of John Richardville and nephew of Francis Lafontaine by the late Chief's marriage to Richardville's daughter, Catherine—claimed ownership by right of inheritance of an "undivided third part" of nearly three hundred acres of land, a portion of which included a tract from the Richardville Reserve, located "at the Forks of the Wabash."[1023] Roche owned the other two-thirds of the land in common with Washington. In his suit for partition, Washington "pray[ed] the Court to apart & set off to him by metes and bounds his interest . . . in said premises." On 7 April 1859, Roche, "by his attorney filed his answer" to the petition, denying that Washington was the "owner of or [had] any legal title to any part of said real estate." Court proceedings commenced the following morning with Judge John Brownlee presiding.

The trial itself was brief, lasting only one day. According to the trial record, the lands in question were "the property of Sa-ka-ko-quah, alias Jane Richardville who died seised of the same in 1857 leaving no children nor father or mother but leaving her husband . . . George Washington, her sister Catharine Richardville, . . . her brother Snap

[1021] Anson, "Roche," p. 51.
[1022] Ibid. p. 52.
[1023] Petition for Partition, dated 11 June 1858, *Washington v. Roche,* Transcript Proceedings of the Huntington Circuit Court, State Supreme Court Case Collection, Indiana State Archives, pp. 1-2.

Richardville and Francis Washington, the Plaintiff [and] only son of her sister Ah-Tah-pe-tah-neah[,] now deceased."[1024] George, Catharine, and Snap had conveyed to Roche the land in question "by Deed since the decease of [Jane] Richardville." It was "further agreed that all the foregoing Persons except [Roche] . . . were Miami Indians and members of said tribe."[1025]

The primary contention between the parties centered on the legal validity of the Miami Tribe's marriage customs as they related to the descent and inheritance of the land in question. Because the legitimacy of Roche's title relied on the recognition of George Washington's marriage to Jane and the subsequent conveyance of those lands to Roche by George and Jane's siblings, the defense counsel argued in favor of acknowledging the Tribe's marriage practices. Ironically perhaps, Francis Washington—in claiming one-third of the estate through his deceased mother Ah-Tah-pe-tah-neah—rejected the validity of Roche's title on the grounds that the marriage between Jane (his aunt) and George (his father), was legally invalid.[1026]

For purposes of determining legal title and rights of inheritance, the Court requested the parties to furnish documentary evidence tracing the family lineage. According to the agreed statement of facts, in 1844, "George Washington was according to the manner and custom of . . . [the] Miami tribe duly married to See-quah[,] a Miami Indian with whom he lived, residing in Huntington county Indiana." Two years later, the

[1024] Bill of Exceptions, dated 8 April 1859, Transcript Proceedings, p. 8. The transcript varies slightly (mostly spelling and punctuation rather than substance) from the agreed statement of facts as published in the reported case. One notable difference is the spelling of names. In the published case report, Sa-ka-ko-quah and See-quah are referred to incorrectly as La-ka-ko-quah and Le-qua, respectively.
[1025] Ibid. Ah-Tah-pe-tah-neah died in 1852. The circumstances of her death were not made clear. Marrying the sister of a deceased wife was not uncommon and had long been a part of Miami custom; see Rafert, *Miami Indians,* p. 135.
[1026] See Appellant's Brief, p. 1, *Roche v. Washington,* Supreme Court of Indiana, State Supreme Court Case Collection, Indiana State Archives.

couple separated "according to the manner and custom of divorce" of the Tribe.[1027] Following his brief marriage to Ah- Tah-pe-tah-neah, with whom he had Francis Washington, George married Jane Richardville, or Sa-ka-ko-quah, "according to the manners and customs of . . . the Miami tribe."[1028]

The statement of facts then turned to a summary analysis of Indian marital practices. "[T]he Indian custom of marriage," the parties agreed, "requires no ceremony further than the agreement being consummated by living and cohabitating together as . . . Husband & Wife."[1029] Likewise, "the Indian custom of divorce requires no special form of proceeding more than the parties disagree and by consent separation takes place." These practices, the statement concluded, were "the ancient immemorially continued . . . customs among . . . [the] tribe . . . and the Law thereof," having existed as such "beyond the memory of man."[1030]

"[H]aving heard all the Proofs & Obligations and being fully advised in the premises," the Court found in favor of Washington. Roche immediately moved for a new trial, which Judge Brownlee overruled.[1031] Roche then "pray[ed] an appeal to the Supreme Court[,] which [was] granted," whereupon he proceeded to file his bill of exceptions.[1032] The Indiana Supreme Court granted certiorari and docketed the cause for its forthcoming November term.

In preparation for the hearing, Roche's attorney John R. Coffroth filed his brief with the Indiana Supreme Court in July of 1862. Coffroth's legal argument began with

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[1027] Bill of Exceptions, p. 8. The reason for their separation, as the Court noted, resulted from See-quah's removal "to Kansas territory with the larger portion of said tribe." See Ibid. p. 9.
[1028] Ibid.
[1029] Ibid.
[1030] Ibid. pp. 9-10.
[1031] Ibid. pp. 3-4.
[1032] Ibid.

"the question of the validity of Indian marriages and divorces amongst the members of the tribe."[1033] "If these [practices] are valid," Coffroth argued, "then the appellant is the owner of the whole tract and the judgment of the [trial] Court is erroneous."[1034] The appellant's attorney then addressed the second issue at bar, that is whether or not "the Miami tribe [was] a distinct nation, or sovereignty."[1035] "A brief reference to the history of the United States, its treaties, its legislation, as well as the legislation of our own State, with respect to the Indians," he argued, "will answer this inquiry in the affirmative."[1036] Coffroth followed with a brief historical sketch of the treaties with the Miami, "[i]n all of which they are recognized as a distinct nation, having a separate but dependent sovereignty; regulated by their own customs and usages, and governed by their own Chiefs."[1037]

Coffroth followed with a survey of relevant state and federal law and policy and then situated his argument upon international legal norms, invoking the doctrine of continuity as grounds for sustaining the validity of the Tribe's marital customs. "[I]t is a principle well settled," he asserted, citing *Calvin's Case,* "that the laws of a conquered people remain in full force, until repealed by the conqueror." The legislative abrogation of the *lex loci,* Coffroth held, had "never been done . . . either by the State, or the United States."[1038] Because "George's marriage to and divorce from See-quah" was celebrated within the "foreign jurisdiction" of the Tribe, "his matrimonial status" was to "be determined by the laws of his domicile," rather than those of Indiana. With the seat of

[1033] Appellant's Brief, p. 1. Unfortunately, the case file in the state archives Supreme Court collection does not contain the appellee's brief and subsequent research yielded no further leads.
[1034] Ibid.
[1035] Ibid. p. 2.
[1036] Ibid.
[1037] Ibid. p. 3.
[1038] Ibid. p. 5.

Tribal government removed to the Kansas territory, those Miami who remained in the state after 1840 "came into [a] new jurisdiction." Nevertheless, even "when the laws of Indiana overtook him, his status, . . . by the *jus gentium,*" was to "be respected in the new domicile."[1039] "A marriage valid in the country where celebrated," Coffroth held, reciting the familiar legal maxim as well as numerous authorities is support of it, "is valid everywhere."[1040]

Yet in order to legitimize tribal marriage practices, to give them normative meaning and value for the Court, Coffroth understood the necessity of analogy: "At Common Law a contract *per verba de præsenti sine copula,* or *per verba de futuro cum copula,* is a complete and valid marriage; the Miami custom is, therefore, simply a common law marriage; and a common law marriage is always good, unless some statute contains an express clause of nullity."[1041] Indiana, he pointed out, "never had such a statute." "The law of divorce," on the other hand, "is simply the law of nature, and has prevailed not only among savage and barbarous people but even, in some ages, among the polished and educated." The laws of Indiana were "little, if any better."[1042]

Coffroth placed particular emphasis on rebutting judicial presumptions related to non-Christian marriages. Quoting *Wall v. Williamson,* he questioned "the correctness of

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[1039] Ibid.
[1040] Ibid. p. 6. Coffroth citing Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits,* Boston: Little, Brown and Co., 1852, sec. 125, "and the numerous authorities referred to in note."
[1041] Ibid.
[1042] Ibid. By mid-century, the proliferation of state code revisions typically expanded the grounds for divorce. But as Cott points out, divorce laws were far from uniform "and variations among states caused what was later called 'migratory divorce'—a restless spouse's move from one state to another to end a marriage legally." "Forum shoppers" often ended up in Indiana, which by the 1850s had become well known as a "divorce mill." Liberal residency requirements made the possibility of divorce quite easy for tenacious plaintiffs. See Cott, *Public Vows,* pp. 49, 51; Also see Norma Basch, "Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815-1870," *Law & History Review,* Vol. 8, No. 1 (Spring, 1990): pp. 1-24; and B.V.A., "Indiana Divorces," *American Law Register,* Vol. 18, No. 12 (Dec., 1870): pp. 721-728.

the doctrine, that polygamy is an universal exception to" recognizing the validity of foreign marriages: "A parallel case to a Turkish, or other marriage, in an infidel country will probably be found among all the savage tribes; but can it be possible, that the children must be illegitimate if born of the second, or succeeding wife?"[1043] But the Court was not to be misled. "[I]n defending the Miami custom of marriage and divorce," Coffroth was "not defending polygamous marriages." Whatever the Tribe's inclination was toward a member's plurality of wives, "George, at least, was not so amorphous—he had but one wife at one time."[1044]

Perhaps the most imperative issue for Coffroth centered on the economic impact of recognition. Indian marriages, he reminded the Court, were contracted and dissolved in "a state of nature," without the benefit of formal consummation or written documentation. "[A]t least two thirds of the whole [Miami] tribe are the issue of such marriages," he concluded; "[m]ust it be said that all these are illegitimate?"[1045] The stakes were certainly high, or at least Coffroth presented them as such. A significant portion of Indian lands in the state came into settler possession through private purchase. Should the validity of all Indian marriages be rejected, "[t]he title to millions of property in this State would be destroyed, and unsuspecting families now in affluence, reduced to beggary."[1046] The Court, on the other hand, would see things differently.

Having weighed the statement of facts, reviewed the trial court transcript, and considered the opposing parties' oral and written arguments, the Supreme Court of Indiana issued its decision in November of 1862. *Per curiam,* Judge Samuel Perkins

[1043] Appellant's Brief, p. 6, quoting *Wall v. Williamson,* 8 Ala. Rep. 48.
[1044] Appellant's Brief, pp. 6-7.
[1045] Ibid. pp. 7-8.
[1046] Ibid.

composed an opinion a mere four pages in length but one nothing short of rewriting Indiana legal history.[1047]

Perkins' judgment began with identifying the principal issue at bar: whether or not Indian marriages, as "sanctioned by the laws of the Miami tribe" were to be judicially recognized by the state.[1048] By distinguishing public international law—"that which regulates the political intercourse of nations with each other"—from private international law—"that which regulates the comity of states in giving effect . . . to the municipal laws of another, relating to private persons, their contracts, &c."—as a framework in which to situate his analysis, Perkins insisted that "[t]he first question to be decided" was whether a "tribe of North American Indians constitute[d] a State[.]"[1049] Quite simply, he held, "[w]e think not." Normally, the state courts were reluctant to apply law of nations principles to cases involving Indian claims, since this would have been seen as an explicit encroachment into the federal sphere. However, by divesting the Tribe of its sovereignty, a status in international law that existed "only among civilized States," Perkins established what he considered a legitimate issue over which to exercise state jurisdiction.[1050]

[1047] Judge Perkins served two non-consecutive terms on the bench, from 1846 to 1865 and 1877 to 1879, authoring 1,573 majority opinions. During his time with the Supreme Court, Perkins—a Democrat and strict constructionist of constitutional provisions protecting personal liberties and private property—achieved a reputation for his staunch political views. As an avid writer and editorialist, he dedicated considerable time preparing legal materials for the study and practice of law in Indiana. For biographical details, see Minde C. Browning, Richard Humphrey, and Bruce Kleinschmidt, "Biographical Sketches of Indiana Supreme Court Justices," *Indiana Law Review*, Vol. 30, No. 1, (1997): p. 368; Emma Lou Thornbrough, "Judge Perkins, The Indiana Supreme Court, and the Civil War," *Indiana Magazine of History,* Vol. 60, No. 1 (March 1964): p. 81; and Leander J. Monks, ed., *Courts and Lawyers of Indiana,* Vol. 1, Indianapolis: Federal Publishing Co., 1916, pp. 206-207. On the number of Perkin's majority opinions, see Brent E. Dickson, "A Tribute to Richard M. Givan, 1921-2009 - Justice, Indiana Supreme Court, 1969-1994 - Chief Justice of Indiana, 1974-1987," *Indiana Law Review,* Vol. 43, No. 1 (2009): p. 1, n. 4.

[1048] *Roche v. Washington,* 19 Ind. 54 (1862).

[1049] Ibid. p. 56.

[1050] Ibid. p. 55.

Perkins' deliberation over these questions began prior to his decision *Roche*. In his 1859 treatise on Indiana pleading and practice, Perkins used the concept of legal primitivism as a comparative means to emphasize the legal progress among "civilized" societies.[1051] Stadial theory—a central feature of Enlightenment-era thought and colonial discourse—had come to play a powerful ideological role by the mid-nineteenth century, appearing prominently in the works of contemporary political theorists and legal scholars. "Society," Perkins wrote, "in its normal or primitive state, is composed of independent individuals and families, controlled by no superior, and acting upon natural impulses and individual judgments."[1052] Progressing to the savage state, "the disorganized multitude, for aid in the protection of its members against mutual injuries, forms itself into clans and tribes under the lead of chieftains . . . whose commands constitute the laws to be obeyed and enforced." Having "politically organized," albeit "crudely," Perkins continued, "society is susceptible of steady advancement [and] . . . contains within itself the elements of progress."[1053] Over time, "[l]aw and order begin to take the place of violence" and "[s]ecurity for person and property increases." In the final stages of this evolutionary paradigm of the modern nation-state, "the sovereign is constituted the arbiter of the differences between individuals of the community, . . . the IDEA OF THE JUST is developed, and fixed rules for the action of the government and the conduct of the citizens are established."[1054]

[1051] Samuel E. Perkins, *Pleading and Practice, Under the Code of 1852: In Civil and Criminal Actions, In the Courts of Indiana; With References to the Latest Statutory Amendments and Judicial Decisions,* Indianapolis: Merrill & Co., 1859.
[1052] Ibid. p. 1.
[1053] Ibid. p. 2.
[1054] Ibid [quote in original].

Perkins' decision in *Roche,* issued three years following the publication of his treatise, expressly situated these ideas. "A State," properly defined, included:

> a people permanently occupying a fixed territory, bound together by common laws, habits, and customs (or by a constitution), into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities.[1055]

For society to have reached the advanced stages of civilization depended on:

> systematized labor, individual ownership of the soil . . . [and] accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well defined and respected domestic and social relations, institutions of learning, intellectual activity, &c.[1056]

In contrast, Perkins argued, "few of the particulars enumerated as constituting a State exist in a tribe of North American Indians." Having taken notice, "as a matter of general historical knowledge" that the Indians were "not elevated above the condition of nomadic, pastoral tribes," Perkins flatly rejected their status as "States or nations in the political or international sense of the term" and considered it "problematic [as to] whether they [were] susceptible of civilization."[1057]

Even if the Miami Tribe of Indians had constituted a sovereign nation, Indiana, Perkins speculated rhetorically, was "not bound by international comity to give effect in her Courts to all the laws and customs of such State; but only to such as are not repugnant to her own laws and policy."[1058] The general rule "in private international law," Perkins recounted, held "that an actual marriage, valid in the country where celebrated, will, not

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[1055] *Roche,* p. 54, quoting George Ripley and Charles A. Dana, eds., *The New American Cyclopædia: A Popular Dictionary of General Knowledge,* Vol. 10, New York: D. Appleton and Company, 1871, p. 360.
[1056] *Roche,* pp. 56-57.
[1057] Ibid. p. 57.
[1058] Ibid.

as upon a claim of right, but by courtesy, be given effect to in other States." If, "in the case at bar, an actual marriage took place between Jane Richardville and George Washington," Perkins argued, "there could be no objection to its being upheld in the Courts of this State, though celebrated among an uncivilized tribe of Indians."[1059]

"What, then," the larger question became, "constitutes the thing called marriage[;] what is it in the eye of the *jus gentium*?" "It is," the judge replied, "the union of one man and one woman, 'so long as they both shall live,' to the exclusion of all others, by an obligation which, during that time, the parties can not, of their own volition and act dissolve, but which can be dissolved only by authority of the State."[1060] "The principle," according to Perkins, citing a well-known legal treatise, "that foreign marriages are to be governed by the *lex loci* is subject to some exceptions," notably "where such law is opposed to the religion, rules of morality, or institutions of this country."[1061] In contrast to and in derogation of Perkins' definition, "the union between Jane and George . . . was not a marriage according to the law of any civilized nation, but simply . . . a contract and state of concubinage."[1062]

[1059] Ibid.
[1060] Ibid.
[1061] Ibid; John E. Bright, *A Treatise on the Law of Husband and Wife, As Respects Property,* Vol. 1, New York: Banks, Gould & Co., 1850, p. 8.
[1062] Ibid. pp. 57-58. Here, Perkins cited Thomas R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America,* Vol. 1, T. & J. W. Johnson & Co., 1858, p. 245, n. 4. The note to which he referred and the case to which he cited in his opinion was a decision from the North Carolina Supreme Court, which held "that the recognition of this state of concubinage . . . does not legalize the marriage, so as to give any of the effects of the marriage relation thereto." See *State v. Samuel,* 2 Dev. & Bat. 177 (1836). The case dealt specifically with the issue of court testimony between an enslaved husband and wife. The problem, however, is that Perkins detached this case from the context of Cobb's analysis of the incidental rights of marriage afforded to the parties. Despite "[t]he contract of marriage not being recognized among [them]," Cobb wrote, "the fact of cohabitating, and living together as man and wife, is universal among slaves, and the privileges of parents over children . . . are universally acceded to them, . . . [as] these relations are recognized by the Courts, and the merciful extenuations of the law, to the conduct of husband and father, are extended to the slave standing in the same situation." See Cobb, *Law of Negro Slavery,* p. 245.

Perkins then proceeded with an analysis of "the incidents, the legal rights and consequences" related thereto.[1063] "Marriage in different countries," he held, "is followed by different property rights." Among the Miami, however, the institution "is not followed by a right in either party by the law of the tribe, to inherit real estate from the other," for this was "a kind of property unknown to them." Adhering to the myth of the Indian as incapable of possessing real property, yet ignoring the actual circumstances in which many of the Miami owned and often conveyed title in fee simple, Perkins asserted that "[t]hey simply hold vaguely defined territory for use in hunting, fishing, &c."[1064]

At this point, Perkins had yet to contend with the doctrine of continuity, an issue that Coffroth had raised as a legitimate basis for recognizing the validity of Miami customary law. Perkins summarily dismissed these grounds, claiming instead that any residual sovereignty the Miami possessed "disappeared with the light of [their] council fires, and departed to the new seat of the tribe" following the Treaty of 1840. While the laws of a nation remained operative within the limits of its own jurisdiction, they did not, Perkins held, "as a general proposition, follow the individuals of such nation, into the jurisdictional limits of another." Thus, for those Miami who remained within state boundaries following the Tribe's removal, their marriage contracts, "to be valid, must [have] conform[ed] to the laws of Indiana."[1065] Having applied these rules to the case at bar, the Supreme Court affirmed the lower court's ruling in favor of Washington.

The significance of *Roche* centers on several factors. First, the case illustrates the extent to which the state, rather than the federal government, exercised jurisdiction over

[1063] *Roche,* p. 55.
[1064] Ibid.
[1065] Ibid. p. 56.

the Indian tribes. Despite the Miami's federally recognized status, the court denied their standing as a self-governing, sovereign nation. To justify this view, Perkins employed a variety of discursive tactics: states' rights rhetoric; positive international law theory; stadial theory; and the extra-legal authority of "general historical knowledge." Having declared Miami marriage customs as "repugnant" to the laws of the state, the court's decision rejected the normative force of an informal, community-based practice long recognized as valid throughout the region.

Second, as an exercise in customary jurisprudence, the case is a unique example of Indiana legal culture grounded in the formative identities and characteristics of colonialism. By deliberating international law doctrine and common law principles of continuity, Perkins sought to convey a sense of fidelity toward precedent and the rule of law. However, in contrast to eighteenth-century British practice, Perkins' theory of continuity held that the sustained force of local law and custom depended upon the territorial integrity of tribal jurisdiction, not the pre-modern paradigm of legal pluralism.

Finally, *Roche* demonstrates the extent to which American Indians adapted to and even manipulated the effects of Anglo-American common law culture. With delicious irony, the case rejects the myth of colonialism as a unilateral, instrumental means of settler domination and turns the post-modern conquest narrative on its proverbial head. Had the factual circumstances of the case been reversed, Washington may have argued in favor of customary law recognition, claiming the jurisdictional integrity of his tribe. Yet regardless of where his intentions lay, Washington effectively used the law to defend and preserve what was his. Ultimately, the idea of Native "custom" as a construct of colonial

society holds true, but only so far as Native peoples themselves took a role in defining, shaping, applying, or rejecting the concept in practice.

CONCLUSION: THE ENDURING MYTH OF SETTLER SOVEREIGNTY

With *Roche v. Washington,* a certain degree of closure comes to this story. As a landmark decision in perfecting settler sovereignty, the case fulfilled, or at least validated, what the state had set out to accomplish in the preceding decades. While the Miami would continue to govern themselves politically and would occasionally gain concessions from the state, Indiana lawmakers had redefined settler sovereignty in complete territorial terms, effectively purging the nineteenth-century anomaly of tribal jurisdiction. No longer would the ill-defined boundaries of a legally plural society challenge the legitimacy of the modern constitutional state.

In telling the story of American Indian and settler sovereignty in Indiana, this study has sketched more than a century and a half of socio-economic, political, legal, and ideological change in the region. Covering from the colonial era to the late-nineteenth century, these pages document the shifting legal landscape from both a local and global perspective. The story traces imperial contests over and concessions to jurisdictional space; regional conflict between tribal, French, British, and American legal cultures; the search for and discovery of a common ground; and the eventual dissolution of a customary-based jurisprudence in western settler society.

The American Revolution marked an ideological departure from pre-modern notions of sovereignty, helping redefine the concept by associating jurisdiction in absolute, territorial terms. In the newly-formed western territory, however, the Northwest Ordinance and various American Indian treaties expressly recognized the constitutional plurality of customs and self-governing polities. When Indiana entered the Union in 1816, the western legal terrain embodied a mixed system of Indigenous

customs, colonial transplants, popular norms, community usages, and federal territorial law. Legal pluralism continued to define jurisdictional practice. As the nineteenth century proceeded, territorial jurisdiction and legal uniformity became guiding principles and many western jurists viewed informal, customary-based regulatory structures with contempt. The ensuing conflict of legal traditions in Indiana characterized a struggle between "high" and "low" legal cultures, the outcome of which proved ill-fated not only for the Indians but for the early French settlers as well.

Despite the shift to a leading federal presence in Indian affairs during the late nineteenth century—most evident in the Indian Appropriations Act of 3 March 1871, which terminated tribal treaty-making, the Major Crimes Act in 1885, and the passage of the Dawes Severalty Act in 1887—the states continued to exercise their jurisdictional authority over Native Americans.[1066] In Indiana, the termination of the Miami Tribe's federally recognized status in 1897 further encouraged this presumption of state sovereignty.[1067] A case decided in 1901 illustrates the contemporary state of affairs. When the Miami County Board of Commissioners sought to collect taxes on tribal lands, Miami Chief Gabriel Godfroy filed suit, insisting such lands retained their tax-exempt

[1066] Act of 3 March 1871, 41st Cong., 2nd sess., ch. 120, *Statutes at Large*: p. 566; The Major Crimes Act extended federal jurisdiction over cases of murder and other serious offenses committed between Indians in Indian Country; see Act of 3 March 1885, 48th Cong., 3rd sess., ch. 120, *Statutes at Large*: p. 385; The Dawes Severalty Act terminated the collective tribal ownership of lands, allotted individual plots to male heads of household, and conferred citizenship status on those who abandoned their "savage" ways. In addition, the act mandated the federal government to hold Indian lands "in trust" for a twenty-five year period, or at which time the allottee was deemed "competent" to own property individually. Once released from trust status, however, poverty forced many allottees to sell their allotted parcels. Moreover, the measure provided for the sale of "surplus" lands to American settlers, the effects of which are felt today from enduring jurisdictional conflict on Indian reservations; see Act of 8 February 1887, 49th Cong., 2nd sess. ch. 119, *Statutes at Large*: pp. 388-391.

[1067] See opinion of Assistant Attorney-General Willis Van Devanter, 23 November 1897, in U.S. Department of the Interior, *Decisions of the Department of the Interior and General Land Office in Cases Relating to Public Lands,* Vol. 25, Washington: Government Printing Office, 1898, pp. 426-432.

status by virtue of article three of the Northwest Ordinance.[1068] Upon appeal, the Indiana Supreme Court rejected this claim, holding instead that "[an] Indian who continued in habits of civilized life after passage of [the Dawes] act had no claim to immunity" and, having become citizens under this law, "ceased to be Indians, within the meaning of the ordinance of 1787." [1069]

By examining in greater detail the diverse sources of state law, Indiana legal history cannot escape its plural origins. The very existence of a middle ground that this story attempts to convey, challenges the idea of incompatibility between legal cultures. Modern conflict of laws principles—a positivist construct designed to preserve the internal coherence and integrity of a particular legal system—merely obscures the multiplicity of traditions within that legal system. While cases of resistance and misunderstanding certainly mark the historical-legal record, conflict itself—as an inter-systemic encounter—always presented an opportunity (with varying degrees of success) for normative dialogue, adjustment, and reciprocity.[1070]

Yet perhaps the greatest myth of settler sovereignty lies in its enduring character. The story is never one of complete closure. Rather, the struggle for Indian sovereignty in Indiana marks a persistent search for recognition, one that continues today. The extent to which modern legal cultures recognize diversity depends upon the existence and vitality of an ongoing dialogue.

[1068] *Board of Com'rs of Miami County v. Godfrey* [sic], 60 N.E. 177 (1901).
[1069] Ibid. pp. 177, 179.
[1070] H. Patrick Glenn, "Are Legal Traditions Incommensurable?" *American Journal of Comparative Law,* Vol. 49, No. 1 (Winter 2001): pp. 141-142; and Glenn, "Mixing It Up," *Tulane Law Review,* Vol. 78, Nos. 1 and 2 (December 2003): pp. 80-81, 83.

IN SEARCH OF RECOGNITION: NORMATIVE CONFLICT, HISTORICAL RECONCILIATION, AND MODERN CHALLENGES TO TRIBAL SOVEREIGNTY IN INDIANA; AN AFTERWORD

"Once having been recognized by the Congress and government of this union, no one has the right to dissolve us and destroy us as a race, but they have been doing so, and are doing so, and through it all we have been reduced to a plight which is a reproach upon this nation. America owes us an obligation. We appeal to you now as its head." –Letter of Miami Leader Camillus Bundy to President Calvin Coolidge, 8 June 1927.[1071]

To examine Native Americans in a strictly historical context perpetuates the myth of the Indian as a figure of the past. In the United States today, 565 Native American nations, as well as millions of individual Indians, actively participate in communities both on and off the reservation; they raise families, manage businesses and governmental affairs, teach, practice law and medicine, and face the complex realities of an increasingly globalized world. History plays a critical role in shaping modern Native American society. Whether looking to the past to educate younger generations, using traditional ecological knowledge to address climate change, or appealing to custom in modern tribal courts, Native Americans, while representing a variety of cultural heritages, possess a shared history that defines their path to sovereignty and self-determination.[1072]

The second half of the twentieth century marked a new and promising era for Native peoples in Indiana and throughout the world. The development of international

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[1071] As quoted by Stewart Rafert, *The Miami Indians of Indiana: A Persistent People, 1654-1994,* Indianapolis: Indiana Historical Society Press, 1996, p. 205.

[1072] Eric C. Henson, et al., eds., *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination: The Harvard Project on American Indian Economic Development,* New York: Oxford University Press, 2008, pp. 1, 2. For updates and current news and events, see the Harvard Project's website at http://hpaied.org/. On the pedagogical importance of history and oral tradition in tribal culture, see Peter Nabokov, *A Forest of Time: American Indian Ways of History,* Cambridge: Cambridge, University Press, 2002; on traditional ecological knowledge in environmental sustainability, see Jeannette Wolfley, "Ecological Risk Assessment and Management: Their Failure to Value Indigenous Traditional Ecological Knowledge and Protect Tribal Homelands," *American Indian Culture and Research Journal,* Vol. 22, No. 2 (1998): pp. 151-169; on the role of custom in modern tribal courts, see Elizabeth E. Joh, "Custom, Tribal Court Practice, and Popular Justice," *American Indian Law Review,* Vol. 25, No. 1 (2000/2001): pp. 117-132.

human rights law that emerged from the post-World War II political economy stimulated a global debate over how societies should deal with the atrocities and injustices of the past. These questions intensified with decolonization. Within two decades following the war, European imperial powers had liberated most of their colonial possessions, reshaping the terms of Indigenous-settler relations and revealing deep tensions in national histories.[1073]

With these changes at the global level, a modern concept of restitution emerged, one that emphasized public apology and forgiveness rather than coercion and vindication between perpetrators and their victims or victims' families. The idea of historical justice and reconciliation—as a symbolic means of addressing the legacies of genocide, racial or ethnic discrimination, slavery, colonialism, and Indigenous removal and dispossession—provided a moral framework and political mechanism for nation-states to reclaim or confirm their identities while accepting responsibility for past wrongs. However, while societies have shown great willingness and ability to acknowledge and make amends for historical injustices, change has come slowly and continues to meet with varying degrees of success.[1074]

[1073] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices,* New York: W.W. Norton & Co., 2000, pp. xvi, xxii-xxiii; and Manfred Berg and Bernd Schaefer, "Introduction," in Berg and Schaefer, eds., *Historical Justice in International Perspective: How Societies Are Trying to Right the Wrongs of the Past,* Cambridge: Cambridge University Press, 2009, p. 1.

[1074] The practice of historical reconciliation includes several possible methods. Restitution involves the repatriation or return of tangible objects, immovable property, assets, or personal belongings such as stolen artwork, ancestral remains, cultural artifacts, or land and natural resources. Reparations entail compensation, monetary or otherwise, for permanent or irreversible loss, such as human life, cultural identity, economic stability, or legal and political rights. Finally, formal apologies involve an admission of past guilt or wrongdoing and the recognition of its lasting effects; see Barkan, *Guilt of Nations*. pp. xviii-xix. On the "pros" and "cons" of historical justice and reconciliation, see Berg and Schaefer, "Introduction," pp. 1-17; and Robert R. Weyeneth, "The Power of Apology and the Process of Historical Reconciliation," *Public Historian,* Vol. 23, No. 3 (Summer, 2001): pp. 9-38.

Following World War II, United States policy toward American Indians reflected, in many ways, the progressive, liberal-democratic values of the new global order. Many Native Americans had faithfully served the U.S. overseas, and returning Indian veterans, like their African-American counterparts, expected recognition for their services. As a sign of the government's good faith, one of the first congressional initiatives came with the passage of the Indian Claims Commission Act (ICCA) in 1946.[1075] This measure established a commission to investigate and settle Indian land claims, treaty violations, and other grievances arising prior to the date of enactment and granted the tribes access to the U.S. Court of Claims to resolve future disputes.

While the ICCA included reparative aspects in its design and implementation, the measure lacked any form of apology or acknowledgment of historical injustice. Moreover, the claims commission limited remedies to monetary compensation (rather than land redistribution) on a per capita basis, thus providing the tribes little potential for long-term structural or economic stability. Congress had also intended for the measure to function as an immediate and final solution to the Indian "problem." Rather than cultivate the tribes' special legal status, federal lawmakers sought to extend principles of "equality" by terminating the federal-tribal trustee relationship and incorporating Native Americans into mainstream society through full citizenship, allotment, urban relocation, and off-reservation employment.[1076]

The federal government's "termination" policy had dire consequences for Native America. Assimilation struck forcefully at tribal culture and the loss of land and federal welfare services thrust many Indians into poverty. As a result, many Native American

[1075] Act of 13 August 1946, 79th Cong., 2nd sess. ch. 959, *Statutes at Large*: pp. 1049-1056.
[1076] See Cohen, *Handbook,* pp. 90-94.

groups demanded reform in national policy. Although fraught with complexities and narrow in remedial scope, the ICCA and subsequent land claims cases opened the door for Indian tribes to seek further restitution for historical injustices.[1077] The Civil Rights movement and Great Society initiatives of the 1960s stimulated even greater protests for change. By the early 1970s, the U.S. government had not only adopted a new policy of Indian self-determination and tribal self-government, but a growing international movement had also begun to identify these principles as fundamental human rights standards in relation to Indigenous peoples worldwide.

Congress has since taken important steps to help reconcile the destructive historical legacy of assimilation policies, forced removal, collective property termination, and the related effects of cultural, political, and economic instability among Native American nations. Although not without controversy, federal legislative measures such as the Native American Graves Protection and Repatriation Act, Indian Self-Determination and Education Assistance Act, Indian Arts and Crafts Act, and American Indian Religious Freedom Act, provide Native peoples with a structural framework for helping them reclaim their sovereignty, identity, and cultural heritage.[1078]

For purposes of this study, the Indian Child Welfare Act (ICWA) serves as a unique example of these initiatives because of its emphasis on Indian-state relations.[1079] Enacted by Congress in 1978, this measure gives jurisdictional preference to Native American tribal courts in cases involving Indian child adoption and custody proceedings

[1077] Sarah Krakoff and Kristen Carpenter, "Repairing Reparations in the American Indian Nation Context," in Federico Lenzerini, ed., *Reparations for Indigenous Peoples: International and Comparative Perspectives,* Oxford: Oxford University Press, 2008, pp. 257, 262.
[1078] For further discussion of the benefits and controversies surrounding these efforts, with a particular focus on the NAGPRA, see Barkan, *Guilt of Nations,* pp. 169-215.
[1079] Act of 8 November 1978, 95th Cong., 2nd sess., *Statutes at Large*: pp. 3069-3078.

that would otherwise fall within the judicial or regulatory ambit of the states. Congress designed the legislation to repair the devastation wrought by a history of U.S. law and policy aimed at breaking up traditional Indian family structures. The nineteenth-century campaign to assimilate Native Americans into mainstream society found an impressionable target with Indian children. State and federal officials removed Indian children from their tribal families, sent them to Christian boarding schools, and placed them with non-Indian adoptive families or foster homes.[1080] As one Congressman noted, "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[1081]

While some states have supported the ICWA through codification measures, the Act has met with considerable resistance in others. Particularly notable is the "Existing Indian Family" (EIF) doctrine, which—pursuant to several state court decisions, including Indiana—holds that Indian children lack sufficient enough cultural or political ties to their tribe to merit special treatment.[1082] Granted, many of these cases involve extremely difficult issues, and sensitivity becomes particularly acute when child welfare comes into play. Indian child removal often results because of parental neglect or maltreatment, problems exacerbated by poverty, alcoholism, or drug abuse on tribal reservations. However, the states have a unique opportunity to work with tribal

[1080] One of the few book length studies to address these issues at length is Marilyn Irvin Holt, *Indian Orphanages,* Lawrence: University of Kansas Press, 2001; for an example of Indian child displacement in Indiana, see Dominic B. Gerlach, "St. Joseph's Indian Normal School, 1888-1896," *Indiana Magazine of History,* Vol. 69, No. 1 (March, 1973): pp. 1-42.
[1081] Lorie M. Graham, "The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine," *American Indian Law Review,* Vol. 23, No. 1 (1998): p. 10, quoting Rep. Stewart Udall's remarks in H.R. Rep. 1386, 95th Congress (1978).
[1082] Krakoff and Carpenter, "Repairing Reparations," p. 264.

governments not only in addressing these social problems but also in helping them sustain their sovereignty and self-determination through jurisdictional comity.[1083]

In 1988, the Indiana Supreme Court addressed the ICWA at length in *In re Adoption of T.R.M.,* a case involving the adoption of an Indian child from the Oglala Sioux Tribe (South Dakota) by a non-Indian couple residing in Indiana.[1084] In reversing the Indiana Court of Appeals decision, the Supreme Court held that exclusive jurisdiction vested in the state rather than the tribal court.[1085] Among several issues, the question of domicile played an important role in the Supreme Court's decision. Because the child was "abandoned" shortly after birth, never resided on the reservation, and spent most of her young life in a non-Indian culture, the Court—in applying the EIF doctrine—rejected the adoption as constituting a breakup of the Indian family under the terms set forth under the ICWA.[1086] Although the Act requires that all states "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings," the Indiana Supreme Court refused to interpret this provision as giving "absolute deference to a tribal court order."[1087] Citing Indiana law as the supreme authority, the Court held that "all foreign judgments are open to collateral attack for lack of jurisdiction."[1088]

[1083] Ibid. p. 265.
[1084] *In the Matter of Adoption of T.R.M., an Indian Child, and J.Q., (Natural Mother), Appellant v. D.R.L. and E.M.L. (Adoptive Parents), Appellees,* 525 N.E. 2d 298 (1988).
[1085] For the Indiana Court of Appeals opinion, see *Adoption of T.R.M. v. D.R.L.,* 489 N.E. 2d 156 (1986).
[1086] *In re Adoption of T.R.M.*, p. 303. The U.S. Supreme Court would not review the ICWA until the following year. In *Mississippi Band of Choctaw Indians v. Holyfield,* (490 U.S. 30 (1989)), the Court ruled that tribal jurisdiction prevailed regardless of the child's residence or place of birth: "had Congress intended a state-law definition of domicile, it would have said so." See Ibid. p. 47.
[1087] As quoted in *In re Adoption of T.R.M.*, p. 305.
[1088] Ibid. p. 306. Based on the Court's interpretation of the Uniform Child Custody Jurisdiction Act (UCCJA), which would otherwise have resolved an inter-state conflict over child custody disputes, "[n]either the Reservation nor the Oglala Sioux Tribal Court" fell within the scope of the Act's definition of a "state." See Ibid. p. 315.

Although *In re Adoption of T.R.M.* dealt with issues of an inter-state nature, at the time of the court's decision the question of tribal sovereignty in Indiana had emerged with renewed vitality. With the 1897 Van Devanter opinion, the Miami Indians had become the last federally recognized tribe in the state.[1089] Since then, the Miami have invested considerable time and resources in defending their legal rights and attempting to regain their purloined status.[1090]

With the passage of the ICCA in 1946, Miami tribal historian Carmen Ryan (Checomequah, or Spirit of the Lakes) dedicated her cause to securing monetary reparations for the Miami. In 1960, as a result of her efforts, as well as those of tribal leader Ira Sylvester "Ves" Godfroy and many others, the Indian Claims Commission (ICC) awarded the Miami nearly five million dollars in restitution for payments never received for lands ceded under the 1818 Treaty of St. Mary's.[1091] De facto recognition by the ICC gave the Miami an increased sense of tribal dignity. However, monetary settlements fell short of the Nation's full aspirations of sovereignty and self-determination. During the mid-1960s, the Indiana Miami made several efforts to regain

[1089] This is accurate in part. Aside from the Miami, the Pokagon Band of Potawatomi Indians, located in Dowagiac, Michigan, gained federal recognition in 1994. Several of the Tribe's members live in Northeastern Indiana.

[1090] Tribal leader Camillus Bundy spearheaded these efforts during the late nineteenth and early twentieth centuries. In 1903, he founded the Miami reunion to as a way to preserve the tribal community. Until his death in 1935, Bundy advocated vociferously on behalf of the tribe, writing frequently to U.S. presidents, lobbying Congresss, and making regular visits to Washington, D.C. to meet with public officials. See Stewart Rafert, "Letter to the Editor," *Indiana Magazine of History,* Vol. 102, No. 2 (June, 2006): p. 173.

[1091] Ibid. p. 174. With Bundy's death, Ryan continued much of her predecessor's work. In 1937, she helped to incorporate the tribe as the Miami Nation of Indians of the State of Indiana. During the late 1930s, she joined the League of North American Indians (LONAI; also known as the League of Nations of North American Indians). Founded in 1935, the LONAI sought to protect tribal lands and publicize historical injustices. Although less well known than other organizations such as the American Indian Federation or National Congress of American Indians, the League was one of the first groups to propose Indian representation in the United Nations and, during the early 1940s, became a vocal advocate of federal Indian claims legislation; see Steven J. Crum, "Almost Invisible: The Brotherhood of North American Indians (1911) and the League of North American Indians (1935)," *Wicazo Sa Review,* Vol. 21, No. 1 (Spring, 2006): pp. 49-55. According to Rafert, "[t]he final Miami reward[,] . . . after attorneys' fees and nineteenth-century annuities were deducted, amounted to $1,215 per person." Congressional distribution of funds came in 1969; see Rafert, *Miami Indians,* p. 240.

federal recognition status through congressional lobbying and petitions to the U.S. Department of Justice. Unfortunately, these efforts fell largely on deaf ears.[1092]

In 1978, the Bureau of Indian Affairs (BIA) issued new regulations (which remain in effect today), requiring unrecognized tribes to meet several prerequisites to attain federal acknowledgement status. Specific criteria include: continuous identification as a tribal entity since 1900; uninterrupted existence as a distinct community; preservation of political authority over members as an autonomous entity; and membership consisting of descendants from an historical Indian tribe. In short, a tribe must demonstrate historical, social, and political continuity as a distinct, autonomous community despite over two centuries of state and federal efforts to eradicate these characteristics. The outcome of BIA decisions determines the extent to which tribes receive important federal services such as health clinics, education and job training programs, housing development, and other community services.[1093] In March of 1979, the Indiana Miami notified the BIA of their intent to petition.

In support of Miami efforts, the Indiana General Assembly adopted a joint resolution in 1980, which sought to expedite federal recognition of the tribe under the 1978 regulations. In their petition to Congress, Indiana legislators documented an extensive history of Indian-settler relations, underscoring the Miami's continuous presence in the region and valorizing their traditional way of life as "worthy of emulation

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[1092] Rafert, *Miami Indians,* pp. 248-249.

[1093] As of early 2011, 17 Native American tribes have gained recognition status under the 1978 BIA guidelines, 28 have been denied, and 9 petitions await final review and determination by the Bureau's Office of Federal Acknowledgement. The most extensive scholarly examination of the federal acknowledgment process is Mark Edwin Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process,* Lincoln: University of Nebraska Press, 2004, esp. pp. 47-78; also see William W. Quinn, Jr., "Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept," *American Journal of Legal History,* Vol. 34, No. 4 (Oct., 1990): pp. 331-364; and Quinn, "Public *Ethno*history? Or, Writing Tribal Histories at the Bureau of Indian Affairs," *Public Historian,* Vol. 10, No. 2 (Spring, 1988): pp. 71-76.

by all Americans today."[1094] The joint resolution clearly reflected Indiana's efforts at historical reconciliation (albeit with blame directed at the federal rather than state government level):

> The nurturing and preservation of Indiana's cultural and historical heritage can be substantially assisted by an early federal recognition of the Miami Indians of Indiana . . . as a properly qualified Indian tribe, thereby setting aright the disability imposed unfairly on said Indians by federal policy more than 130 years ago.[1095]

With this critical support from the state, the tribe spent the following years conducting extensive historical research before submitting their final petition on 10 July 1984.

On 12 July 1990, the Interior Department issued a preliminary report that found the tribe had not met two of the criteria needed for recognition: continuous existence as a distinct community; and the maintenance of political authority over its members. Responding to these findings, the Miami conducted extensive research to satisfy any deficiency in evidence demonstrating tribal integrity. To help coordinate these efforts, the Miami employed academic historians (including Stewart Rafert) and anthropologists as well as tribal attorneys from the Native American Defense Fund. However, on 9 June 1992, the Assistant Secretary of the Interior issued the BIA's final determination, which found that the Indiana Miami failed to satisfy the same criteria noted two years earlier.[1096]

[1094] Indiana, S. Res. 9, 101st General Assembly, short sess., *House and Senate Concurrent and Joint Resolutions* (1980).
[1095] Ibid. "130 years ago" referring to the forced removal of several hundred Miami to the Kansas Territory in 1846.
[1096] Rafert, *Miami Indians,* pp. 269, 276, 283-284. In 1991, U.S. Senator Richard Lugar introduced a bill that sought to extend federal recognition to the Miami. However, Lugar soon removed his support when tribal gaming became a controversial issue; see *Miami Nation of Indiana Restoration Act,* S. 538, 102nd Cong. 1st sess., *Congressional Record,* Vol. 137, No. 4 (5 March 1991): pp. S 2620-2621; also see Rafert, *Miami Indians,* p. 292.

In seeking further remedy, the Miami sued the Department of the Interior in federal court.[1097] In July of 2000, following a series of initial rulings during the mid- to late-1990s, the U.S. District Court for the Northern District of Indiana upheld the BIA's resolution, finding that the bureau had "sound support in the record" and that "its explanations for its decisions [were] clear and logical."[1098] On 15 June 2001, the U.S. Seventh Circuit Court of Appeals affirmed the federal district court's decision, claiming dismissively that "[r]ecognition in such a case would merely confer windfalls on the members of a nonexistent entity."[1099] With the U.S. Supreme Court's denial of certiorari the following year, the Miami had exhausted all potential judicial forums to reverse the BIA decision.[1100]

Despite these obstacles, the Indiana Miami continue to persevere as a distinct political community and, in recent decades, the State of Indiana has invariably shown its support in preserving tribal culture. In 1989, largely due to the lobbying efforts of Miami Chief Raymond White, the General Assembly amended the Indiana Historic Preservation and Archeology Act (IHPAA), making the destruction of historic burial sites and Native remains a criminal offense.[1101] The Indiana courts have since interpreted the act broadly, applying its protective provisions to state owned lands as well as private property.[1102] In

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[1097] Judicial review of federal agency decisions is limited in scope. The courts typically involve themselves only when questions arise as to whether a decision was arbitrary, unsupported by significant evidence, or inconsistent with the law; see *United States Code* 5 (2010), Pt. 1, Ch. 7, Sec. 706(2)(A); also see Roberto Iraola, "The Administrative Tribal Recognition Process and the Courts," *Akron Law Review,* Vol. 38, No. 4 (2005): pp. 883-886, for a discussion of the process of judicial review using the *Miami Nation* cases as examples.

[1098] *Miami Nation of Indians of Indiana v. Bruce Babbitt,* 112 F. Supp. 2d 742, 763 (2000).

[1099] *Miami Nation of Indians of Indiana v. United States Department of the Interior,* 255 F. 3d 342, 351 (2001).

[1100] *Miami Nation of Indians of Indiana v. Norton,* 534 U.S. 1129 (2002).

[1101] *Indiana Historic Preservation and Archeology Act, Indiana Code.* sec. 14-3-3.4-1 (1994) (current version at *Indiana Code.* sec. 14-21 (2011)).

[1102] See *Whitacre v. State of Indiana,* 619 N.E.2d 605 (Ind. Ct. App. 1993); 629 N.E.2d 1236 (Ind. Sp. Ct. 1994). This case involved two amateur archeologists who had purchased farm land in Dearborn County,

2003, the General Assembly enacted Senate Bill 337, establishing the Native American Indian Affairs Commission.[1103] The legislation authorizes the Commission to advise state officials on the final disposition of artifacts and human remains excavated from Indian burial sites. The measure also requires the Commission to study issues related to Native American employment, education, civil rights, health, and housing and to make recommendations to federal, state, and local government agencies accordingly.[1104] In 2011, the Indiana Senate introduced a bill that would provide official state recognition of the Miami Nation.[1105] Although limited in scope compared to federal acknowledgment, state recognition would facilitate inter-cultural cooperation between tribal and public officials. Moreover, the measure would protect the status of tribal artwork under the

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Indiana for purposes of conducting excavations on a Hopewell Indian site that contained artifacts and burial remains dating to 150 A.D. Having been informed by the Indiana Department of Natural Resources of the need for a permit to continue their work, the couple filed suit. The Indiana Court of Appeals ruled that the "legislature intended [for the statute] to mean any ground within the State of Indiana, whether owned by the state or privately owned." The Court justified its reasoning by holding that the "information in these sites expands our knowledge of human history and prehistory and thus enriches us as a state, nation and as human beings." See *Whitacre,* 619 N.E.2d 606, quoting *Indiana Dept. of Natural Resources v. Indiana Coal Council, Inc.,* 542 N.E.2d 1000, 1005 (1989). The decision in *Whitacre* has received widespread (and often positive) commentary from legal scholars; see, for example, Sherry Hutt and C. Timothy McKeown, "Control of Cultural Property as Human Rights Law," *Arizona State Law Journal,* Vol. 31, No. 2 (Summer, 1999): p. 376; James A. R. Nafziger, Robert K. Paterson, and Allison Dundes Renteln, *Cultural Law: International, Comparative, and Indigenous,* Cambridge: Cambridge University Press, 2010, pp. 281-284; and Pamela D'Innocenzo, "'Not in My Backyard!' Protecting Archaeological Sites on Private Lands," *American Indian Law Review,* Vol. 21, No. 1 (1997): pp. 146-147.

[1103] Senate Enrolled Act 337, 113th General Assembly, 1st reg. sess. (2003).

[1104] While an important step in Indian-state relations, the Act prohibits the Commission from negotiating with state or federal officials over gaming and tribal sovereignty. On 8 May 2003, Governor Frank O'Bannon vetoed the enrolled act because it restricted participation to members of federally recognized tribes, thus excluding a majority of Native Americans residing in Indiana. O'Bannon encouraged the General Assembly to correct these problems; however, state legislators overrode his veto. While state code provisions retain the definition of a "Native American Indian" as promulgated under federal statutory law, Governor O'Bannon issued an executive order in December of 2003, which expands the definition to include a "person who has demonstrated membership in a tribe that is located in Indiana; and has established documented historical recognition." See Executive Order 03-17, *Indiana Register,* Vol. 27, No. 3 (1 December 2003): pp. 984-986.

[1105] Senate Bill 311, 117th General Assembly, 1st Reg. Sess. (2011).

Indian Arts and Crafts Act of 1990 and ensure the freedom to practice religious ceremonies under the American Indians Religious Freedom Act.[1106]

Today, the Miami Nation administers its affairs at the seat of tribal government in Peru, Indiana. Under the leadership of Chief Brian J. Buchanan (Akima Tandaksa), the Miami Nation conducts regular council meetings and operates a charitable gaming enterprise that supports cultural preservation, educational programs, a community food pantry, and the maintenance of tribal government. Their cultural committee works to preserve Miami language, tribal history, and cultural artifacts.

[1106] Miami Nation of Indiana, "Indiana Bill to Provide State Recogniton to Miami Nation of Indians of Indiana," *News,* 3 March 2011, www.miamiindians.org (accessed 9 July 2011). Following the bill's referral to the Committee on Public Policy, the Indiana General Assembly took no further action during the first regular session. The Indian Arts and Crafts Act covers "any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority." See Act of 29 November 1990, 101st Cong., 2nd sess., *Statutes at Large*: p. 4663. For the American Indians Religious Freedom Act, see Act of 11 August 1978, 95th Cong., 2nd sess., *Statutes at Large*: pp. 469-470; amended by Public Law 103-344, 103rd Cong., 2nd sess., *Statutes at Large*: pp. 3125-3127.

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CURRICULUM VITAE
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PROFESSIONAL EXPERIENCE

Librarian 2006-Present
Ruth Lilly Law Library
IU-Indianapolis School of Law

- Provide research instruction and reference services for faculty, student, and public patrons
- Manage circulation and inter-library loan departments
- Assist law review editors with source pulls and citation checks for forthcoming articles
- Conduct faculty publication citation analyses
- Prepare annotated legal bibliographies and resource guides
- Compile monthly and annual statistics on library use and patron services for American Bar Association and other law school ranking publications

Chief Operations Officer 2001-2006
Starkey Law Group, PC
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- Legal research support in the areas of estate planning, probate and trust litigation, and medical malpractice
- Legislative liaison services to Indiana Uniform Law Commissioners (ULC) and ULC National Legislative Services Director; Drafted ULC annual reports for the Indiana Governor and State Budget Agency
- Managed firm administrative affairs including client billing, vendor accounts, inter-office budget, staff benefits, and marketing initiatives

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Master of Arts (M.A.), Public History 2011
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PUBLICATIONS

"Debate Continues over Native American Land Rights," in John R. McKivigan and Heather L. Kaufman, eds., *Encyclopedia of American Reform Movements,* New York, NY: Facts on File (forthcoming, 2012).

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"The Bricks and Mortar of Information: Preserving Indiana's Historic Public Libraries," *Indiana Libraries*, Vol. 27, No. 1 (Winter 2007-2008): pp. 63-68.

TEACHING, RESEARCH, AND CONSULTING

Legal Research Instruction Services, Ruth Lilly Law Library, IU-Indianapolis School of Law.

Presentation: "Fundamentals of Legal Research," Marian College, Legal Practice and Method (Pre-Law Program), Indianapolis, Indiana, 28 October 2010.

Presentation: "Information Ethics and Creative Research Methods for Thesis Writing," Universidad de Guadalajara, Centro Universitario de Ciencias Económinco Administrativas (CUCEA), Zapopan, Jalisco, Mexico, 12-13 June 2007.

Research Historian, Historical Research Associates, Inc. (Missoula, Montana), Summer 2008.

Feasibility Study for Proposed National Heritage Area in St. Augustine, Florida (2008).

COMMUNITY ACTIVITY

Volunteer ESL instruction for staff of Mexican Consulate of Indianapolis (Fall 2007).

Indiana State Library-Volunteer reference services and database administration (Winter 2004).

Spanish translation assistance with multiple community-focused publications.

PROFESSIONAL MEMBERSHIPS

National Council of Public History, 2007-present.

Indiana Library Federation, 2007-present.

LANGUAGES

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