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The Transformation of American Federalism, 1848-1912

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1848-1912

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ABSTRACT

United States expansion following the Mexican-American War served as the catalyst for a reinvention of American Federalism. While much of the historiography traces the accretion of sovereign power in the national government to events caused by the divisions between northern states and southern states, there is an important and understudied East to West component of the process by which sovereign boundaries changed. The American West is a legal space where the hazily defined and capacious concept of federalism received fuller form and clearer definition. During the late nineteenth century and first few years of the twentieth century, the United States modified and ultimately solidified three important relationships: (1) its relationship with Native American Tribes; (2) its relationship with territorial law and governance; and (3) its relationship to the land and natural resources.

The Framers of the Constitution, including those of the Fourteenth Amendment, acknowledged Native American tribal sovereignty. The power of tribes to police themselves remained relatively undisturbed until one particular specie of intra-tribal violence attracted the attention of Anglo-American authorities – witch killings. With the sensationalization and publication of witch killings, Native Americans were introduced to the Anglo-American criminal justice system. Since that time, the United States

has severely curtailed Native American power to police and regulate their own tribes.

After the Civil War, the national government re-formulated territorial governance to assert greater control over areas of law, including common law, traditionally reserved to local sovereigns, and did so in the service of a nationalizing project. Concerned that local territorial citizens might re-assert their local laws following statehood, Congress placed increasingly stringent conditions on statehood for territories in the West.

Finally, the national government asserted robust powers not only over people in the West, but also over its most valuable natural resources – minerals, timber, water, and land. Whereas the national government had initially served as something akin to a real estate sales agent for the nation, ensuring that the public domain was disposed, it adopted a different role in the West – that of a Landlord.

All these changes necessitated new theories of federalism. Legal elites articulated these theories in Supreme Court cases, legal commentaries, and Congressional legislation. By the second decade of the twentieth century, the hazily defined federalism that had existed in flux had congealed.

ACKNOWLEDGMENTS

Graduate students in history learn, at the outset of their education, to adopt a critical eye in the reading of historical scholarship. The requirement to write a dissertation, I am convinced, serves to temper and refine our critical attitude in two ways. First, it instills an appreciation of the difficulty in conducting sound research and writing well. Second, it reminds us that scholarly inquiry is a collaborative enterprise. Our research and writing is enhanced through formal processes and informal conversations. This work is far better than it would have been due to helpful feedback from generous scholars. First and foremost, David Tanenhaus is the epitome of kindness and is everything one could hope for in an advisor. He combines gentle and thoughtful commentary with a generosity of time unmatched in academia. And, based on his email response times, I believe he never sleeps. The other members of my dissertation committee have provided outstanding feedback and support: Paul Werth, Maria Raquel Casas, Dean Daniel Hamilton, and Rebecca Gill. The UNLV History community of both past and present is full of wonderful people who have helped me develop as a historian and a person: Michael Green, David Holland, Greg Hise, Colin Loader, Elspeth Whitney, William Bauer, Elizabeth Nelson, Mary Wammack, Eugene Moehring, Greg Brown, Nick Pellegrino, Jordan Watkins, Stefani Evans, and the three "Andrews" – Andy Fry, Andy Kirk and the late Andrew Bell. I would especially like to thank Heather Nepa and Annette Amdal who have not only shepherded me through this process, but whose kind words of encouragement have meant more than they realize.

I have been very fortunate to spend time as a fellow at Stanford University which has provided outstanding access for archival research. Its best assets, however, are its many great scholars. This project has benefited from the conversations I've had and feedback I've received from: Mark Storslee, Geoff Sigalet, Michael McConnell, Greg Ablavsky, Lawrence Friedman, Robert Gordon, Jonathan Geinapp, Jack Rakove and David Kennedy. Additionally, I'm grateful for thoughtful comments from Will Baude, Maeva Marcus, Barry Cushman, Lee Otis and Jason Iuliano.

When I moved to Las Vegas to attend UNLV, people often asked me if I gamble. I was not sure how to answer. Although I tend to avoid casinos, I did leave a secure job in legal practice in order to pursue a graduate degree in history, a move that seemed to entail more risk than putting a quarter in a slot machine. The pursuit of this dream was risky, and would not have been possible without the support of my wife, Ashleigh, who has given me nothing but love and encouragement on this journey. Likewise, my children Malakai, Rori, and Zuri are my source of joy and serve as a constant reminder of what is truly important. Finally, I would not have been able to complete this dissertation and degree without the love and support of my parents Brice and Colleen Sorenson and my parents-in-law Mark and Alice Evans.

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INTRODUCTION

On October 31, 1837, the steamboat Monmouth slowly powered north on the cold waters of the Mississippi River carrying her cargo. The consignment was unique, but not unusual. The United States Army had contracted with the owners of the Monmouth to assist in removing Cherokee, Creek and other Native Americans from the Southeast to what is now Oklahoma. On that late autumn night, the overloaded boat carried 700 Creek Indians who, according to the Army's plan, were supposed to disembark at a point further upriver and then resume their forced march west to "Indian Country" – federal land held in theoretical trust for Native Americans. The Monmouth also carried a small load of whiskey, and the crew managed to lighten the barrels during the journey. Sometime during the dark hours, the Monmouth suddenly and violently collided with another boat steaming downriver. The Monmouth split apart and threw most of its passengers into the cold river. The front section of the boat remained afloat and those fortunate enough to hold on kept their heads above water. The rest of the group drowned. Of the 700 Native Americans on board the Monmouth, 300 lost their lives to the river that night, all while in the custody of the United States.[1]

Steamboats on the Mississippi River such as the Monmouth also carried a different form of human cargo in the antebellum period – slaves. New Orleans was a terminus point in the transatlantic slave trade and, upon crossing the Atlantic, slaves might find themselves forced to

[1] For an account of the Monmouth disaster, *see* Grant Foreman, *Indian Removal: the Emigration of the Five Civilized Tribes of Indians* (Norman: University of Oklahoma Press, 1953), 187. The phrase "Indian Country" effectively became a legal term of art. The first Congress of the United States passed the "Non-Intercourse Act" disallowing the private purchase of tribal lands without federal government approval. Thus, the United States asserted plenary power over tribal lands and planted the seeds for the federal trust doctrine – the concept that the United States owns the underlying title to native lands but must manage the land for the benefit of the tribes. The national government designated Trans-Mississippi "Indian Country" as a safe haven for removed tribes. For a discussion of "Indian Country" and an argument that its promises to tribes were always illusory, *see* William Unrau, *The Rise and Fall of Indian Country, 1825-1855* (Lawrence: University of Kansas Press, 2007).

board a steamboat to continue the journey to the interior. After Congress prohibited the transatlantic slave trade in 1808, the more common direction for slaves to travel along the Mississippi and other inland waterways was from north to south as part of the internal slave trade. To be sold "downriver" usually meant leaving a small-scale slave operation in the Upper South to a larger one in the Deep South where conditions were, on average, harsher. Scholars estimate the number of slaves who traveled on this "Second Middle Passage" to be about 700,000.[2] In 1837, boats such as the Monmouth might bring slaves downriver and then return with a cargo of Native Americans upriver.

These two groups of captive people shared, for a moment, the troubled watery highways of the American interior. Their intersection on the Mississippi illustrates in a literal way that the forces driving their captivity and removal pushed in multiple directions. The slave traveled, under threat of violence, from north to south – into a physical and economic climate that increasingly valued field hands as the demand for cotton and other cash crops grew. The Indian[3] went, also under threat of violence, from east to west, as Euro-American settlers and miners lusted after native lands – a history that would repeat itself several times over the course of the nineteenth and

[2] *See* Walter Johnson, *Soul by Soul: Inside the Antebellum Slave Market* (Cambridge, MA: Harvard University Press, 2001); *See also* Robert Gudemstad, *Steamboats and the Rise of the Cotton Kingdom* (Baton Rouge: Louisiana State University Press, 2011); Michael Tadman, S*peculators and Slaves: Masters, Traders and Slave in the Old South* (Madison: University of Wisconsin Press, 1989). Historians disagree on both the number of Native Americans forced onto the Trail of Tears as well as the number who died. For decades, historians asserted that 4,000 Native Americans lost their lives along the Trail of Tears. More recently, scholars have disputed that number, asserting that it is too high. *See, e.g*., William L. Anderson, *Cherokee Removal: Before and After* (Athens, GA: University of Georgia Press, 1991), 85.

[3] Since the 1960s and 70s, scholars and activists have debated the appropriate appellation for the indigenous people of North America. In 1977, a delegation from the American Indian Movement to the United Nation's Conference on Indians in the Americas elected to identify as "American Indian." Most scholars and American Indians accept both "Native American" and "Indian." The phrases are sometimes used interchangeably. Some scholars and activists prefer one phrase over the other. *See* David Wilkins, *American Indian Politics and the American Political System* (Rowman and Littlefield, 2006); Russell Means, "I am an American Indian, Not a Native American!" *Treaty Productions* (1996) (available at https://web. archive.org/ web/20090503130744/http://www.peaknet.net/~aardvark/means.html. I will use both terms herein interchangeably, unless otherwise noted.

twentieth centuries. The North / South dichotomy eventually developed into a Civil War, Segregation, Jim Crow, and a Civil Rights movement that all re-defined and restructured the American experience with federalism. The East to West story of removal, conquest, and expansion has been just as important in the shaping and re-shaping of American law – particularly the allocation of sovereign power over people and land. This latter story has received less attention than the former.

The goal of this project is to tell the "East to West" story of American Federalism. The American West is a legal space where the hazily defined and capacious concept of federalism received fuller form and clearer definition. Legal and political boundaries between competing sovereigns that had previously been nebulous took shape. During the late nineteenth century and first few years of the twentieth century, the United States sought to solidify three important relationships: (1) its relationship with Native American Tribes; (2) its relationship with territorial law and governance; and (3) its relationship to the land and natural resources. The transformation of these relationships was made in the service of a nationalizing project – one in which the federal government would have greater power to create a national identity in terms of race, commercial pursuits, and citizenship. In the words of John Wesley Powell, the West was a "field in which the great and rich harvest to be reaped consisted of thousands and perhaps millions of good citizens."[4] The sovereign boundaries that congealed in the American West in the aftermath of the Mexican-American War remain largely unchanged to this day.

These changes necessitated new theories of federalism more deferential to national power. Legal elites articulated these theories in Supreme Court cases, legal commentaries, and Congressional legislation. While trying to avoid the practices and language of British Imperialism

[4] Report of the Public Lands Commission, 1879, VII.

against which the Founders had revolted, these constitutional reformers transformed federalism by curtailing tribal and territorial sovereign powers, and asserting national control of land in the West.

There is a tendency in the literature to view federalism through a "North and South" lens. This emphasis is reasonable. The Civil War was, after all, the bloodiest war in American history.[5] The struggle for racial equality that began with the Fourteenth Amendment continued for well over a century and continues to the present. Further, there is a heroic and whiggish component to the North and South story. The United States government, over the objection of recalcitrant states, liberated slaves at great cost, wrote equality into the Constitution and eventually constructed legislation to combat both de jure and de facto racial discrimination. According to this history, the change to the federal nature of the United States – particularly the accretion of power in the national government and the weakening of state power – was primarily the product of the North / South dichotomy and served to correct historical injustices. Scholars working in this vein argue that the Founders created a constitutional system primarily to protect slavery, and that the national government asserted greater sovereign power in the nineteenth and twentieth centuries to end slavery and reverse its legacy.[6]

Yet this historiography, with important exceptions noted below, tends to ignore or downplay the role of the West in the development of American Federalism. Disagreements regarding the

[5] Recent estimates of Civil War casualties suggest that for many years historians have underestimated the number of deaths. J. David Hacker argues the actual number is approximately 750,000. *See* J. David Hacker, "A Census-Based Count of Civil War Dead," *Civil War History*, Vol. 57, No. 4, 2011, 307-348.

[6] For arguments that the Founders sought to protect the institution of slavery in the Constitution, *see* George William Van Cleve, *A Slaveholders' Union* (Chicago: Univ. of Chicago Press, 2010); David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009); Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge, United Kingdom: Cambridge University Press, 2006); Paul Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* (Chapel Hill: The University of North Carolina Press, 1981). *See also* Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge, United Kingdom: Cambridge University Press, 2001).

proper distribution of sovereign power and, more fundamentally, the very nature of sovereignty and who can exercise it, did not take place solely on Civil War battlefields or in eastern courtrooms. The exercise of federal power in the West was, ultimately, more assertive than in the South and sometimes used for less noble ends. The same United States Army that liberated the slaves also rounded up Native Americans in the West, confined them to reservations, and sometimes massacred them.[7] To justify these actions, legal and political elites created new theories of sovereignty.

Following the Civil War, the national government re-formulated territorial governance to assert greater control over areas of law traditionally reserved to local sovereigns, and did so in the service of a nationalizing project. Concerned that local territorial citizens might re-assert their peculiar institutions following statehood, the national government placed increasingly stringent conditions on statehood for territories in the West. Finally, the national government asserted robust powers not only over people in the West, but also over its most valuable natural resources – minerals, timber, water, and land. Whereas the national government initially served as a real estate sales agent for the country, ensuring that the public domain was transferred to private hands, it adopted a different role in the West – that of a landlord. Federal land policies resulting from westward expansion have ensured a large federal presence in western land management and economic interests. New theories of land management in the West also inspired Congress to re-purchase forested lands in the East, ultimately strengthening federal power across the nation.

[7] *See, e.g.*, Stan Hoig, *The Sand Creek Massacre* (Norman: University of Oklahoma Press, 1961), and Brigham Madsen, *The Shoshoni Frontier and the Bear River Massacre* (Salt Lake City: University of Utah Press, 1985). Kass Fleisher criticizes historians for not paying enough attention to the Bear River massacre and suggests that it has been ignored for reasons of race, gender and geography. *See* Kass Fleisher, *The Bear River Massacre and the Making of History* (New York: State University Press of New York, 2004).

The changing relationship of the United States to its native peoples in the American West, the implementation of a more homogenous law in western territories, and the retention of federal lands in the West all contributed to a reformulation of American Federalism in which the national government attempted to exercise a veto power over the sovereignty of local institutions, and often succeeded. The United States' westward expansion served as the context for, and catalyst of, new iterations of federalism.[8]

This project sits at the intersection of two veins of literature: (1) American Legal History in general and American Federalism in particular, and (2) the history of the American West. J. Willard Hurst and Morton Horwitz, in groundbreaking works, both described how law was manipulated to be put in the service of particular goals, and the role lower level judges played in advancing those goals.[9] Here, I describe the unique role of territorial judges – local judges who were nevertheless accountable to Congress and the President. They, too, advanced a certain goal. They were used as tools in a great nationalizing project. More recently, Heather Cox Richardson, in *West from Appomattox*, argues that reconstruction was not just a southern phenomenon, but occurred in the North and West as well. Gradually, a national identity formed from three distinct regions.[10] My work seeks to build upon hers by examining how competing sovereign entities

[8] For investigations of the connections between sectionalism and federalism, *See* Richard Bensel, *Sectionalism and the American Political Development: 1880-1980* (Madison, Wisconsin: University of Wisconsin Press, 1984); Calvin Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution* (New York: Cambridge Univ. Press, 2005); David Potter, *The Impending Crisis: 1848-1861* (New York: Harper Collins, 1976) Christopher Tomlins, *Freedom Bound: Law, Labor and Civic Identity in Colonizing English America, 1580-1865* (New York: Cambridge Univ. Press, 2010).

[9] *See* James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1956); Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass: Harvard University Press, 1977).

[10] Heather Cox Richardson, *West from Appomattox: The Reconstruction of America after the Civil War* (New Haven: Yale University Press 2007). Richardson is one of several scholars who write about "The Greater Reconstruction" – a term coined by Elliot West. In an essay written in 2003, West called attention to a gap in the historiography. He asserted the West played a much larger role than had been appreciated in the nation's racial history. *See* Elliot West, "Reconstructing Race," Western Historical Quarterly, Vol. 34, No. 1 (2003). In *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850-1890,*

negotiated new boundaries, and what local identities may have been lost in the forging of a national identity. It also suggests that the Mexican-American War laid the groundwork for new theories of federalism, rather than the Civil War.

In this discussion of the changes to American Federalism, I will frequently refer to three concepts, or constructs: "federalism," "sovereignty," and "the West." All three of these terms are slippery. One of the goals of this project is to recover the meaning of "federalism" and "sovereignty" to contemporary actors. What did those terms denote to individuals living in the American West in the long nineteenth century? How did they give them significance? Despite the hazy and evolving meanings of federalism and sovereignty, it will nevertheless be useful at the outset to establish some baseline for these ideas, in order to appreciate how they have been shaped, re-shaped and put into service. It will also be useful to discuss what I mean by the "West," given its multiple connotations to historical actors and historians.

D. Michael Bottoms suggests that Reconstruction may have had a greater affect in California than in Mississippi. California's multi-racial character led to complexities in hierarchy that were absent in the South. *See* D. Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850-1890* (Norman: University of Oklahoma Press, 2013). Stacey L. Smith, in *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation and Reconstruction* traces the legal and political struggles of a large and varied unfree workforce in California during the period of Civil War and Reconstruction. *See* Stacey L. Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation and Reconstruction* (Chapel Hill: University of North Carolina Press, 2013). For other treatments of Reconstruction as broader than slavery and white / black relations, *see* Jane Tuner Censer, *The Reconstruction of White Southern Womanhood, 1865-1895* (Baton Rouge: Louisiana State University Press, 2013); and Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper and Row, 1988).

Federalism

What is federalism? A "hazily defined and capacious idea," writes Alison LaCroix, "upon which there is little agreement beyond the fact that many of the Founders regarded 'federalness' as one of the nation's essential attributes."[11]

The etymological roots of "federalism" are found in the Latin word *foedus*, meaning a treaty, compact, or contract. *Foedus* derives from an older Latin word – *fides* – signaling "trust." *Foedus* was used in both the Roman Republic, referring to treaties with populations in other part of the Italian peninsula, and during the Empire, when Rome contracted alliances with non-Romanized "barbarians" in the periphery.[12] Political entities also used the word *foedus* in the Middle Ages, to describe peace treaties. An alliance among various mountain groups in 1291 in the Swiss Alps formalized the *Confedoeratio Helvitica*.[13]

Historians and political scientists generally trace the first full-fledged theorizing of federalism to Samuel Pufendorf and Montesquieu, both of whom proffered visions of non-unitary authority for a viable modern political state.[14] Althusius and Kant also described "federalist" unions.[15] Frederic Lepine writes that these European theories of federalism shared a common feature: "a bottom-up organisation of political entities based upon a cooperative contract." They all opposed, Lepine continues, "the centralisation of power and authority developed with the modern state."[16]

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[11] Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass: Harvard University Press, 2010), 2.

[12] *See* Frederic Lepine, "A Journey through the History of Federalism: Is Multilevel Governance a Form of Federalism?" *L'Europe en Formation* Vol. 1 (2012), p. 21-62, 31.

[13] *Ibid*. *See also* Karl-Heinz Ziegler, "The Influence of Medieval Roman Law on Peace Treaties," in *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One*, ed. Randall Lesaffer (Cambridge: Cambridge University Press, 2004).

[14] *See* Lepine, "A Journey through the History of Federalism," *supra* note 12, at 30. *See also* LaCroix, *The Ideological Origins of American Federalism*, *supra* note 11, at 19.

[15] *See* Lepine, "A Journey through the History of Federalism," *supra* note 12, at 35.

[16] *Ibid*., at 39.

Madison, Hamilton and other American Founders were familiar with their work. They quoted from Montesquieu liberally in the *Federalist Papers*. Many of the arguments they put forth to encourage acceptance of the Constitution of 1787 were designed to demonstrate the need for greater central authority. However, they nevertheless sought to assure wary citizens that not all power would find its way to the new national government.[17] The unique American contribution to federalism then, both in theory and in practice, was the blending of a national government with a confederated union. Hamilton argued that the United States, under the Constitution of 1787, would not be a mere league of states, but a state by itself. "[W]e must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens."[18]

Madison, perhaps more attentive to state sovereignty than Hamilton, stated, "The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both."[19] Madison's "federal" in this sentence means something akin to a federated union, or a league of states. Madison continued his argument in Federalist No. 51. There, he stated, "In the compound Republic of America, the power surrendered by the people is first divided between two distinct governments … Hence a double security arises to the rights of the people. The different governments will control each other."[20] In the American version of federalism, at

[17] The "federal government' now exclusively means the national government. Madison and other Founders occasionally referred to the federal union as the larger system of government in the United States. Herein, I will use both "federal" and "national" to refer to the United States government. I sometimes use "national" to highlight its character as a political entity competing with state and tribal governments for political power.

[18] Alexander Hamilton, "Federalist No. 15," *The Federalist Papers* (New York, N.Y: Mentor, 1999).

[19] James Madison, "Federalist No. 39," *The Federalist Papers* (New York, N.Y: Mentor, 1999).

[20] James Madison, "Federalist No. 51," *The Federalist Papers* (New York, N.Y: Mentor, 1999).

least as envisioned by Madison, sovereign power could and would be divided into different governments.[21] Further, such division would serve to benefit the "security" of the people.[22]

Although Madison articulated a coherent, if somewhat vague, theory of federalism in *The Federalist Papers*, there was not then, nor has there ever been, a consensus on the appropriate boundaries between local and national sovereignty, or on the limits of national power. For this reason, America's favorite pastime is not baseball. Rather, the activity that has historically generated the most passionate and intense interest in the United States is debating the contours of federalism. From the Constitutional Convention and the Ratification Debates in the 1780s, to the debate over the National Bank that began in the 1790s and lasted forty years, continuing to issues big and small through nineteenth, twentieth and twenty-first century, federalism occupies a central place in political, legal, social and cultural conversations. Discussions about law in America have not been limited to what the law should be, but include debates about who should make and enforce the law. A political system that recognizes multiple sovereigns must have boundaries between those sovereigns. Where are the boundaries? This question is the essence of any federalism inquiry. Furthermore, fights over federalism's boundaries have not occurred only in the forums of the elite – Congressional wells and judicial courtrooms. They have occurred between Native Americans and U.S. Army removal agents; between advocates of Catholic-based education and advocates of non-sectarian education; and between sheepherders and U.S. Forest Service agents.

[21] Scholars are divided as to origins of American federalism. *See* LaCroix, *The Ideological Origins of American Federalism*, *supra* note 11; Gordon Wood, "Federalism from the Bottom Up: Review of *The Ideological Origins of American Federalism* by Alison LaCroix," *Univ. of Chicago Law Review*, Vol. 78 (2011), 705-732; and Alison LaCroix, "Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood," *University of Chicago Law Review*, Vol. 78 (2011), 733-758.

[22] The argument that divided government serves to "secure the freedom of the individual" was articulated by a unanimous Supreme Court in a recent case that included a lengthy ode to federalism. See *Bond v. United States*, 564 U.S. 211 (2011).

Edward Purcell writes that the Constitution "neither gave the federal structure any proper shape … nor mandated any particular and timeless balance among its components."[23] Purcell contends that there is no "true," "proper" or "original" understanding of American federalism. Rather, it is characterized by "elasticity" and "dynamism."[24] I agree with Purcell that federalism at the Founding was contested, and that no particular version prevailed in the early Republic concerning the appropriate dividing line of authority between national and local government. How, then, might I assert that there was a "transformation" of American federalism if it was shapeless to begin with?[25] What interests me about the long nineteenth century is that many of its characters asserted there was indeed a "true" federalism, and they sought to preserve it. For instance, the major political and legal question of the 1850s was whether Congress had constitutional authority to prohibit slavery in the territories (especially those procured through the Mexican-American War). The major participants in the discussion – Roger Taney, Stephen Douglas, and Abraham Lincoln – each framed their arguments with an appeal to the original

[23] Edward Purcell, *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry* (New Haven: Yale University Press, 2007), 7.

[24] *Ibid*., 6-7.

[25] The title of this dissertation is, of course, meant to call to mind the title of Morton Horwitz's classic two volumes. See *The Transformation of American Law, 1780-1860* (Cambridge, Mass: Harvard University Press, 1977) and *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992). The danger of riffing on titles this way is that you draw immediate comparison of your work to the foundational texts in the field. My intent is not to put myself anywhere near the same class as Horwitz, but only to call attention to a broad theme of his work that relates to this project – the manipulation of law – particularly private law – in the service of ends-oriented goals. Horwitz, in the first book, argues that private common law was interpreted in a way to benefit a particular class in the ante-bellum period. In Part II of this project, I argue that private common law was interpreted in a way to serve a nationalizing project in the post-bellum period in the territories.

This project also adopts some of the broad themes from Daniel Hulsebosch's *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005). Hulsebosch contend that legal elites in New York did not reject British constitutionalism in the Revolution, but re-purposed it to suit their desires. In the late nineteenth century, as the United States reached the apex of its imperial experiment, legal elites reformulated federalism to maintain the language of divided sovereignty in contested spaces while exerting greater federal executive power in those same spaces. These reformulations are found, for example, in *United States v. Kagama* and the *Insular cases*.

meaning of federalism. They each argued their interpretation of federalism was consistent with that of the Framers. Even after the Civil War, as I hope to demonstrate herein, we find assertions of individual rights based in a federal structure.

Part of the transformation was to give shape to the shapeless. Even if the platonic Form of Federalism that Purcell finds lacking at the Founding is inaccessible, we may nevertheless investigate its earthly implementations.[26] Although there may have been no "original" federalism at the Founding, at least with respect to the appropriate boundaries between sovereign powers, Americans throughout the nineteenth century asserted that a dividing line existed somewhere.[27] One of the purposes of this study is to examine where they sought to draw the line.[28] Sometimes that line became embedded into law. In the words of Madison, the constitutional status of a particular dividing line became "liquidated."[29] For other issues, we still argue where to draw the line.

A large portion of this dissertation addresses concepts of federalism in United States western territories.[30] Western territories are a unique and somewhat problematic venue for an examination

[26] Gordon Wood writes that "federalism is not some transcendent idea standing outside of time and place but a historically created conception that changed through time as circumstances changed. Gordon Wood, "Federalism from the Bottom Up," *supra* note 21, at 708.

[27] Purcell tends to deemphasize that the founders did agree that there should be a dividing line, even if they disagreed as to where it should be drawn, as evidenced by the scant attention he pays to the Tenth Amendment, which receives one paragraph of his attention. *See* Edward Purcell, *Originalism, Federalism, and the American Constitutional* Enterprise, *supra* note 23, at 31.

[28] LaCroix, Purcell, Hulsebosch, and Horwitz are but some of the many scholars who have aroused my interest in this topic. William Nelson and Mary Sarah Bilder, for example, have both written important analyses of the colonial institutions that formed the foundation, in their opinion, of the legal and institutional structure of the American Republic, including its multiple layers of governmental authority. *See* Mary Sarah Bilder, *Transatlantic Constitution: Colonial Legal Culture and Empire* (Cambridge, Mass: Harvard University Press 2004) and William Nelson, *The Common Law in Colonial America, Vol. 1, The Chesapeake and New England, 1607-1660* (New York: Oxford University Press, 2008).

[29] James Madison, "Federalist No. 37," *The Federalist Papers* (New York, N.Y: Mentor, 1999).

[30] The timeframe I've indicated for this work, 1848-1912, denotes the Treaty of Guadalupe-Hidalgo and the Mexican Cession at the front end, and the admission of the last two continental states, New Mexico and Arizona, on the back end. Most of the important events I discuss herein – the cessation of treaty-making with the tribes, the statehood debates, the attempts to create federal common law, the adoption of

of American federalism. After all, federalism is commonly understood, at least in its modern sense, to signify a division of authority between the federal and state governments. How might an examination of territories – which lacked a state apparatus – enlarge our understanding of American Federalism? One of the goals of this project is to contend that popular understandings of federalism encompassed broader notions of individual and local autonomy than the mere division of state and federal power. Territorial citizen-subjects were protective of the "sovereignty" of local institutions – like territorial legislatures, courts, and schools. In their minds, national intrusions into local institutions violated principles of federalism. In this aspect, my work shall reflect not only Alison LaCroix's recent work on popular constitutionalism, but also Michael Kammen's scholarship, both of which suggest that a unique aspect of American history is the percolation into popular culture of the Constitution and constitutional ideas – like federalism.[31] We should not be surprised to find that territorial subjects adopted a language of constitutionalism and articulated concepts in a variety of contexts. Federalism was a much broader idea for nineteenth-century Americans than the binary state / federal construction found in modern legal scholarship. For them, Native American tribes, territorial legislatures, and even churches and schools were participants in *federalism writ large*, with their own unique roles to play in the legal structuring of society.

federal land retention policies – post-date the Civil War. Yet, the Civil War by itself was not the catalyst for these "western" changes to federalism. Rather, what prompted these events was the question of how to govern more land and people. To be certain, I do not feel strictly confined by the dates and have freely discussed pre-1848 developments, such as the Marshall Trilogy, and post 1912-developments, such as the Weeks Act and the Taylor Grazing Act.

[31] *See* Alison LaCroix, "The Interbellum Constitution: Federalism in the Long Founding Moment," 67 *Stanford Law Review* 397 (2015); and Michael Kammen, *A Machine that Would Go of Itself*: *The Constitution in American Culture* (New York: Knopf, 1986).

Sovereignty

"Sovereignty" may be subject to fewer interpretations than "federalism," but its meaning is nevertheless hard to pin down. Thomas Hobbes elaborated the notion of sovereignty to establish the legitimacy of "single hierarchy of domestic authority."[32] Blackstone's Commentaries reference sovereignty as "supreme, irresistible, absolute, uncontrolled authority."[33] Sovereignty entails the right to govern – to make rules and to enforce them. At the heart of sovereignty lies the right to legalized violence – to arrest people, imprison them, and even execute them.[34]

Federalism and sovereignty are related because American federalism posits that sovereignty can be divided (and shared). A state government might arrest a person and imprison her for an activity over which the national government has no jurisdiction, and vice versa. A tribe might regulate the conduct of its members in a way that the state may not. Tribes imprison people. States also imprison people, and so does the national government.[35] Sometimes the different entities all assert the right to imprison a person for the same conduct. Using this framework, all three entities have sovereignty. However, as will be discussed herein, they do not exercise sovereignty to the same degree. A tribe's ability to imprison people, and engage in other acts that sovereigns historically have done, became severely limited during the 1800s. Similarly, state control over aspects of private common law also diminished during the same period. Changes to tribal, state, and national sovereignty meant changes to American Federalism.

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[32] *See* Stephen D. Krasner, "Sovereignty," *Foreign Policy*, No. 122 (2001).

[33] William Blackstone, *Commentaries on the Laws of England*, Vol. 1 (Philadelphia: J.P. Lippincott Co., 1893), 49.

[34] Max Weber wrote that the "state" is the "only human community which lays claim to monopoly on the legitimated use of physical force." Max Weber, *Politics as a Vocation* (Munich: Duncker and Humblodt, 1919). In the American system, "monopoly" is not quite the right word because multiple governments claim the right to use physical force on the citizens.

[35] States also authorize, by legislation, municipalities to arrest and imprison people.

The West

Historians of the American West seek to answer a seemingly simple, yet perplexing question – "Where is the West?" Another formulation of the question is "What is the West?" One of the goals of this project is to contribute to that conversation by reference to legal and constitutional history.

Frederick Jackson Turner may not have been the first to think of the West as a field worthy of scholarly inquiry, or even been the first to impose upon western historiography a nationalistic interpretation.[36] Turner, however, earned the distinction as the preeminent and groundbreaking scholar of the field for his cogent articulation of a theory, the Frontier Thesis, which simultaneously provided seemingly disparate Americans from places as diverse as Alabama and Connecticut with a common and honorable history, while also giving voice to anxiety about the future of the country.[37] Turner and Turnerians dominated the field for several decades. During the

[36] Frederick Jackson Turner, *The Significance of the Frontier in American History* (1893)(Madison, WI: Silver Buckle Press, 1984). Both Josiah Royce and Hubert Howe Bancroft, for example, had published, prior to Turner, significant investigations of the West as a district region. *See* Josiah Royce, *California: A Study of American Character: From the Conquest in 1846 to the Second Vigilance Committee in San Francisco* (Boston: Houghton Mifflin, 1886); Hubert Howe Bancroft, *Histories* (San Francisco: The History Company, 1887). Indeed, Charles Peterson has labeled Bancroft the "First Western Regionalist." Charles Peterson, "Hubert Howe Bancroft: First Western Regionalist," in Richard Etulain, ed., *Writing Western History*, (Albuquerque: New Mexico, 1991), 43-70.

[37] Turner's Frontier thesis, in short, argued that the American identity, particularly American concepts of democracy and freedom, evolved for the better as America's frontier pushed further and further west. The European seed of civilization, when planted in a new and untamed American environment, yielded a more fruitful crop of individual freedom and self-determination. As each generation successfully expanded more into the seemingly boundless and empty western horizons, those concepts of democracy were refined and improved. The hardy individualist pioneer, rancher, trapper and farmer seemed further and further removed from the arbitrary rule of monarchs in Europe and the urban corruption of the eastern seaboard. The frontier and the West then, for Turner, was not a geographical place but an evolutionary process by which a common American identity, for north, south and all points in between had been created. The frontier also marked the boundary between civilization and savagery. As those pioneers, all of them white and mostly male, fulfilled the country's manifest destiny, they helped turned the wilderness into a garden and tamed any vestiges of savagery. In this interpretation, then, Turner foreshadowed his British contemporary, Kipling, by six years – the "White Man's Burden" was published in 1899 – and the Spanish American War by just 3 years.

continued rise of nationalism between World War I and World War II, Turner, while not rejecting wholesale the Frontier Thesis, placed greater emphasis on the importance of regionalism in American history.[38]

In the years that followed World War II, Turner's theses – both Frontier and Sectional – were undermined by new interpretations influenced by the Cold War. New consensus interpretations entered the field, and the American West as a distinct region declined in prominence in the scholarly literature. Henry Nash Smith argued, in *Virgin Land: The American West as Symbol and Myth*, that the popular characterization of the West, as found in dime store novels as well as in Turner's Frontier Thesis, served to create an "American" identity based largely on myths, such as heroic frontiersmen, rugged individualism, hard-working yeomen farmers, and self-determination. Smith undermined Turner by revealing these conceptions as largely legend, not fact.[39] A more recent exploration of the use of myth to construct an identity in the West is found in Phoebe Kropp's *California Vieja*, in which the identity constructed is not rugged cowboys and pioneers, but Spanish colonialism.[40] The notion, though, that the West might be a place where an "American" national identity could be forged has basis in fact. As I will discuss in detail in Part II, western territories provided legal elites an opportunity to construct a federal, "American"

[38] *See, e.g.*, Frederick Jackson Turner, *The United States, 1830-1850: the Nation and its Sections* (New York: Henry Holt Co., 1935). *See also* Frederick Jackson Turner, "The Significance of Section in American History," (1925) ed., Martin Ridge (Albuquerque: University of New Mexico Press, 1993). Patricia Limerick argues that Turner failed to explicitly revise his Frontier Thesis. *See* Patricia Limerick, "Turnerians All: The Dream of a Helpful History in an Intelligible World," in *Something in the Soil: Legacies and Reckonings in the New West* (New York: Norton, 2000) pp. 141-165. Turner may not have seen a contradiction between his sectional and frontier theses. However, by the 1930s he implicitly demoted, even if he did not outright reject, the importance of the frontier.

[39] *See* Henry Nash Smith, *Virgin Land: The American West as Symbol and Myth* (Cambridge, Mass: Harvard University Press, 1950).

[40] *See* Phoebe Kropp, *California Vieja: Culture and Memory in a Modern American Place* (Berkeley: University of California Press, 2006).

common law in areas that struck at the heart of identity, such as marriage and early childhood education.

Although the scholarly pursuit of the American West was relatively dormant during the 1950, 60s and 70s, the West gained prominence in the popular imagination. John Wayne, John Ford and Louis L'Amour enjoyed the pinnacles of their success during this time. It was not until the waning moments of the Cold War that the West re-emerged, with vigor, in the academy.

By the time scholars of "New Western History" began to reinvigorate the field of the American West in the mid 1980s, Frederick Jackson Turner had been dead for over 50 years and his seminal essay, "The Significance of the Frontier in American History" had been in print for almost 100 years.[41] The Frontier Thesis had been thoroughly prodded, poked, and branded by the 1960s. Turner himself had taken part in the re-interpretation, if not the wholesale burying, of the Frontier Thesis when he published "The Significance of Sections in American History" in 1925.[42] Yet the New Western historians resurrected Turner in order to kill him again.

Patricia Limerick published *Legacy of Conquest: The Unbroken Past of the American West* in 1987.[43] There, she argued for at least two important reorientations in American Western historiography: (1) that the Frontier is an unworkable and improper tool for understanding the history of the American West. In its place, she proposed a framework of Conquest; and (2) that the history of the American West is better understood in terms of continuity than of change.[44] For

[41] Turner, "The Significance of the Frontier," *supra* note 36.

[42] Turner, "The Significance of Section in American History," *supra* note 38.

[43] Patricia Limerick, *Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton and Co., 1987). Limerick is the dean, self-proclaimed to some extent, of the New Western History School of thought. Her goal since graduate school has been to utterly dismantle and destroy Turner's Frontier Thesis and she has declared mission accomplished. *See* Patricia Limerick, "What on Earth is the New Western History?" in Patricia Limerick, Clyde Milner, and Charles Rankin, eds., *Trails Toward a New Western History* (Lawrence: University Press of Kansas, 1991), p. 88

[44] "Frontier, then, is an unsubtle concept in a subtle world …. Reorganized, the history of the West is a study of a place undergoing conquest and never fully escaping its consequences." Limerick, *Legacy of*

Limerick, the West is a distinct geographical region – essentially everything west of the Mississippi on the American Continent, though she declines to specify some of its borders.[45] By isolating the land, she seeks to give greater prominence to its occupants and their interactions. Also by isolating the land, she sought to reestablish "the West" as an historical field worthy of scholarly investigation in a way that is distinct from broader American history.[46]

Conquest, *supra* note 43, at 25-26. In making these arguments, she seeks to apply and synthesize the many theoretical approaches that had been in operation in other fields of history since the 1960s, by giving voice to minorities and women who had been pushed to the fringe by Turner, and by giving voice also to the environment.

[45] Modern historians of the West as a "place" are engaged in an endeavor that is anything but simple. Building off the work of earlier historians, like James Malin and Earl Pomeroy, who conceptualized the West as a region, these modern scholars have undertaken to describe the dynamic and multifaceted western landscapes. For them, the West is indeed a place (or many places) with identifiable contours but, more importantly, their West is not and probably never has been virgin land; rather, it has been constructed, sometime deliberately and sometimes not so deliberately. *See* James Malin, *The Grassland of North America* (Lawrence: University of Kansas Press, 1947); Earl Pomeroy, *The Pacific Slope* (New York: Alfred A Knopf, 1965). Perhaps the most erudite distillation of the West as a set of different kinds of places was that offered by David Emmons in an article from 1994 – "Constructed Province." Emmons identified 8 overlapping sub-categories or sub-regions of the West: (1) the corn belt west; (2) the wheat belt west; (3) the hydraulic west; (4) the cattle and sheep west; (5) the urban west; (6) the corporate and extractive resource west; (7) the wage workers' frontier; and (8) the Native American west. By describing these different categories, Emmons did not seek to provide specific boundaries for each. Rather, Emmons' article is a clever way to show how each of these "wests" was a deliberate construct, designed by various groups at various times. For Emmons, the construction of the West was "as massive an undertaking as … reconstruction of the South had been." David Emmons, "Constructed Province: History and the Making of the Last American West," *Western Historical Quarterly*, 25 (Winter 1994).

Michael Steiner and David Wrobel also explored the notion of sub-regional identities in "Many Wests: Discovering a Dynamic Western Regionalism." Wrobel and Steiner identified various, different components of the West. However, whereas Emmons' sub-regions tended to rise and fall over time, Wrobel and Steiner identified geographical regional loyalty and argued that such regions are defined by both insiders and outsiders. According to Wrobel and Steiner, regionalism, even sub-regionalism of the West, is a "source for good" because the United States needs "sub-national place[s] of belonging, and regional loyalty often emerges as a conscious response to the emptiness of mass culture and the nation-state." Wrobel and Steiner thus described a complex, almost psychological relationship between sub-region, region and nation in which individual and communal identity draws from all three. In large nation-states, regional loyalty fills a void left by the larger, distant national associations. Michael Steiner and David Wrobel, "Many Wests: Discovering a Dynamic Western Regionalism," in Wrobel and Steiner, eds. *Many Wests: Place, Culture, and Regional Identity* (Lawrence: University of Kansas, 1997), 9.

[46] Limerick may have done more to bolster Turner, rather than to defeat him. Conquest is the flip side of the Frontier. Whereas Turner viewed westward expansion through the sympathetic eyes of the white pioneer or rancher, Limerick views westward expansion through the eyes of the conquered minority. In both cases, they are interpreting the American West in terms of expansion. Under either rubric, the history of the American West did not begin until the white man arrived.

Richard White has noted strong dichotomies between "old school" historians of the West and the "new school." For example, whereas older historians saw untouched nature, new historians take note of the "trash" – the environmental impact of westward expansion and development. Most importantly for White, though, older historians sought to discover the "essence" of the West. Was it the frontier, the plains or the aridity? Was it the myth and symbols? White argues New West historians focus more on relationships – the relationships among various groups of people and their relationship to the land.[47]

After New Western Historians appeared on the scene in the late eighties and early nineties, the historiography of the American West burst into many new directions. Liberated, so it seemed, from a Turnerian mindset, historians were free to pursue alternate theoretical approaches, ranging

[47] *See* Richard White, "Trashing the Trails," in Limerick, Milner, and Rankin, eds. *Trails: Toward a New Western History* (Lawrence: University Press of Kansas, 1991) 26-39

from gender[48] to race,[49] from environmental[50] to urban history[51] and even explorations of historical consciousness in the West.[52]

The political history of the American West, to which this project relates, rests on the shoulders of two scholars, Earl Pomeroy and Howard Lamar. Earl Pomeroy wrote *The Territories and the*

[48] *See, e.g.*, Katherine Morrissey, "Engendering the West," in *Under and Open Sky: Rethinking America's Western Past*, edited by William Cronon, George Miles, Jay Gitlin (New York: W.W. Norton & Co., 1992); and Albert Hurtado, *Sex, Gender and Culture in Old California* (Albuquerque: University of New Mexico Press, 1999). Preceding the bulk of "New West" historians, John Mack Faragher brought women more fully into the narrative. *See* John Mack Faragher, *Women and Men on the Overland Trail* (New Haven: Yale University Press, 1979).

[49] *See, e.g.*, William Deverell, *Whitewash Adobe: the Rise of Los Angeles and the Remaking of its Mexican Past* (Berkeley: University of California Press, 2004); and Albert Broussard, *Black San Francisco: the Struggle for Racial Equality in the West* (Lawrence: University Press of Kansas, 1993).

[50] *See, e.g.*, Richard White, "Trashing the Trails," *supra* note 47; Donald Worster, *Rivers of Empire: Nature, Aridity, and the Growth of the American West* (New York: Oxford University Press, 1985); and Richard White, *The Organic Machine: The Remaking of the Columbia River* (New York: Hill and Wang, 1995).

[51] Some historians have placed cities as the central and organizing component of western history and argue that ignoring cities will lead to severely flawed understandings of the West. In *Nature's Metropolis*, William Cronon described his gradual awakening to the idea that the urban landscape he observed when visiting Chicago as a youth was interconnected with and just as much a part of the panoply of the West as the more rural area where he lived in Wisconsin. Cronon used *Nature's Metropolis* to further elaborate on his theories that cities cannot be surgically removed from the story of the West. Indeed, cities play an arguably more important role in the development of the region because they served as loci for decision-making and commerce. Chicago, in that sense, was just as much a part of the nature of the West as farms and ranches. Cronon also notes, almost parenthetically, that it is a fallacy to think of the rural areas of the West as "virgin" or unconstructed. He argues most of the West has been touched and modified by man's intervening hand. *See* William Cronon, *Nature's Metropolis: Chicago and the Great West* (New York: W.W. Norton and Co., 1991).

One of the most thorough treatments of the metropolitan West is found in Eugene Moehring's *Urbanism and Empire in the Far West, 1840-1890*. There, Moehring argued that the settlement of the West is the story of settlement in urban areas containing rudimentary social safety nets and communal values. According to Moehring, San Francisco, Salt Lake City, Denver and the smaller cities of the Northwest were central forces in creating a western culture and environment in the nineteenth century. Property was owned and controlled principally by those living in and near cities. Moehring described the development of the West as the continuation of the story of previous developing civilizations, not only in the eastern United States but also in Europe and even ancient Greece and Rome. In this way, Moehring contributed to the historiography by de-emphasizing the uniqueness of the West and portraying its history as yet one more iteration of a phenomenon that has occurred many times before. Eugene Moehring, *Urbanism and Empire in the Far West, 1840-1890* (Reno and Las Vegas: University of Nevada Press, 2004).

[52] Ray Allen Billington and Martin Ridge, *Westward Expansion: A History of the American Frontier* (Albuquerque: University of New Mexico Press, 2001).

United States, 1861-1890 in 1947, eighteen years before his best known work, *The Pacific Slope*.[53] In *Territories,* Pomeroy undertook a thorough examination of the political relationship between the federal government and territorial governments. He described the process of granting and obtaining territorial status. He also outlined the practice of making political appointments to territorial office, although he did not examine the implications of a politicized territorial judiciary. I attempt to fill that gap herein, in Part II.

Lamar, in *The Far Southwest*, examined the underlying political debates that had to be resolved when the "four corners" states applied for statehood.[54] My work will expand upon his by asking what those statehood debates reveal about the participants' understanding of federalism. Statehood debates are, in some ways, the mirror image of the ratifying convention debates. Whereas the Framers and ratifiers debated how much and what kind of power the existing states would cede to the new federal government, statehood debates often centered around what kind of powers Congress would cede to newly formed states.

Historians of the American West have described western space in a variety of ways – as space of developing democracy, space of conquest, space of borderlands, arid space, rugged space, mythical space. How do I define the "West" in this project? The West is a legal space where the "hazily defined and capacious" concept of federalism received fuller form and clearer definition. It is the place in which the United States confined Native Americans and curtailed tribal law. It is the place in which politically accountable territorial judges attempted to construct an American federal common law. It is the place in which Congress attempted, with varying degrees of success,

[53] Earl Pomeroy, *The Territories and the United States, 1861-1890* (Seattle: University of Washington Press, 1947); *The Pacific Slope: A History of California, Oregon, Washington, Idaho, Utah and Nevada* (Reno, University of Nevada Press, 1965).

[54] Howard Lamar, *The Far Southwest 1846-1912: A Territorial History* (Albuquerque: University of New Mexico Press, 1966).

to homogenize marital law, education law, and the rules governing democratic reform. It is a place in which the national government created and enforced laws governing the extraction and use of natural resources. The American West of the late nineteenth century was a nationalizing space. This study examines ways in which the West became a space for experimentation with nationalization. The construction of these unique legal spaces defined the American West and, in turn, redefined American Federalism.

PART I:

E PLURIBUS, DUAS – THE CURTAILMENT OF NATIVE AMERICAN TRIBAL SOVEREIGNTY

Introduction

In 1810, the Wyandot Indians of Ohio executed one of their own tribal leaders, Leatherlips, after tribal members accused him of witchcraft. Several members of the tribe claimed to have suffered from his sorcery. However, the accusations of witchcraft were largely a pretext. Many members of his tribe, like many other Native Americans in the early nineteenth century, were displeased with any Indian who cooperated or encouraged cooperation with Anglo-American settlers. Commerce with white people – particularly the sale of native land – threatened the integrity and existence of the tribe. The same year that the Wyandot executed Leatherlips, the Shawnee leader Tecumseh met with William Henry Harrison to repudiate a treaty signed by other tribal leaders. Tecumseh publicly berated those who signed the treaty on behalf of the Indian confederation.[55] In the disruptive world of changing political, cultural, and economic landscapes, these new crimes against the tribe were ill-defined. Therefore, tribal leaders searched for the appropriate punishment, and then charged a corresponding crime – in the case of Leatherlips,

[55] *See* Robert Yagelski, "A Rhetoric of Contrast: Tecumseh and the Native American Confederacy," *Rhetoric Review*, Vol. 14, No. 1 (1995), pp., 64-77.

witchcraft.[56] On the day of his execution, white settlers pleaded with tribal leaders for Leatherlips' life, to no avail.[57]

Compare this plea for mercy in 1810 with a similar one at the end of the nineteenth century. Johnson Sides, a Paiute Chief, appeared before the Nevada Board of Pardons in Carson City in July 1892. The previous year, the state of Nevada convicted three members of his tribe for murder after they admitted to killing a member of their own tribe – an Indian witch doctor.[58] Nevada sentenced them to ten years in the State prison. Sides appeared on their behalf to ask for clemency. When the Board of Pardons asked Sides why the Indians killed the witch doctor, he replied, "For the same reason you folks used to kill 'em." The editors of the White Pine News wrote, "Sides no doubt had been reading history and remembered that it was not very long ago when our ancestors killed and burned witches at Salem, and they claimed to be a good deal more civilized than the Indians are now."[59] The Board of Pardons commuted their sentences to time served.[60]

[56] Colin Calloway draws a connection between treaty making and witchcraft. The treaty-making process initially followed native customs and protocols. As the power dynamics changed, however, tribes were coerced, manipulated and misled into signing treaties that led to loss of land and culture. Some tribes referred to treaties as "pen and ink witchcraft." *See* Colin Calloway, *Pen and Ink Witchcraft: Treaties and Treaty-making in American Indian History* (New York: Oxford University Press, 2013).

[57] Alfred A. Cave, "The Failure of a Shawnee Prophet's Witch Hunt," *Ethnohistory*, Vol. 42, No. 3 (1995), 445-475; *see also* William Henry Carpenter, *The History of Ohio: From Its Earliest Settlement to the Present Time* (Philadelphia: Lippincott, Grambo and Co., 1854), 209.

[58] "Indian Witch Killers Sentenced." *White Pine News*, July 27, 1891.

[59] "The Indians' Reason." *White Pine News*, July 23, 1892.

[60] "How an Indian Advocate Saved his Client," *Washington Post*, July 16, 1892, 7.

Figure 1 – Profile of Johnson Sides in the San Francisco Call

The two vignettes are interesting in and of themselves, but especially when compared with each other to assess the change in the relative positions of power in each story. In the case of Leatherlips at the beginning of the nineteenth century, the sovereign tribunal holding the power of life and death consisted of Native American tribal members, and those reduced to begging for mercy on behalf of Leatherlips were neighboring Anglo-American settlers. In the Southern Paiute case near the end of the century, however, the sovereign tribunal consisted of Anglo-American judges installed in the state of Nevada, and the person doing the pleading, successful as it turned out, on behalf of the defendant was an elderly Native American. At the beginning of the century in Ohio, Anglo-Americans did not question the authority of a tribe to execute one of its own. By the end of the century, the authority of a tribe to execute their own members for internal crimes had been greatly diminished, near the point of extinction. That sovereign power was then held by

a state of the United States. The story of this change over time is the story of how American Federalism changed as the United States expanded its international borders and defined its internal ones in the latter half of the nineteenth century. The process of subdividing the continent into sovereign jurisdictions entailed a re-evaluation of notions of citizenship and sovereignty. The nationalizing of American law homogenization of citizenship necessitated the elimination of witch killings within the nation's borders. The United States for the first time arrogated tribal authority to police crimes against the tribes and their members.[61]

[61] Historical and anthropological investigation by Anglo-American scholars into Native Americans began in the late-nineteenth century, as the United States' efforts to relocate and assimilate native populations was in full swing. Early efforts, then, to describe Indian tribes tended to portray them as savage, and barriers to advanced civilization. *See, e.g.*, Lewis Henry Morgan, *Ancient Society, or Research in the Lines of Human Progress from Savagery through Barbarism to Civilization* (New York: Henry Holt and Company, 1877). This theory was also reflected in Frederick Jackson Turner's Frontier Thesis. *See* Turner, "The Significance of the Frontier," *supra* note 36. Turner's suggestion that the frontier was closed, combined with the Progressive impulse toward assimilation, caused some scholars to predict the extinction of Indian tribes and propelled them to catalogue Native American culture in advance of their expected disappearance, in a process that came to be known as "salvage ethnography." *See, e.g.*, Franz Boas, *Indian Myths and Legends from the North Pacific Coast of America* (Vancouver: Talon Books, 2002) (translation of 1895 German edition); James Mooney, *Myths of the Cherokee* (Washington, D.C.: U.S. Bureau of Ethnography, 1900); Alfred Kroeber, *Indian Myths of South Central California* (Berkeley: University of California, 1907).

The next major school of historiography to develop was one that tended to portray Native Americans as inactive victims. *See* Angie Debo, *And Still the Waters Run: the Betrayal of the Five Civilized Tribes* (Princeton: Princeton University Press, 1940); Alvin Josephy, *The Nez Perce and the Opening of the West* (New Haven: Yale University Press, 1965); Donald Berthrong, *The Cheyenne and the Arapaho Ordeal: Reservation and Agency Life in the Indian Territory, 1875-1907* (Norman: University of Oklahoma Press, 1976). A competing interpretive school that included not only victimization, but also resistance, developed in the late 1960s and early 1970s. *See* Vine Deloria, *Custer Died for your Sins: An Indian Manifesto* (New York: Macmillan, 1969); and Dee Brown, *Bury my Heart at Wounded Knee* (New York: Henry Holt, 1971).

In the 1980s, a new generation of scholars arose who began to depict Native Americans as active agents. This "New Indian History" showed complexity, agency, and agenda-driven tribes. *See* Neal Salisbury, *Manitou and Providence: Indians, Europeans, and the Making of New England, 1500-1643* (New York: Oxford University Press, 1982); Richard White, *The Roots of Dependency: Subsistence, Environment, and Social Change Among the Choctaws, Pawnees, and Navajos* (Lincoln: University of Nebraska Press, 1983); R. David Edmunds, *Tecumseh and the Quest for Indian Leadership* (Boston: Little Brown, 1984); James H. Merrell, *The Indians' New World: Catawbas and their Neighbors from European Contact through Removal* (Chapel Hill: University of North Carolina Press, 1989); James Axtell, *The Invasion Within: The Context of Cultures in Colonial North America* (New York: Oxford University Press, 1985); Gregory E. Dowd, *A Spirited Resistance: the North American Indian Struggle for Unity, 1745-1815* (Baltimore: Johns Hopkins University Press, 1992); Colin Calloway, *New Worlds for All: Indians, Europeans and the Remaking of Early America* (Baltimore: Johns Hopkins University Press, 1997); Jean M. O'Brien, *Dispossession by*

What had happened between the time the Wyandot executed Leatherlips as a witch in 1810 as white settlers stood by helplessly and 1892, when Johnson Sides pleaded before an Anglo court of criminal justice on behalf of the witch-killers of his tribe? Briefly, the United States incrementally but persistently de-recognized and de-valued tribal sovereignty. At the Founding of the Republic, the United States largely considered Native tribes to be foreign entities. The

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Degrees: Indian Land and Identity in Natick, Massachusetts, 1650-1790 (New York: Cambridge University Press, 1997).

The field of United States' policy toward Native American tribes was initially dominated by Francis Paul Prucha. *See American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman: University of Oklahoma Press, 1976) and *The Great Father: the United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1984). Prucha depicted the United States' policy makers as paternalistic, and failed to include native voices in the narrative. More complicated histories of U.S. Indian policy followed Prucha, especially of the Allotment and Assimilation Eras. These histories analyzed the racial aspects of U.S. policies and examined whether they were successful on their own terms or not. *See* Frederick Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (Lincoln: University of Nebraska Press, 1984) and James McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington: Indiana University Press, 1991).

Subfields of the New Indian History emerged in the 1990s. Historians examined the role of women in native societies. *See, e.g.*, Theda Perdue, *Cherokee Women: Gender and Culture Change, 1700*-1835 (Lincoln: University of Nebraska Press, 1998); Margaret Jacobs, *Engendered Encounters: Feminism and Pueblo Cultures, 1879-1934* (Lincoln: University of Nebraska Press, 1999); and Katherine Osborne, *Southern Ute Women: Autonomy and Assimilation on the Reservation, 1887-1934* (Albuquerque: University of New Mexico Press, 1998). The borderlands history that emerged in the 1980s included some works specific to Native American history. *See, e.g.,* Robert Utley, *The Indian Frontier of the American West, 1846-1890* (Albuquerque, University of New Mexico Press, 1984) and Albert Hurtado, *Indian Survival on the California Frontier* (New Haven: Yale University Press, 1988).

In the 1980s and 1990s, scholars paid more attention to Native American history in the twentieth century. *See, e.g.*, Frederick Hoxie, *Parading Through History: the Making of the Crow Nation, 1805-1935* (New York: Cambridge University Press, 1995); Robert Trennert, *The Phoenix Indian School: Forced Assimilation in Arizona, 1891-1935* (Norman: University of Oklahoma Press, 1988); Devon Mihesuah, *Cultivating the Rosebuds: the Education of Women at the Cherokee Female Seminary, 1851-1909* (Urbana: University of Illinois Press, 1993); Brenda Child, *Boarding School Seasons: American Indian Families, 1900-1940* (Lincoln: University of Nebraska Press, 1998); and Graham Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45* (Lincoln: University of Nebraska Press, 1980). For a more native-centered view on the Indian Reorganization Act, *see* Thomas Biolsi, *Organizing the Lakota: the Political Economy of the New Deal on the Pine Ridge and Rosebud Reservations* (Tucson: University of Arizona Press, 1992). For a study of Termination Era policies, *see* Donald Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1961* (Albuquerque, University of New Mexico Press, 1986).

"Post-New Indian History" works address historical memory, cultural authenticity, and sense of place among the tribes. *See, e.g.,* Ian W. Record, *Big Sycamore Stands Alone: the Western Apaches, Aravaipa, and the Struggle for Place* (Norman: University of Oklahoma Press, 2008); Paige Raibmon, *Authentic Indians: Episodes of Encounter from the late Nineteenth Century Northwest Coast* (Durham: Duke University, 2005).

Constitution excluded Indians from the census (and representation) unless they paid taxes. Further, power granted to Congress to regulate interstate commerce and foreign trade also permitted Congress to regulate Indian commerce. The implication of these clauses was that Native groups fell outside the purview of full Anglo-American sovereignty, state or national, even if the tribes resided within the territorial borders of the United States. The Constitution thus recognized plural sovereigns beyond state and national authorities. During the early to mid-nineteenth century, the United States increasingly viewed Native tribes not as "foreign" entities, but as "domestic dependent nations" – at least in theory. As such, they were left outside the developing Anglo legal system, both in its civil and criminal divisions, but fell under the sovereign umbrella of the national government. For example, the United States refused to recognize the validity of any treaties Native Americans enacted with foreign powers. The drafters of the Fourteenth Amendment included a clause to protect the sovereign status of tribes. However, during the settlement of the West that followed the Civil War, the United States came to treat native groups no longer as "nations" at all, but as full "domestics" in need of rearing and civilizing. Using this latter characterization, Eastern progressive reformers first confined Native Americans to reservations and later brought them within the American legal system where they became the object of a tug of war between the national and local governments. In the late nineteenth century, legal and political elites began to ignore Tribal sovereign systems of civil and criminal justice.

The United States Supreme Court articulated this new relationship between the United States and Native American Tribes in 1886 in the case of *United States v. Kagama*.[62] In that case, a new legal theory entered the constitutional canon – one that posited that in the United States there could only be two sovereign entities – state governments and the national government. Out of the many

[62] *United States v. Kagama*, 118 U.S. 375 (1886).

sovereigns that initially existed, including Indian tribes, there came to be but two, at least in the constitutional theory adopted by the Supreme Court. *Kagama* reputed a previous constitutional framework in which tribes had sovereignty. Although *Kagama* has never garnered full acceptance by the political branches of the federal government, the states, and the tribes – it nevertheless marked a point of departure in American federalism. It denoted the shift from a tri-partite to binary federalism.

The stories of Leatherlips and Johnson Sides are interesting for one other reason – the role of witches and witchcraft therein. For much of the nineteenth century, Anglo-Americans did not take an interest in policing the internal crimes of the tribes. They mostly left the regulation of Indian-on-Indian crime to Indians. Only when a white person was involved, as either a victim or a suspect, did Anglo communities assert an interest in the criminal process. The Bureau of Indian Affairs' early efforts to extend Anglo-American justice over Native American crime was met mostly with resistance or indifference by Anglo-Americans.[63]

However, one particular specie of Indian-on-Indian crime attracted the attention of Christian missionaries and Progressive Reformers – the killing of accused witches. In times of great social upheaval, accusations of witchcraft often rise.[64] The social unrest among Native Americans in the North American West during westward expansion caused an increase in witch hunting and killing. Western newspapers from the 1870s to the 1910s are replete with accounts of tribes killing their own members who they accused of some form of witchcraft. The reports often recounted sensationalized details from the executions. These stories were picked up by the eastern press and

[63] Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal law, and United States law in the Nineteenth Century* (New York: Cambridge University Press, 1994), 115.

[64] *See, e.g.*, Jean Van Delinder, "'Wayward Indians:' The Social Construction of Native American Witchcraft," *Quarterly Journal of Ideology*, Vol. 26, No. 4 (2004); Maia Green, "Witchcraft Suppression Practices and Movements: Public Politics and the Logic of Purification," *Comparative Studies in Society and History*, Vol. 39, No. 2 (1997), pp. 319-345.

used to justify the extension of Anglo "civilized" justice into the "savage" practices of the tribes. Witch killings, then, were both a consequence of westward expansion and a cause of the extension of the Anglo criminal justice into tribal affairs.

In this Part, I explore the process by which the United States altered its institutional engagement with Native Americans and re-conceptualized federalism from an idea of plural sovereigns to a binary structure. That process involved the extension of Anglo-American criminal justice systems to Indian-on-Indian crime. Chapter I is a recounting of the United States' institutional engagement with Native American Tribes from the founding until the creation of the Department of the Interior in 1849. In Chapter II, I will discuss why Euro-American settlers in the West, though willing to let Native American tribes govern themselves regarding "ordinary crime," sought to exercise jurisdiction over Indians for the "extraordinary" crime of witch killing. Finally, in Chapter III, I will trace how legal and political elites articulated a new political and legal theory of American federalism in the late nineteenth century that accounted for the United States' changing relationship with tribes in the West.

Chapter 1:

Early Anglo-American Institutional Engagement with Native Americans

Colonial Period and Articles of Confederation

Prior to the French and Indian War, English colonial governments recognized the sovereignty of Native American tribes and negotiated directly with them on a colony to nation basis.[65] Despite their common allegiance to the Crown, colonial officials were free to formulate policies for their colonies that might differ from one another.[66] For example, the governments of Virginia, Maryland and Pennsylvania entered into the Treaty of Lancaster with the Haudenosaunee Confederacy in 1744.[67] New York was not party to the Treaty of Lancaster, even though it had been party to the Treaty of Albany in 1722 with the same tribal nations.[68] With continuing land disputes between Native Americans and Anglo settlers following the Treaty of Lancaster, Virginia re-negotiated with the Six Nations, and concluded the Treaty of Logstown in 1752, but without representation from previous participants Maryland and Pennsylvania.[69] The subsequent unification of the colonies tends to color our present view of them; we assume greater cultural and diplomatic unity than there was, including in their approaches to Native American relations.[70] William Penn, for example, adopted a "softer" approach, at least in tone, in Pennsylvania's

[65] *See* Eric Foner, *Give Me Liberty* (New York: W.W. Norton Company 3d ed., 2012), 55.

[66] As Mary Sarah Bilder has shown, the British Empire's approach to colonial law allowed for legal *divergence* in the colonies from standards in the motherland, but not *repugnance*. This "play in the joints" allowed colonies, including those in North America, to develop their own domestic as well as "foreign" policies pertaining to North American Indians. *See* Bilder, *Transatlantic Constitution*, *supra* note 28.

[67] Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from Its Beginnings to the Lancaster Treaty of 1744* (New York: W.W. Norton Company, 1984).

[68] Jayme A. Sokolow, *The Great Encounter: Native Peoples and European Settlers in the Americas* (New York: Routledge, 2003), 206.

[69] *Ibid*.

[70] On colonial disunity and weakness, and contemporary plans to overcome it, *see* Jack P. Greene, "Martin Bladen's Blueprint for a Colonial Union," *William and Mary Quarterly*, Vol. 17, No. 4 (1960), 516-530.

treatment of Native Americans than did Virginia.[71] An early attempt at colonial unity in Indian policy, formulated as part of the Albany plan, was thwarted by the Crown and colonial legislatures.[72]

Global conflict prompted a British reevaluation of the Empire's institutional engagement with North American Indians. During the French and Indian War, the Crown sought to create a unified Indian policy by creating two departments of Indian affairs in North America, one for the northern colonies and one for the southern colonies, and appointed commissioners for each. The commissioners reported directly to superiors in London.[73] The Crown thus removed from the colonies the power to negotiate with native groups and centralized that power in London. After the war, the Crown formulated a unitary policy toward Native Americans; such singularity was expressed in British Peace Treaties with the Iroquois in 1768. The Crown negotiated these treaties with the tribes on a nation-to-nation basis.[74]

The Crown also spoke with singular authority when it issued the Proclamation of 1763, prohibiting colonial settlement beyond the Appalachians as an effort to avoid conflict with Native Americans. The Proclamation of 1763 was highly unpopular among British colonials, and sowed the seeds of revolution that culminated 12 years later. Prior to the Declaration of Independence, but after fighting between British forces and revolutionaries had already begun, the Continental Congress created three geographical departments for Indian Affairs, patterned after the Crown's

[71] *See, e.g.*, J.W. Frost, "'Wear the Sword as Long as thou Canst:' William Penn in Myth and History," *Explorations in Early American Culture*, vol. 4, (2000) 13-45, *see* particularly 23-24. *But, cf.*, Daniel Richter, *Trade, Land, Power: The Struggle for Eastern North America* (Philadelphia: University of Pennsylvania Press, 2013) for an argument that Penn's approach to land issues was in reality in line with other colonies.

[72] *See* H.W. Brands, *The First American: The Life and Times of Benjamin Franklin* (New York: Random House, 2002).

[73] *See* Wilcomb E. Washburn, *The Indian in America* (New York: Harper and Row, 1975), 95.

[74] *Ibid*. at 147-48, 213.

system, and appointed commissioners for each department including, among others, Benjamin Franklin and Patrick Henry.[75] Thus, Congress attempted to control Indian policy at the outset of independence, and attempted to formulate Indian policy in a national, unified way, instead of on a state-by-state basis. The commissioners' immediate duty was to negotiate with various Indian tribes to procure their neutrality during the Revolutionary War.[76] As the war evolved, so did Congressional policy toward the Tribes; rather than request their neutrality, Congress requested their military assistance.

Congressional primacy in dealing with Native Tribes was born of military necessity. However, as the independent but confederated states began to negotiate control over Indian affairs, Congress and the states saw the need for compromise. During the debates for the Articles of Confederation, there was "vigorous" discussion over appropriate handling of Indian affairs.[77] Many states did not want to give up the authority they had enjoyed as colonies prior to 1763. Therefore, the Articles of Confederation granted Congress qualified power – the power of regulating the "trade and managing all affairs with the Indians," provided that such authority did not infringe on a state's right to legislate "within its own limits."[78] Further, Congress could not exercise authority over Indians who were already "members" of the States.[79] The complex relationship among the national government, the states and the tribes began to emerge.

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[75] James H. O'Donnell III, *Southern Indians in the American Revolution* (Knoxville: University of Tennessee Press, 1973), 23.

[76] Congress even drafted a speech for the Commissioners: "This is a family quarrel between us and Old England. You Indians are not concerned in it. We don't wish you to take up the hatchet against the king's troops. We desire you to remain at home, and not join either side, but keep the hatchet buried deep." Quoted in O'Donnell, *Southern Indians*, *supra* note 75, at 23.

[77] Gregory Ablavsky, "Beyond the Indian Commerce Clause," 124 *Yale L. J.* 1012 (2015), 1021.

[78] *See* ARTICLES OF CONFEDERATION OF 1781, art. IX.

[79] *See* Greg Ablavsky, "Beyond the Indian Commerce Clause," 124 *Yale Law. J.* 1012, 1022 (2015).

Following the War, Congress maintained the offices of Superintendents for Indian Affairs within the War Department, and continued to negotiate with the Tribes through a treaty-making process.[80] Congress instructed the Superintendents of Indian Affairs to "maintain a constant friendly correspondence with the chiefs of the several nations within [their] district" and hold several "general and particular treaties from time to time."[81] The Northwest Ordinance, passed by the Continental Congress in 1787 while the Constitutional Convention was meeting, and reauthorized by the first Congress in 1789, likewise enshrined high ideals for the treatment of Native American Tribes into law:

> The 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.[82]

Despite the fact that the new nation consistently acted contrary to the ideals of the Northwest Ordinance, the notion that the United States should interact with the tribes as sovereign entities was nevertheless written into American law from its Founding.

Constitutional Recognition of Tribes

Absent, of course, from the Constitutional Convention, were representatives of Tribes and Nations. This is not to say Indians were not on the minds of the Framers. The Constitution of 1787 sought to address defects relating to the United States' relationship with native tribes under the Articles, including the perceived threat tribes posed to the United States militarily, as well as

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[80] *See* Carl Waldman, *Atlas of the North American Indian* (New York: InfoBase Rev. Ed. 2000), 236.

[81] "Instructions to the Superintendent of Indian Affairs for the Department," Documents from the Continental Congress and Constitutional Convention, Library of Congress, online catalogue at https://www.loc.gov/item/90898190/.

[82] Northwest Ordinance, Article III, 32 *Journals of the Continental Congress, 1774-1789*, Roscoe R. Hill, ed. (1936), 340-43.

the lack of coherence and unity in negotiating with tribes.[83] The Framers of the Constitution removed many of the qualifications placed upon Congress in the Articles of Confederation that restricted its authority to interact with tribes.[84]

The Constitution of 1787 explicitly mentions "Indians" or "Indian Tribes" in two places. First, Article I, Section 2, excludes "Indians not taxed" from the population when counting persons for purposes of determining representation.[85] The second, in Article I, Section 8 grants to Congress the power to regulate Commerce "with the Indian Tribes."[86] The "Indians not taxed" clause is a constitutional acknowledgment that Native Americans owed allegiance to a sovereign other than the United States and its several states. The Indian Commerce Clause is a more explicit constitutional acknowledgment of Tribal entities. As we shall see, the executive treaty-making power in Article II, Section 2, though not explicitly mentioning Tribal Nations, also played an important role in Federal – Tribal Relations from the Founding until 1871.

Congress's Commerce Clause power relates to three entities – foreign nations, the states, and Indian Tribes. While Congress has power to regulate commerce "among" the States, it has power to regulate Commerce "with" foreign nations and Indian Tribes. Read together, this tri-partite Commerce clause suggests two things: (1) that the three entities mentioned had, in the eyes of delegates to the Constitutional Convention, degrees of sovereignty; and (2) that Indian Tribes do not, according to the Constitution, square neatly with either foreign nations or states.[87]

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[83] *See* Gregory Ablavsky, "The Savage Constitution," 63 *Duke L. J.* 999 (2014).

[84] *See Ibid.*, at 1040-1044.

[85] U.S. CONST., art I, § 2. This phrase was repeated in the Fourteenth Amendment's Apportionment clause. *See* U.S. CONST., amend. XIV, § 2

[86] U.S. CONST., art. I, § 8.

[87] Alex Tallchief Skibine argues that even if the Constitution does not guarantee tribal sovereignty, it acknowledges it. *See* "Constitutionalism, Federal Common Law and the Inherent Powers of Indian Tribes," 39 *Am. Indian L. Rev*. (2014), 77-80 ("Although the sovereignty of Indian tribes may not be guaranteed or defined in the Constitution, this does not mean that the tribes have no constitutional status").

Native American Tribes and Nations have a unique, *sui generis* status in their relationships with the United States, not identical to foreign nations and not identical to states. Indeed, the tri-partite Commerce Clause suggests this difference in status.[88] Various United States Supreme Court decisions have described Native American tribes as "domestic dependent nations,"[89] "wards" of the United States,[90] "quasi-sovereign nations,"[91] and "unique aggregations possessing attributes of sovereignty over both their members and their territory."[92] The political branches, as will be discussed more fully herein, have adopted similar appellations for Indian Tribes.[93]

The Constitution created a framework for the United States' institutional engagement with Native American Tribes but, like so many other important constitutional questions, the Framers left the details of the exact nature of the relationship for subsequent generations to work out. Congress, the Executive, the Supreme Court and the states all would assert their own theories of tribal sovereignty in subsequent years.

Early Republic

The first United States Congress in 1789 placed the responsibility for Native American relations within the War Department, where it had resided under the Articles of Confederation.[94] In 1806, Congress created the Office of Indian Trade within the War Department, and charged it with maintaining a trading post network for commerce with Native Americans.[95] In 1824, without

[88] U.S. Const., art. I, § 8, cl 3 ("[The Congress shall power to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[89] *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831)

[90] *Ibid*.

[91] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 71 (1978).

[92] *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

[93] Although more work needs to be done to understand how contemporary Native Americans viewed the United States Constitution in 1787 and their place, if any, within the structure, a brief account can be found in Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (New York: Oxford University Press, 2009).

[94] *See* Waldman, *Atlas of the North American Indian*, 236.

[95] *Ibid*.

authorization from Congress, Secretary of War John Calhoun created the Bureau of Indian Affairs within his department.[96] Congress later formally established an office of Indian Affairs in 1832, which office remained located in the War Department until 1849 when Congress created the Department of the Interior.[97]

The Bureau of Indian Affairs would later take on a more important and outsized role in the formulation of Indian policy in the latter half of the nineteenth century, continuing well into the twentieth century. However, in the early Republic, Congress asserted primacy in the devising of Indian policy, and Executive interaction with Tribes occurred mainly outside the Bureau of Indian Affairs. Beginning with its first session, Congress repeatedly passed Indian Non-Intercourse Acts primarily aimed at codifying the inalienability of tribal lands and establishing federal primacy over the states in interacting with tribes. The Acts prevented the sale or grant of tribal lands to anyone without approval from the national government. Whereas early iterations of the law contained statutory expiration dates, the non-Intercourse Act of 1834 was permanent, and remains codified to this day.[98] The Acts were aimed, in part, to preserve tribal sovereignty by ensuring that tribal territory remained intact.[99] However, such acts were a two-edged sword for sovereignty because not only did they establish federal primacy over the states, they also established federal primacy over the tribes. In disallowing the private sale of traditional tribal lands, the federal government

[96] *See* Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (New York: Cambridge University Press, 2010), 78.

[97] *Ibid*. at 241, 247.

[98] *See* 25 U.S.C. § 177.

[99] George Washington told the Seneca after passage of the Non-Intercourse Act of 1790, "Here then is the security for the remainder of your lands…. The general government will never consent to your being defrauded. But it will protect you in all your just rights. *The Papers of George Washington*, Presidential Series, vol. 7, *1 December 1790–21 March 1791*, ed. Jack D. Warren, Jr. (Charlottesville: University Press of Virginia, 1998), pp. 146–150. "The Indian Non-Intercourse Act embodies the policy of the United States to acknowledge and guarantee the Indian tribes' right of occupancy of tribal lands and to prevent the tribes from disposing of their land improvidently." *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 296 F.Supp.2d 153 (Dist. Rhode Island 2003), affirmed in part, reversed in part by 407 F.3d 450, rehearing granted, vacated 415 F.3d 134, on rehearing 449 F.3d 16, certiorari denied 127 S.Ct. 673.

assumed the power to determine the boundaries of tribal lands. Thus Congress, at the Founding, simultaneously recognized and curtailed tribal sovereignty.

An early and important dispute among tribes, state governments and the federal governments resulted from contestations for land in Georgia. The Cherokee Nation by the 1820s had established a nation modeled after European and American governments. It had democratic institutions, including a principal chief and legislative council, as well as a court system. It had a capital city and a constitution.[100] Over time, Georgia came to view the Cherokee Nation and its associated sovereignty as a competing government. The discovery of gold on Cherokee land led Georgia and Congress to pass laws mandating the removal of the Cherokee from Georgia. Although the Supreme Court repeatedly emphasized theoretical sovereignty for Native tribes, the following decades saw the inability and/or unwillingness on the part of the political branches of the United States to protect Native sovereignty from state and settler encroachment.[101]

Despite the theoretical settlement at the Constitutional Convention by which Congress would exercise primacy in Indian commerce, states (especially Georgia) began in the 1820s to assert a prominent, even dominant, role over Indian affairs. Initially, Georgia and other southern states had developed an uneasy but tenable arrangement with Indian tribes. In *Settler Sovereignty*, Lisa Ford describes how Georgia, in the early nineteenth century until the 1820s maintained a complex system of legal pluralism, in which native tribes retained sovereignty and jurisdiction over intra- and inter-tribal disputes. However, for matters involving white settlers, whether occurring on

[100] *See* Brian Wildenthal, *Native American Sovereignty on Trial* (Santa Barbara, CA: ABL-CLIO, 2003), 38.

[101] Sidney Harring, in *Crow Dog's Case*, traces the complex relationship among the federal government, state governments, Native American tribes and local settler populations in the nineteenth century, who all asserted different versions of native sovereignty. Adding to the complexity, the United States Supreme Court sometimes offered interpretations of native sovereignty at odds with Congress, and the executive branch often failed to enforce either Congressional treaties or Supreme Court mandates because of inability, unwillingness, or both. Sidney L. Harring, *Crow Dog's Case*, *supra* note 63.

tribal land or not, Georgia officials would haul Native American individuals into the Georgia courts. The system was not necessarily stable or even consistent, but workable for a number of years. Ford argues that Georgians began to assert jurisdiction over Native tribes in the 1820s not to create a unified legal system within the state, but as a means of asserting sovereignty *vis-à-vis* the growing national government. [102] At roughly the same time the states insisted on the Eleventh Amendment, which proclaimed a large degree of state sovereign immunity, they also asserted more jurisdiction over Native American affairs. The United States Supreme Court resisted assertions of state sovereignty over Native affairs. The coordinate political branches were initially ambivalent about the exercise of states' power over tribes, but ultimately re-asserted federal primacy.

Congress passed the Indian Removal Act in 1830, which was signed into law by President Andrew Jackson. The Act was the culmination of lengthy dialogue between southern states and the federal government. Acculturation policies set in place during Washington's administration remained the official policy of the federal government until the Age of Jackson.[103] Acculturation was the policy by which the federal government recognized tribal sovereignty and self-government east of the Mississippi river conditioned upon the tribes adopting Anglo behaviors in government, industry and religion. However, since at least the Jefferson administration if not earlier, southern states, particularly Georgia, agitated for removal policies that would allow them to control Native

[102] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in American and Australia: 1788-1846* (Cambridge, MA: Harvard University Press, 2011).

[103] For a discussion of the shift from policies of acculturation to those of removal, *see* Christian Keller, "Philanthropy Betrayed: Thomas Jefferson, the Louisiana Purchase and the Origins of Federal Indian Removal Policy," *Proceedings of the American Philosophical Society*, Vol. 144, No. 1 (2000), 39-66.

lands.[104] Meeting with some federal resistance to the idea, and being impatient, Georgia began removing Native Americans without federal authorization in the 1820s.[105]

Those who continued to assert that federal policy should take primacy over states with respect to Native Americans demanded that the federal government act. Congress passed the Removal Act, which did not simply order the military removal of Native Americans without a pretense of negotiation. Rather, it set aside federal land west of the Mississippi river and authorized the president to negotiate land exchanges with the southeastern tribes.[106] The vehicle for legalizing such land exchanges were treaties. To be sure, the United States negotiated the removal treaties at the end of a rifle – an offer the tribes could not refuse – but the federal government at least paid lip service to tribal sovereignty by going through the motions of negotiating with the tribes on a nation-to-nation basis. In this, the United States continued to recognize the Tribes' sovereignty, even as it exercised military dominance over them.

Scholars generally offer two interpretations of the actions of Jackson and Congress, and they are not necessarily mutually exclusive. The first posits that Jackson was acting in concert with the south to deprive Native Americans of their territorial sovereignty to enrich Anglo-Americans.[107] The second, more charitable interpretation of Jackson's actions as put forth by Robert Remini, is that Jackson believed tribal sovereignty would be completely lost through acculturation. According to this interpretation, Jackson genuinely thought the best way to protect tribal sovereignty was to remove the Indians from states into federal territory where the federal government would be on more solid legal and literal ground to serve as "guardians" of their

[104] *Ibid*. at 54-55.
[105] *Ibid*. at 55.
[106] Indian Removal Act, 4 Stat. 411-412, §§ 1 and 2.
[107] *See, e.g.*, Alfred A. Cave, "Abuse of Power: Andrew Jackson and the Removal Act of 1830," *The Historian, Vol. 65, No. 6* (2003), 1330-1353. Cave also argues Jackson's use of force exceeded the power granted to him in the Removal Act.

"wards."[108] That is, the federal government could hold vast lands in trust for Native Americans, thereby protecting their sovereignty. In either case, though, Jackson and Congress at least acknowledged theoretical tribal sovereignty by negotiating removal treaties (either under threat of force or after already implementing force).

Against this backdrop of Removal, the Supreme Court first fully entered the fray of Native American Sovereignty. In three seminal cases now referred to as the Marshall Trilogy, the Court struggled to find where in the American constitutional system Native Indians fit. Given the continued precedential value of the Marshall Trilogy in Federal Indian Law and Property Law, and the enduring characterization found therein, for better or worse, of Native American Tribes as "domestic dependent nations," the Trilogy is well-trod scholarly ground among legal academics and historians.[109] This brief review is undertaken with an eye toward tracing the Supreme Court's evolving views on Native American sovereignty and

The first of the Trilogy, *M'Intosh v. Johnson,*[110] had its roots in the earlier case of *Fletcher v Peck.*[111] In *Fletcher*, the Court entertained the theory that tribes did not occupy tribal lands in fee simple. "Fee simple" is an Anglo-American property law concept, in which all ownership, rights

[108] Robert V. Remini, *Andrew Jackson and the Course of American Freedom, 1822-1832*, Vol. 2 (New York: Harper and Row, 1981).

[109] *See, e.g.*, Matthew L.M. Fletcher, "The Iron Cold of the Marshall Trilogy," 82 *N.D. L. Rev*. 627 (2006); Ann E. Tweedy, "Connecting the Dots between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty," 42 *Univ. Mich. J. L. Reform* 651 (2009); Sarah H. Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs," 81 *Texas Law Review* 1 (2002); David Loth, *Chief Justice: John Marshall and the Growth of the Republic* (New York; W.W. Norton & Company, 1949); Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," 21 *Stanford Law Review* 500 (1969); Stephen G. Bragaw, "Thomas Jefferson and the American Indian Nations: Native American Sovereignty and the Marshall Court," *J. Sup. Ct. Hist*. 155 (2006); Robert N. Clinton, "Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law," 46 *Ark. Law Rev*. 77 (1993); and Stuart Banner, *How the Indians Lost their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005).

[110] *M'Intosh v. Johnson*, 21 U.S. 543 (1823).

[111] *Fletcher v. Peck*, 10 U.S. 87 (1810).

to use, and rights to sell a parcel of real property are vested in a person, persons, or corporation. Under Anglo-American property law, "fee simple" is the "highest" form of property control. "Lesser" forms of property rights include the right to use property for a restricted time or restricted use, but not the right to alienate (sell) it. The Supreme Court, by raising in *Fletcher* the idea that tribes did not own the land they occupied suggested that the underlying ownership of such land belonged to someone else.

The Supreme Court answered that question in *M'Intosh* thirteen years later. There, the Court held Native American Tribal land to be inalienable – at least not without the approval of the federal government. In essence, the Court held that the underlying ownership of Native American lands – the fee simple – was vested in the United States government. Pursuant to that theory, Native American tribes were not allowed to sell, and purchasers were not allowed to buy, land occupied by tribes without the approval of the United States. Though not basing its ruling on the Non-Intercourse Acts, the Court nevertheless reinforced the policy behind them by acknowledging tribal sovereignty while simultaneously curtailing it, in the service of establishing the primacy of federal law over state common law. The roots of the Federal – Native American Trust Relationship regarding real property are thus found in *M'Intosh*. "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy … [which is] incompatible with an absolute and complete title in the Indians."[112] Marshall appealed to the law of nations to reach his ruling, which laws recognized an almost unfettered right in the Crown (and its American successor) to control indigenously occupied land.

In the second case of the Marshall Trilogy, *Cherokee Nation v. Georgia,*[113] the Court held that the Cherokee Nation did not have standing to bring a lawsuit in federal court to challenge

[112] *M'Intosh*, 21 U.S. 543 at 588.
[113] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

Georgia's incursions into its sovereignty, because the tribe was not a sovereign state and not a foreign sovereign. Several activities in the state of Georgia led to *Cherokee Nation v. Georgia*. Georgia had arrested and convicted a Cherokee Indian – George Corn Tassel – for the murder of another Cherokee Indian on tribal land. Although federal law recognized native sovereignty over criminal matters occurring within tribal nations, Hall County, Georgia officials arrested Tassel and tried him on November 22, 1830. He was found guilty and sentenced to hang. Georgia courts denied his appeals.[114] The Attorney General of the United States appealed the conviction to the Supreme Court on behalf of the Cherokee Nation. In response to the filing of the appeal and the Supreme Court's order to produce the trial records, the state of Georgia proceeded post-haste with the execution of Corn Tassel and simultaneously passed laws asserting Georgia's supremacy over the Cherokee Nation. These laws would allow Georgia to divide and sell Native lands (including gold mines) and would disallow any citizen of Georgia from working among the Cherokee without a state-issued license.

The Supreme Court heard the case several months after the execution of Corn Tassel. Georgia did not bother to show up to argue. While expressing sympathy with the plight of the tribe, the Court nevertheless held that the Cherokee Nation did not have legal standing in a federal court. The Constitution provides that the judiciary may exercise the judicial power only over disputes between citizens and states, including foreign states. According to the Court in *Cherokee Nation*, Indian tribes did not fit the definition of a state, either foreign or domestic. Rather, according to John Marshall, Native tribes were "domestic dependent nations," as well as "wards" in need of "guardians," – characterizations that have stuck and permeated Federal Indian law to the present. Presumably, the appropriate party to bring a case would be either the United States government –

[114] *Ibid.*

the guardian – or a private, aggrieved individual. *Cherokee Nation* was a fractured opinion, with Justice Joseph Story joining the dissent, who would have granted legal standing to the tribe and heard the case on the merits. Story later privately expressed his satisfaction that part of the holding of *Cherokee Nation* was effectively overruled in the later case of *Worcester,* exclaiming, "Thanks be to God the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights."[115]

Whatever the deficiencies of *M'Intosh* and *Cherokee Nation*, one might still sympathize with John Marshall, whose practice was to avoid constitutional showdown and preserve the viability of the judiciary in national affairs. Had the Court granted the Cherokee Nation standing and ruled in its favor, Marshall would be in the position of issuing an order to either the State of Georgia or the federal executive, or both. Marshall, who recognized the futility of issuing a writ of mandamus to Thomas Jefferson almost thirty years earlier,[116] would have certainly recognized the futility of issuing a writ of mandamus to Andrew Jackson to protect tribal sovereignty. In any event, Marshall had the chance to clarify, if not correct, his ruling the next year.

The State of Georgia had detained a Christian minister, Samuel Worcester, for proselyting to the Cherokee without a state-issued license – one required by the laws passed during the appeal of Corn Tassel's arrest. Worcester challenged his detention in federal court. The Court held the state of Georgia could not interfere with Worcester's activities on the basis that the tribes were, under the Constitution and in treaties, separate, sovereign entities.[117] Although Indian tribes did not have

[115] *See* R. Kent Newmeyer, *Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 215-16.

[116] *Marbury v. Madison*, 5 U.S. 137 (1803). *See, e.g.,* Lawrence Goldstone, *The Activist: John Marshall, Marbury v. Madison and the Myth of Judicial Review* (Walker and Co. 2008), 5 (Marshall "knew all too well that if he sided with his fellow federalist and ordered Marbury's commission to be delivered, Jefferson would simply refuse and Marshall had no means to compel him to comply. The Court's authority would therefore be weakened").

[117] *Worcester v. Georgia*, 31 U.S. 515 (1832).

legal standing to bring lawsuits in federal courts *qua* tribes, they nevertheless continued to enjoy attributes of sovereignty that states could not disrupt. The *Worcester* opinion helped Joseph Story sleep at night. However, it did not elevate tribes to the same sovereign status as states. While protecting the tribes from *state* intrusion, the seeds of *federal* plenary power remained undisturbed. In *Worcester*, the court did not issue orders to the federal government, but did order Georgia to release Worcester. Georgia dragged its feet and Jackson helped little. Ultimately, Georgia relented, owing less to the Court's order than to political sentiment in Georgia itself. The immediate effect of the *Worcester* opinion was limited – federal removal policies continued unabated.[118] Nevertheless, Marshall embedded a principle of retained sovereignty into the constitutional framework. Tribes retained theoretical sovereignty if they had not surrendered it via treaty.

Creation of the Department of Interior

As will be discussed more fully in Part III, the administration of public lands became a pressing issue for the United States immediately upon the signing of the Treaty of Paris in 1783. In that treaty, Great Britain ceded to the United States extensive lands west of the Appalachians. Since that initial cession, there has not been a period in United States history where there has been no federal territory or federal title. Initially, the Department of Treasury handled the sale of public lands. Congress created a General Land Office in 1812 as an independent federal agency to take over the public lands. As previously indicated, the United States quickly asserted that Native Tribes did not own any land, but merely possessed federal lands. From the Founding through the Mexican-American war, the War Department was primarily responsible for federal interaction

[118] Ronald N. Satz, "The Cherokee Trail of Tears: A Sesquicentennial Perspective," *The Georgia Historical Quarterly, Vol. 73, No. 3* (1989), 431-466.

with Native Tribes. Thus, both the General Land Office and the War Department could assert some interest in tribal lands.

The idea of a separate Department of the Interior long preceded the Mexican-American War, but did not get off the ground until the acquisition of 529,000 additional square miles in the Treaty of Guadalupe-Hidalgo brought the concept to the fore. [119] Robert Walker, President James K. Polk's Treasury Secretary, drafted the bill and shepherded it through Congress. Not all of Congress was on board. Senator John Calhoun, who had charge of Indian Affairs when he was Secretary of the War Department, objected. During the course of debates, he argued:

> I understand it is proposed to make this new department take charge of our Indian affairs. Who does not see that the preservation of our peace and harmony, both in our own and in the Indian towns, depends upon the actions of the War Department? There is an intimate relation between our Indian Affairs and the War Department, and you cannot separate them without doing great injury to both. [120]

Despite Calhoun's objections, Congress voted to create the Department of Interior the day before Polk left office, and then moved both the Bureau of Indian Affairs and the General land Office to the new Department.

As the nation expanded its borders to the Pacific, it also reevaluated its Indian policy. Having pushed tribal nations continually west beyond the reach of settlers and states, the nation began to run out of an unorganized "West." The transfer of the Bureau of Indian affairs to the Department of the Interior marked a shift in the bureaucratic treatment of tribal nations. Although the U.S. continued to negotiate with tribes through the treaty-making process until 1871, and although the United States army continued to "assist" in the realm of Indian affairs, the transfer denoted that

[119] Henry Barrett Learned, "The Establishment of the Secretaryship of the Interior," *The American Historical Review, Vol. 16, No. 4* (1911), 751-773.

[120] *See* Clyde N. Wilson, Shirley B. Cook, and Alexander Moore, eds., *The Papers of John C. Calhoun: 1848-1849*, Vol. 26 (Columbia: University of South Carolina Press, 2003), 337. *See also* Debate of March 3, 1849, CONG. GLOBE 30th Cong., 2nd Sess. (1849).

tribal relations became less a matter of foreign affairs and more a matter of domestic concern, involving subjects, if not citizens, of the United States. The creation of the Department of the Interior was the natural outgrowth of the Polk's expansive and imperial administration.

Just two years following the creation of the Department of the Interior, Congress began creating the reservation system. It did so by allocating funds for reservations in the Indians Appropriation Bill of 1851.[121] Tensions between Trans-Mississippi whites and Native Americans, including those forced from the Southeast on the Trail of Tears, led to the creation of reservations first in Oklahoma, and then elsewhere. As with removal, the charitable interpretation of the creation of reservations was that the federal government acted with paternalistic regard for the integrity of Native American sovereignty. Commissioner of Indian Affairs Orlando Brown explained the rationale of the reservation system as designed to create well-defined boundaries that the federal government could police, as well as to force Native Americans into agriculture pursuits.[122] Under the reservation system, then, the federal government combined the policies of removal and acculturation, while tribal sovereignty received continued recognition, albeit increasingly curtailed. No longer charged with merely administering a network of trade with the tribes, the BIA began administering the reservation system. The BIA took on a new direction, becoming more aggressive in advocating a particular kind of Indian policy – one hostile to tribal sovereignty. Sidney Harring argues that the BIA engaged in a sustained and systematic effort to extend U.S. criminal jurisdiction into Indian Country.[123]

[121] Indian Appropriations Act of 1851, Ch. 14, 9 Stat. 574, 586-87 (1851).
[122] *See* Washburn, *The Indian in America*, *supra* note 73, at 191-92.
[123] *See* Sidney Harring, *Crow Dog's Case*, *supra* note 63, at 115. For a summary of critiques against the BIA, see Robert McCarthy, "The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians," 19 *B.Y.U. J. Pub. Law* 1 (2004).

Despite the BIA's efforts, however, there was little desire in state and territorial governments to begin policing and prosecuting the tribes. Local governments were content to let the tribes regulate themselves. One specie of Indian-on-Indian crime, though, caught the attention of western Anglo-American settlers in the mid and late nineteenth century – the killing of alleged witches.

Chapter 2:

Witches and Criminal Justice

In 1876, an epidemic of measles broke out among a band of Southern Paiutes in the Owens Valley in California. The disease claimed the lives of many tribe members. Tribal leaders laid blame for the deaths on local shamans, or medicine men, who failed to prevent the outbreak and failed to cure it. The life of a Southern Paiute shaman was a precarious one. Considered to have special healing powers, shamans were respected tribal leaders and counselors who garnered honor when their medical practices were successful. However, failures (deemed by tribal leaders to be premature deaths and other unfortunate events, such as the measles outbreak) earned them suspicion and derision. Three deaths on a Shaman's watch was sufficient evidence to convict him, according to tribal tradition, of being a witch who had turned his special powers into dark magic. The punishment was execution. The Owens Valley measles outbreak was sufficiently horrible that it warranted the execution, the *Inyo Independent* Newspaper reported, of dozens of shamans.[124]

Scholars have noted an epidemic of Native American witch killings in the late nineteenth and early twentieth centuries. Jean Van Delinder argues that the rise of Native American witch-hunts might be attributed to Euro-American policies of acculturation, removal and, in some cases, extermination. "Native American Tribes experienced social disruption and loss of autonomy as the federal government implemented [these] policies. … At the societal level, extensive contact

[124] The killing of the Owens Valley shamans was reported in the Inyo Independent in 1876. *See* "Indian Manners and Customs," *Inyo Independent*, November 5, 1876, 1; It has also been discussed in Dorothy Clora Cragen, *The Boys in the Sky Blue Pants: The Men and Events at Camp Independence and Forts of Eastern California, Nevada and Utah, 1862-1877* (Fresno, CA: Pioneer Press, 1975), 184; Richard Allen Wilson, "Owens Valley Paiutes; Dependency of Interdependency" (Unpublished M.A. Thesis, University of Nevada Las Vegas, 1979), 30-40; Anton P. Sohn, *Healers of Nineteenth Century Nevada* (Reno: University of Nevada Press, 1997), 44; and Julian H. Steward, "Ethnography of the Owens Valley Paiute," *American Archeology and Ethnology*, Vol. 33, No. 3 (1933), 233-350.

with white Europeans also led to disruption in the lifestyle, politics and religion of Indigenous peoples. Accompanying this disorder was a rise in accusations of witchcraft."[125]

The execution of Shamans, witch doctors, and witches was common in the late nineteenth century and well into the twentieth among many western tribes in North America. The tribe might execute anyone suspected of witchcraft, including women and young boys. Usually, a local medicine man who failed to cure a tribal member of illness would deflect blame for the death toward someone in the household who he would accuse of having bewitched the deceased. Upon investigation, the tribe could order the execution of the accused witch to be conducted by a family member, or by someone else deputized by tribal leadership. By removing the members suspected of bringing ill will and bad providence to the tribe, tribal leaders felt they were maintaining social harmony, not disrupting it.

Anglo-American settlers and missionaries living in the vicinity of witch killings felt otherwise. While they took little interest in monitoring the policing of "ordinary" crime within tribes, witch killings caught their attention. Although the perpetrators of the deaths of the shamans in Owens Valley in 1876 were not prosecuted under Anglo-American law, Anglo-Americans publicized the incident and other ones like it to use as justification to bring Indian-on-Indian acts of violence under the jurisdiction of the Anglo-American criminal justice system.

What did the process of bringing Native peoples within the criminal justice system look like? An examination of available evidence reveals a general pattern. First, Anglo-Americans moved into territory inhabited by Native American tribes, often brought by the prospect of sudden wealth,

[125] Van Delinder, "Wayward Indians," *supra* note 64. A historical inquiry into Native American witchcraft is relatively thin; the subject deserves more attention. In addition to the work of anthropologists, like Van Delinder, British historian Owen Davies has written a book examining witchcraft in the United States after Salem. He devotes a few pages to Native American witch hunting and killing. *See* Owen Davies, *America Bewitched: The story of witchcraft after Salem* (New York: Oxford University Press, 2013).

whether it be gold in California and Alaska or silver in Nevada. The Anglo-Americans and the tribes then had increasing amounts of contact between them, in commerce, proselytizing, fraternizing and conflict. Then, Anglo-Americans began to note the killing of suspected witches among the tribes (killings that, according to some scholars, probably occurred as a direct result of the increasing contact between white settlers and native tribes). The Anglo-Americans then publicized the killings and called for the extension of criminal justice to the witch killers.

Early Conflicts

Western state and territorial newspapers from the late nineteenth century and early twentieth century are replete with accounts of Indian witch killings.[126] From these accounts, we can trace a general chronological trajectory of increasing Anglo-American interference in tribal justice. In the first wave of stories, newspapers offered sensationalized accounts of witch killings, designed to evoke horror at the violence and sympathy for the victims.

For example, at the same time that the *Inyo Independent* in California reported the Owens Valley measles outbreak and accompanying execution of shamans, the *Daily Alta California* sought to educate its readers on the customs of the Southern Paiute tribe. It recounted the story of "a buck [who] got persistently sick, and his friends accused the most handsome squaw of having bewitched him." The tribe therefore took the "one practical way to exorcise the mischievous devil or witch having its abode within the pretty little mohere and that was simply to burn it out." The tribal members wrapped the accused witch in rye straw grass, tied her to a stake and burned her to death. The story then went on to discuss the tribe's practice of killing witch doctors who failed in

[126] There is some debate over the timing and motivation of the rise of Native American witch-killings. Although accounts of witch killings among Native Americans are found in the colonial and early Republic period (*see, e.g.*, Cave, "The Failure of the Shawnee Prophet's Witch-Hunt," *supra* note 57), Jean Van Delinder argues they became more frequent in the latter half of the nineteenth century. This development, she contends, was directly related to the Native Americans' attempt to make sense of and deal with encroachments by Anglo-Americans. *See* Van Delinder, "Wayward Indians," *supra* note 64.

their medical practices. "After the doctor has been butchered pursuant to the Indian Code, his body is given over to the squaws who finish the operation by driving out the devil." While calling attention to these "voo-doo" practices, the *Daily Alta California* did not, in 1876, call for the criminal prosecution of the witch killers. It did note, though, that local Anglo-Americans "notified [the tribe] that that style of devil killing had to cease, or there would be trouble."[127]

As Anglo-Americans became increasingly aware of witch-killings, they noted the supposed lack of law and order among tribes. Consider in the following account not only the horror expressed at the underlying execution of a suspected witch in Needles, California, but also the discounting of legal pluralism and federalism writ large:

> A horrible story of the *wild law* and superstitions of the Mojave Indians is told …. The Mojave Indian reservation is about a half a mile from the Needles and the aborigines are virtually their own masters, *having their own laws* and superstitions …One of the prettiest squaws … gave birth to twins and as a result a grand pow-wow was called, for according to Mojave tradition the squaw who has twins is a witch and a consort of evil spirits. The penalty has always been death for the mother and babies.[128]

Despite pleas from the woman's husband, the medicine men ordered the babies clubbed to death and burned the woman alive by locking her in a shack filled with firewood, and then setting fire to it. The publication of executions like these served as calls to extend the Anglo-American criminal prosecution system to the perpetrators of the crimes, although jurisdiction to prosecute any such crime fell under the purview of the sovereign tribes.

Local Anglo-American judges were not always willing to go along with criminal prosecution of Indian-on-Indian crime, even for witch killings. The *Territorial Enterprise*, a Nevada paper, related the following:

> [The Tribe's] local medicine man lost a third patient. He had faithfully done the best he knew how. … He knew that under the crude, but admirably just and equitable unwritten laws of the tribe his life was forfeited. … The Indians held an inquest in the matter – a

[127] "Indian Manners and Customs," *Daily Alta California*, Nov. 5, 1876.
[128] "Horrible Indian Death," *The Daily Enquirer*, December 27, 1893 (emphasis added).

> sort of a Grand Jury affair – and came to the unanimous conclusion that this doctor must be killed. The nearest relative of the deceased was deputed to carry out the verdict.[129]

"Troubled citizens" brought the matter to the attention of the Anglo-American county court judge who, in this case, decided against prosecution. However, as the century wore to a close, similarly situated Indian executioners were often surprised to find themselves arrested and placed in Anglo-American jails for having carried out the orders of their tribal leaders.

White settlers who learned of witch killings appealed to local authorities to intervene, but sometimes found it necessary to take matters into their own hands. In one case in Yuma, Arizona from 1893, white settlers noted an aged Indian woman being led by Native leaders to a place of execution for alleged witches. The white settlers threatened those responsible with criminal prosecution if they did not stop, and succeeded in preventing her death.[130]

The Anglo-American press continued to publicize witch killings in the 1890s and 1910s and began explicitly to call for prosecution. An example of this call for prosecution is found in *The White Pine News* in 1891 after the murder of an alleged witch in Lovelocks, Nevada. "The Indians ought to be made to understand that the perpetrators of such butcheries will be punished."[131] The *Deseret Evening News* of Utah took a more measured tone in urging the eradication of witch-killings. After noting two incidents in Alaska in 1893, in which one woman was deprived of food and beaten for nine days until she died, and another was tied up in a tent for seven days without food until she died, the editors lauded the "modern progress" which had taken place in Europe and America since the days of "Cromwell and Salem." The eradication of witch-hunting in those cultures, according to the *News*, was a mark indicating "humanity and enlightenment." The lesson drawn from the cases in Alaska were that "thoughtful people" should give "no encouragement to

[129] "Tribal Relations," *Territorial Enterprise*, March 19, 1890.
[130] "A Murder Prevented," *Los Angeles Herald*, Vol. 40, No. 113 (August 2, 1893).
[131] "State and Coast News," *White Pine News*, May 30, 1891.

the barbarous sentiments" expressed in witch hunting.[132] Contrast the attitude of the editors of the *White Pine News* and *Deseret News* in the 1890s (the "Indians ought to be made to understand") with the helplessness of the white settlers of Ohio in 1810 who pleaded unsuccessfully for the life of Leatherlips. Those intervening years saw the rise of a dominant Anglo-American criminal justice system and its associated sovereignty, and a celebration of "enlightenment" and "civilization."

The *Deseret Evening News* referred, above, to what appeared to contemporaries to have been a particularly concentrated outbreak of witch killing in Alaska and the Yukon in the 1890s, most likely due to the social disruption among native tribes caused by the Klondike Gold Rush. Owen Davies writes that the native "way of life was disrupted by miners making their way to the Klondike gold fields, and concern regarding witches increased with greater contact with the Tlingit peoples of the west amongst whom witchcraft had already assumed epidemic proportions."[133]

The *New York World* reported that an outbreak of consumption in 1898 in Alaska led to the killing of many alleged witches, similar to the deaths of the Southern Paiute Shamans in the Owens Valley in the 1870s.[134] It is not clear, however, whether witch killings increased at this time or, perhaps, the prosecution of witch killers in United States courts began in earnest at this time. The *Los Angeles Times* reported in 1898 that the Federal Territorial Court for the District of Alaska in Juneau had "the largest number of criminal cases since the organization of that district." The Court had "taken up the matter of suppressing … the torture and killing of alleged witches."[135] The population of the territory of Alaska had grown dramatically after the Klondike gold rush of the

[132] "Witch-Killing," *Deseret Evening News*, July 21, 1894.
[133] Owen Davies, *America Bewitched*, *supra* note 125, at 141.
[134] "Torture by Indians," *New York World*, re-printed in the *Salt Lake Herald*, December 29, 1898.
[135] "Witchcraft Cases," *Los Angeles Times*, December 12, 1898.

1890s, bringing American and Canadian citizens in much closer contact with Native tribes.[136] That close contact led to reports of torture by Indians, particularly the Wrangel and Stikene River Indians. Newspapers detailed such torture, such as the following:

> Often to effect a cure [the alleged witch] is terribly tortured. Burning out the eyes of the victim with a red-hot iron is a favorite mode of punishment. Before the patient dies the alleged witch is slowly put to death. Usually his internal organs are burned out, for the death must be slow and painful … Their witches are usually young boys or women. Several have been rescued by missionaries after being terribly mutilated.[137]

The federal judge in Juneau appears to have taken orders from officials in Washington, D.C. "The edict has gone forth from the powers at Washington and Judge Johnson, with the assistance of a federal grand jury, is trying to carry out his instructions."[138] Contrary to our contemporary concept of a federal judge as independent of political influence, it would not have been unusual for a territorial federal judge to receive advice and even commands from political officials in Washington, D.C. As will be discussed more fully in Part II, territorial judges were (and are) appointed pursuant to Article IV of the Constitution, which grants Congress power to administer the territories of the United States, rather than Article III, which creates an independent judiciary for federal courts located within states. Thus, we should not be surprised to find orders from Washington, D.C. issued to territorial judges, like Judge Johnson in Alaska, to implement a national policy. In this instance, the "edict" that came down was to eradicate witch killings. Judge Johnson did not have the same discretion as the earlier court in Nevada to decline to prosecute or decide a case of witch killing.

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[136] There are interesting parallels among the Georgia Gold Rush of the early 1830s, the California Gold Rush of the late 1840s and 1850s, the discovery of the Comstock Silver Lode in 1858 and the Klondike Gold Rush of the 1890s – all of which brought large numbers of prospectors those respective areas in a short amount of time, forcing a relatively dramatic restructuring of relationships among newcomers and original inhabitants.

[137] "Torture by Indians," *supra* note 134.

[138] "Witchcraft Cases," *supra* note 135.

The Klondike gold rush had a similar effect on Anglo-Canadian interaction with Native tribes as it did in Alaska. The *Coalville Times*, Utah, re-printed the report of two incidents in 1897 and 1898 in which Canadian authorities sought to stamp out witch killing among the Tahltan tribe. There, the tribe tortured, then killed, a boy suspected of bewitching a woman who had died. Her deathbed statement accused the boy of witchcraft. According to the newspaper, the tribe tied the boy up by his thumbs and beat him for several days, before he was disemboweled and thrown under the ice of a frozen river. His mother sought help from British authorities who arrived too late to save the boy, and whose efforts to find the principal perpetrator were in vain. The newspaper cast the incident in terms of a battle between civilization and savagery. "Civilization … does not reach the deep, black superstitions of the Tahltan people … They buy and sell their wives and children; they practice their heathenish religious rites, their medicine and witch dances, … and worst of all, they believe in witchcraft."[139] In the second incident, the Coalville Times reported, another boy accused of witchcraft was forced to hang by his thumbs for a period of weeks; but this time, "civilization" arrived in time to save him. "The sudden rush of gold seekers to the Canadian Klondike landed within 20 miles of [his] home 4,000 civilized gold seekers, 200 Canadian soldiers, and a fine body of provincial police. They saved the boy, gave him his "first suit of American clothes," and arrested the perpetrator, who spent 60 days in jail.[140] By the late 1890s, the Anglo-American prosecution of Indians for Indian-on-Indian violence was in full swing.

[139] "The Tahltan Rites," *The Coalville Times*, January 27, 1899.
[140] *Ibid*.

WHERE WITCHCRAFT REIGNS.

A BOY MURDERED FOR EVERY TAHLTAN WHO DIES A NATURAL DEATH.

By a Special Contributor.

WITCHCRAFT did not perish from American soil with the last witch burning of Salem. Away up in British Columbia, where the Stikine River flows too shallow to float the flatboats of the miners of Glaktora and Telegraph Creek, a witch boy is killed with terrible torture for every man or woman, who dies a natural death. And this is among Indians whom civilization has marked for its own. Where a belle has risen to silk shirt waists and parasols and where the braves wear patent leather shoes and jewelry.

For civilization is of the outward appearance and it does not reach the deep, black superstitions of the Tahltan people. While the coming of the white man—the miner of the Klondike with his freight to be packed—has brought the comforts of comparative wealth and a realization of the advantages of civilized dress, food and horses, it has not been extended to the point that includes morals and religion. Along these paths they have made no progress. They buy and sell their wives and children; they practice their heathenish religious rites, their medicine and witch dances; they believe in and practice a very rude method of cremating the dead, and worst of all, they believe in witchcraft. Every natural death in the tribe is accredited to witchcraft, and for every "bewitched" Indian that dies some poor Indian boy is barbarously murdered. To their open-air life and the healthful climate of the Cassiar district is due the low death rate of the tribe, and the correspondingly low "murder" rate.

A "WOLF" EXERCISES A WITCH.

In the winter of 1896, an Indian woman lay near unto death in her home at Tahltan village, and the wise men of the tribe decided that she had been bewitched. She belonged to the faction of the Tahltans known as the "Wolves," so a "Wolf" witch doctor was called upon to drive out the witch that had crept into the mortal body of the Klooehman. The doctor came dressed in wolfskins and made up to resemble as nearly as possible a wolf; that she was bewitched, that the boy was responsible for the bewitchment—and thus she died.

The mother wept and pleaded for the boy's life. The lad declared that he would not know how to go to work to bewitch anyone; but what could the mother and child do against the deathbed confession and accusation of the bewitched Klooehman? The deceased should certainly know whether she was bewitched or not, and to whom the responsibility belonged. From such a court there was no appeal.

"TIED UP BY THE THUMBS."

A brave of the tribe (his name was Desculta) here took charge of the proceedings. The boy was tied up by the thumbs and beaten with switches as punishment for the witches. A big hunt was organized and set for a date two months ahead, and while waiting for the final act in the tragedy, the boy was frequently tied up and whipped, to bring him to a realizing sense of his condition.

The mother of the doomed lad doubted the wisdom of the elders of the tribe and the justice of her boy's sentence, so she journeyed to Telegraph Creek and laid the matter before John Highland, a white merchant, who is still in business there. Mr. Highland immediately communicated with Superintendent of Indian Affairs Vowell, at Victoria, B. C., who sent a detective to Tahltan village to stop the murder and secure the executioner. In those days, means of communication between Victoria and the towns in northern Cassair were not up to their present mark, and the detective arrived too late. The hunt occurred, and at a convenient spot on the banks of the Stikine, Desculta's hunting knife dexterously wielded, disemboweled the poor little Siwash, and the body was slipped under the ice of the Stikine, a river that seldom gives up its dead.

The day following the murder, the detective arrived on the scene. A friend of Desculta's offered to help him find the murderer, and they started off on their wild-goose chase. The treacherous guide led him by one spot where, twenty feet away, an Indian woman with back toward them was scraping the bloody snow from the spot where the murder was committed; there was snow on the ground and ice in the river, the victim had a considerable length of time to attend to his sore thumbs and acquire a better understanding of the disadvantages of being himself a martyr, for he is the first of his people to be "persecuted" for practicing the pastimes of his tribe.

ATTEMPTED WITCH MURDER ONLY LAST AUGUST.

There have been other executions among the Tahltans for the crime of witchcraft, even within a few months.

In August, 1898, an Indian girl died at Tahltan Village. Before her death she confessed that she had been bewitched and declared that little Joe Cullihan, a twelve-year-old orphan, who was purchased years ago from the Coast Indians, was the boy that bewitched her. Of course, Joe denied the accusation, but the girl died, and that proved her story, according to the Indian belief. An Indian named Lolli took upon himself the right to mete out fate to little Joe, and tied the boy up by the thumbs, according to the best methods of the tribe. As snow would not arrive for at least sixty days, and as it would be contrary to all precedent to order a big hunt until

A TAHLTAN SETTLEMENT

THE WITCH DOCTOR AT WORK.

Figure 2 – "Where Witchcraft Reigns"

Mercy for the Executioner

Not all witch killers were convicted or even indicted. Sometimes Anglo-American authorities freed the Indian because of jurisdictional questions. As will be discussed more fully in Chapter 3, the process by which Native Americans came within the United States criminal justice system was uneven and haphazard; territories, states and the federal government all asserted the right to prosecute at times, even if some local authorities did not wish to exercise the right. The competing claims created confusion in the process. For example, in 1886, a federal judge in New Mexico set free a Zuni witch killer on trial before him because the judge did not think his court had jurisdiction, stating that the defendant had not committed an offense against the United States.[141]

However, the more common forms of reprieve were not based on jurisdiction but on clemency – non-indictment, acquittal, and pardon or commutation. Owen Davies writes, "Considering the pervasive racism towards Native Americans at the time, white juries and judges sometimes demonstrated surprising sensitivity to cultural defense arguments."[142]

Occasionally, a jury acquitted an Indian accused of witch killing, despite evidence of the actual crime. Such was the case with Descuitah, an Indian living in the village of Peluten, British Columbia. An Indian who became sick accused a young boy of bewitching him, and charged Descuitah with the duty to kill the boy after he died. Descuitah did so and Canadian officials prosecuted him in a Vancouver court.[143] The jury acquitted Descuitah despite his confession of the act. The court records are scarce, and records of jury deliberations do not exist, so we can only speculate on the reasons for Descuitah's acquittal. One wonders whether a form of jury nullification – by which a jury might "veto" the jurisdiction of the courts – was at play, which

[141] *Quincy Daily Journal*, May 25, 1886; *see also* Davies, *America Bewitched*, *supra* note 125, at 199.
[142] Davies, *America Bewitched*, *supra* note 125, at 200.
[143] "Strange Story of Indian Witchcraft," *San Francisco Chronicle*, October 16, 1900.

would indicate that not all citizens were yet on board with the project of bringing Native Americans within the Anglo-American criminal justice system.

Another instance of clemency for an alleged witch killer, for which we have some evidence of motivation, is found in what was perhaps then the most nationally known case of witch killing – that of Solomon Hotema. In 1890, Hotema grieved after the loss of his daughter to an outbreak of meningitis in the Cold Springs reservation of Texas, which disease also took the lives of many tribal members. One of the tribe's medicine men told Hotema that two women and a man had bewitched Hotema's daughter and all those who had succumbed to the disease. Hotema, who had earlier converted to Presbyterianism and became a minister, killed the three suspected witches after heavily drinking. The United States then arrested Hotema and charged him with murder. The jury acquitted Hotema of two of the murders and could not reach a verdict on the third. After direct instruction from the judge, the jury finally found Hotema guilty of the third murder and sentenced him to execution. Hotema appealed his case to the United States Supreme Court.[144] The case became famous not only because of the underlying facts, but also because the Court expounded upon the defense of temporary insanity. The Court ultimately upheld his conviction, but suggested that some type of executive clemency might be in order. The Attorney General took the hint and convinced President Theodore Roosevelt to commute Hotema's sentence from death to life in prison.[145]

In 1902, two chiefs of the Umatilla tribe in Oregon, Columbia George and Toy Toy, killed a suspected witch, Edna George, who they believed responsible for the death of Toy Toy's father. The state of Oregon charged them with murder. The jury convicted them, but they appealed to the Oregon Supreme Court. The Oregon Supreme Court reversed the trial court's decision, finding

[144] "Indian Murderer's Case to be Appealed," *New York Times*, December 2, 1901.
[145] *See* Davies, *America Bewitched*, *supra* note 125, at 194-202.

that the State of Oregon did not have jurisdiction over Indian-on-Indian crime due to the exclusive jurisdiction granted to the federal government in the Major Crimes Act. Following the state's dismissal, the United States charged the two men with murder in federal court. There, the jury convicted them but recommended life imprisonment, instead of execution, taking into consideration Umatilla tribal culture. Toy Toy continued to appeal his sentence until President William Howard Taft pardoned both men in 1911 and 1912.[146]

Into the Twentieth Century

By the late 1890s, the authority and appropriateness of Anglo-American prosecution of Native American witch killers was no longer seriously questioned. This change was aided by legislation such as the Major Crimes Act, discussed more fully in Chapter 3. Thus, the newspaper accounts that follow the turn of the century became less sensationalized, as the need to provoke law enforcement into action waned. Rather, the accounts reported the arrests, trials and convictions of witch-killers, with an almost sympathetic tone toward them.

Native American witch killings persisted in spite of criminal prosecution. In 1911, the San Francisco Call reported that the county sheriff arrested two Indians in northern California for the murder of a medicine man they believed had been responsible for the deaths of several members of their tribe. The two Indians confessed and told the arresting authorities that the tribe approved of their action. The *San Francisco Call* reported, "[s]uch executions of medicine men are not of rare occurrence, even at this late day."[147]

Martha Knack has written of a story from Las Vegas in 1915 where those responsible for the death of a suspected witch were perplexed to find themselves prosecuted in Anglo-American courts for murder. Five Paiute men had killed a fellow Paiute shaman, Harry York, openly and in

[146] *See* "Indians Pardoned," *Anaconda Standard*, January 12, 1912.
[147] "Indian Medicine-Man Killed as Witch-Doctor," *San Francisco Call*, June 1911.

front of many witnesses. York had lost a succession of patients in his treatment of tribal members. The five men who had killed York carefully buried his body, and that evening the community held a large pow-wow and a dance in celebration of the event. There was, Knack writes, "no effort to keep the execution secret from non-Indians. When Anglo authorities came to arrest they five men, they admitted to what they had done and expressed no feeling of guilt or remorse but stated that they had done their tribe and community a service, by eliminating a man who was, in their view, a murderer. An Anglo jury thought otherwise and sentenced the men to state prison, where they were soon released for good behavior.[148] Other accounts indicate that Native Americans were perplexed to find themselves in Anglo courts, especially for having taken action that was, in their eyes, good for their own community.

The late nineteenth century process by which Native Americans were brought within the ambit of Anglo-American criminal justice represents an important chapter not only in the development of the United States' relationship with Native Americans, but also the relationship among the national, state and the territorial governments. The Anglo press depicted the witch killings in a sensational manner as part of their pleadings to their representatives in both local and national governments to prosecute the perpetrators and, in so doing, force Native nations into the Anglo-American criminal justice system. Both the national government and local governments began prosecuting Indian-on-Indian crime committed in "Indian Country." Tribes had previously policed those crimes internally.

According to the Major Crimes Act of 1885, discussed more fully in Chapter 3, Indian-on-Indian crimes occurring in Indian Country fell within the exclusive jurisdiction of the national government. However, states retained jurisdiction to prosecute Indian-on-Indian crime committed

[148] Martha Knack, *Boundaries Between: The Southern Paiutes, 1775 – 1995* (Lincoln: University of Nebraska Press, 2001).

anywhere else within the state. Even before the Major Crimes Act, states had ramped up their prosecution of Native American crime, and arrested suspected witch-killers after publication of stories such as the execution of the Paiute woman whose crime was to have given birth to twins. Although prosecutions proceeded unevenly, they did proceed. Anglo-Americans sometimes took it upon themselves to halt witch killings, even in the absence of formal legal authority. Ultimately, all western Anglo-American jurisdictions asserted and exercised authority over tribes. They did so in an effort to create a more uniform American character of law – one that eschewed witch killing.

Chapter 3:

Nation to Nation?

The process by which the United States chipped away at Native American sovereignty in the late nineteenth century was uneven due to the different goals and interests of the coordinate branches of government.[149] For example, as Congress drafted the Fourteenth Amendment, it sought explicitly to overturn the Dred Scott decision and extend citizenship to all African-Americans. Therefore, the first sentence of the Fourteenth Amendment reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside."[150] The purpose of the caveat "and subject to the jurisdiction thereof" was not to preclude Native Americans from obtaining U.S. citizenship. Paths to citizenship were open to Indians from the founding of the country. Rather, it was included to protect tribal sovereignty. As early as 1862, John Bingham, who drafted the first section of the Fourteenth Amendment, argued for extending citizenship to "every human being, no matter what his complexion."[151] However, the only exception to this rule were Indians. Bingham justified this exception on the basis that tribes had been "recognized at the organization of this government as independent sovereignties."[152] To extend constitutional citizenship over Native Americans would be to violate tribal sovereignty over their members, a point recognized by Congress subsequent to

[149] Indeed, to the present day, the three branches of the federal government manifest differing understandings of Native American Sovereignty. *See* Lance Sorenson, "Tribal Sovereignty and the Recognition Power," 42 *American Indian Law Review* __ (2017).

[150] U.S. Const., Amend. IV.

[151] *See* Bethany Berger, "Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Won Kim Ark," 37 *Cardozo L. Rev*. 1185, 1198-99 (2016).

[152] *Ibid*.

the Fourteenth Amendment as well as by the Supreme Court in the case of *Elk v. Wilkins*, discussed herein.[153]

However, even though Congress might have recognized tribal sovereignty in theory, its practice of interaction with the tribes was not as solicitous. Additionally, the Bureau of Indian Affairs paid no heed to the constitutional recognition of tribal sovereignty. A series of legislative, judicial and executive activity from the 1870s through the 1890s served to divest tribes of sovereignty in piecemeal fashion to the point of almost complete extinction.

The Act of 1871

Following the Civil War, Congress turned its attention more fully to the West.[154] In an effort to protect overland trade routes, especially railroads, and to avoid the high cost of protecting western settlements militarily, Congress sought to establish peace with and among Plains Indians. Lieutenant General William T. Sherman wrote to the Secretary of the Interior "if fifty Indians are allowed to remain between the Arkansas and Platte we will have to guard every stage station, every train, and all railroad working patties. In other words, fifty hostile Indians will checkmate three thousand soldiers."[155] In July 1867, Congress passed a bill authorizing the creation of a seven-man commission with the express aim of accomplishing these goals. The bill authorized the President to appoint three members of the peace commission while Congress itself named four members directly in the bill.[156] Thus, representatives chosen by both Congress and the Executive

[153] *Ibid*.

[154] See Heather Cox Richardson, *West from Appomattox: The Reconstruction of America after the Civil War* (New Haven: Yale University Press 2007).

[155] "Letter to the Secretary of the Interior, communicating in compliance with a resolution of the Senate of the 8th Instant, information touching the origin and progress of Indian hostilities on the frontier, CONG. GLOBE 40th Cong., 1st sess., S. Ex. Doc. 13, 1867.

[156] 15 Stat. 17 (1867).

negotiated the treaties.[157] Lieutenant General Sherman served as a leader of the Commission. Congress instructed the commission to select two new sites for reservations and persuade Indians to abandon their nomadic life in exchange for agricultural pursuits. Should the commissioners fail to achieve peace, the bill authorized the Secretary of War to raise an army to accomplish the tasks through force. Thus, the "Peace" Commission carried with it the threat of forced removal. The Peace Commission succeeded in making new treaties with twenty tribes.

In exchange for relocation to reservations, the United States promised homes, schoolhouses, churches, teachers, agriculture implements, livestock and others buildings and tools, so that the reservations might become "crucibles of assimilation."[158] Although the Senate had ratified the treaties, the House of Representatives resented being locked out of the process, because the agreements contained many expenditure decisions that included provisions to transfer land taken from tribes directly to railroads and other private interests.[159] The selection of railroad locations continued to be a source of high stakes Congressional debate, negotiation, and compromise. Francis A. Walker, who served as Commissioner of Indian Affairs from 1871 to 1872, described that the House of Representatives had a "growing jealousy" toward the Senate who obligated the House to fund treaty-provisions "without inquiry."[160] Even as early as 1867, the House of Representatives had expressed its discontent with having to fulfill treaty obligations without being able to offer input on ratification. The House managed to insert a provision into an appropriations act purporting to repeal "all laws allowing the President, the Secretary of the Interior or the

[157] *See* Robert M. Kvasnicka and Herman J. Viola, *The Commissioners of Indian Affairs, 1824-1977* (Lincoln: University of Nebraska Press, 1979).

[158] *See* Berger, "Birthright Citizenship on Trial," *supra* note 151, at 1201. *See also* G. William Rice, "25 U.S.C. Sec. 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?" 5 *Am. Indian L. Rev*. 239, 240 (1977).

[159] *See* Berger, "Birthright Citizenship," supra note 151, at 1201.

[160] Francis Walker, "The Indian Question," (1874), reprinted in Felix Cohen, *Federal Indian Law* (Washington, D.C.: United States Government Printing Office, 1945), 67.

Commissioner of Indian affairs to enter into treaties with any Indian tribes."[161] The constitutionality of this Act was never put before the courts; Congress repealed the Act a few months later, perhaps because Congress realized that the law allowing the President to enter into treaties – the law it sought to repeal – is Article II of the Constitution.[162]

Due to the new treaties of 1867, an intra-branch debate between the two houses of Congress was re-ignited over the appropriate role of the House in negotiations with Native Tribes.[163] In 1869, the House flatly refused to appropriate funds to fulfill the new treaty-obligations, to the embarrassment of the Executive.[164] When the next session of Congress convened, the House relented but insisted on including a provision that "nothing in this act … shall be so construed as to ratify or approve any treaty made with any tribes, bands, or parties of Indians." The Senate had already ratified the treaties, so the provision was not binding, but merely expressed the sentiment of the House.[165] In 1871, when the two Houses were again deadlocked, the House renewed the tactic it had previously used to assert its role in Indian affairs by invoking its appropriation authority in the Constitution.[166] The appropriations bill, passed by the Senate, came back from the conference committee with the following proviso:

> Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty: Provided further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.[167]

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[161] Act of March 20, 1867, 15 Stat. 7, 9 (1867). Congressional records do not reveal discussion on Congressional authority to "repeal" Article II of the Constitution. The Act of 1871 adopted a more measured approach in its attempt to insert Congress more fully into recognition and treaty-making powers.

[162] *See* Act of Apr. 10, 1869, Ch. 16, § 5, 15 Stat. 13, 40 (1869).

[163] Robert Clinton, "There is no Federal Supremacy Clause for Indian Tribes," 34 *Arizona St. L. J.* 113, 167 (Spring 2002). *See also* Rice, "25 U.S.C. Sec. 71," *supra* note 158, at 240.

[164] Robert M. Utley, *Frontier Regulars: The United States Army and the Indian, 1866-1891* (Lincoln: University of Nebraska Press, 1979), 215, n.4.

[165] *See* Laurence F. Schmeckebier, *Office of Indian Affairs* (Baltimore: Johns Hopkins Press, 1927), 56-58.

[166] U.S. CONST. art. I, §7.

[167] 25 USC § 71.

Senator Garrett Davis of Kentucky strenuously objected to the provision on Constitutional grounds. He viewed it as an inappropriate intrusion into the Presidential power to "determine what tribes of Indians he will make treaties with, and what he will not."[168] However, Senator James Harlan, a former Secretary of the Interior, argued that the Bill in effect did nothing more than allow the House to participate in decisions "usually effected by the stipulations of treaties." Specifically, he pointed to a bill passed the previous year authorizing the sale of Indian lands "with the consent of the Indians, under a contract to be made with them by the President." Senator Harlan's characterization of the statute is not one of ordinary legislation for Indians, but one of House involvement in the process of contracting agreements with Indian Tribes.[169] Over the objections of Senator Davis, and at the prodding of President Grant, who was anxious to fulfill the treaty obligations, the Senate approved the bill. From that point forward, the United States ceased treaty negotiations with Native Tribes, although it has continued to honor some pre-1871 treaties while abrogating others.[170]

Senator Harlan's statement in support of the constitutionality of the statute (the Act of 1871) – that it merely reorganized the manner in which the United States entered into agreements with Native American tribes *qua* tribes – is an early allusion to treaty-substitutes. "Treaty-substitutes" is the phrase that has come to denote those agreements between sovereign entities that do not use the traditional and formal language and procedures of treaties, but nevertheless recognize negotiations and agreements as happening between sovereigns, particularly between the United States and Native American Tribes.[171]

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[168] 41 Congressional Globe 1822.

[169] 41 Congressional Globe 1822.

[170] In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court held that Congress could unilaterally abrogate treaties with Native American tribes under a theory of plenary power.

[171] G. William Rice, Francis Paul Prucha, and others have discussed the use of treaty-substitutes in Native American affairs. *See* Rice, "25 U.S.C § 71," supra note 158, at 247; *see also* Francis Paul Prucha,

What was the legal effect of the Act of 1871? There are at least two competing interpretations: (1) that the statute de-recognized the sovereignty of Indian Tribes and Nations, effectively announcing their complete conquest and assimilation, rendering them subject to full legislative power of the federal government; (2) that the statute did not de-recognize their status as sovereign nations, but merely altered the method of "ratifying" agreements with them. The historical record suggests that although the Supreme Court has employed both interpretations, the political branches have been more consistent (relatively) in recognizing sovereignty and negotiating agreements with the tribes, with some notable exceptions, as discussed in the following sections.

Early Interpretations (1872-1884)

The year following the Act of 1871, the Supreme Court was called upon to determine the status of the Cherokee Nation in a property dispute involving former Cherokee lands. After citing the Act of 1871, the Court stated, "Indian tribes are States in a certain sense, though not foreign states, or states of the United States. … [A]cts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as states, and the Courts of the United States are bound by those Acts."[172] This language echoed that used by Senator Eugene Casserly during the debate over passage of the Act that an Indian tribe is "like a State under a protectorate, a State quasi- independent, having certain distinct and separate rights and yet subject

American Indian Treaties: The History of a Political Anomaly (Berkeley: University of California Press, 1994), 173, 233.

Outside the context of Native American sovereignty, the United States uses a treaty-substitute process in its dealings with Taiwan. Congress passed the Taiwan Relations Act creating a conduit for diplomatic relations between the United States and Taiwan. The United States and Taiwan conduct bilateral talks and enter into direct agreements. The United States' relationship with Taiwan underscores that the decision to disengage from treaty making does not automatically trigger de-recognition of sovereignty.

[172] *Holden v. Joy*, 84 U.S. 211, 242 (1872).

to the control of another State. … It is not easy to define expressly their political relation to the United States, … more independent than the States, less independent than foreign states."[173] This early judicial interpretation of the Act of 1871 indicates that the Court did not believe the political branches had fully de-recognized the sovereign status of tribes and nations through the Act. The opinion also echoed the language of John Marshall from the *Cherokee Nation* case 40 years earlier.

The Court encountered another chance to consider the meaning of the Act of 1871 in *Elk v. Wilkins*, decided in 1884. John Elk, a Winnebago Indian, petitioned the Court to declare him a United States citizen due to the Fourteenth Amendment's citizenship clause and his voluntary separation from his tribe. The Court denied his claim, finding that Indians born of tribes or nations were not "subject to the jurisdiction" of the United States at birth, and were therefore excluded from citizenship without naturalization – the only other avenue to citizenship.[174] When analyzing the Act of 1871, the Court stated that its "utmost possible effect [was] to require Indian tribes be dealt with for the future through the legislative and not the treaty-making power."[175] Although the phrase "dealt with" is itself ambiguous, the Court's holding that Elk was not subject to the jurisdiction of the United States only makes sense if there remained continued recognition of tribal sovereignty after 1871. Had the tribes been de-recognized by the statute, the Court would have had to hold John Elk was now a citizen of the United States and his respective state. However, the Court did not do so. Even as late as 1896, well into the Allotment period, the Court held the Fifth Amendment's protection of due process rights had no operation within tribal courts on the basis that Constitutional due process protections did not extend to pre-existing sovereigns.[176]

[173] 41 Congressional Globe 1824.

[174] *Elk v. Wilkins*, 112 U.S. 94, 109 (1884). *See* Berger, "Birthright Citizenship," supra note 151, at 1197, arguing the holding in *Elk v. Wilkins* was consistent with the desires of the Framers of the Fourteenth Amendment to protect Native Sovereignty by excluding Indians from application of the Citizenship Clause.

[175] *Elk v. Wilkins*, 112 U.S. 94, 107 (1884).

[176] *Talton v. Mayes*, 163 U.S. 376 (1896).

Thus, the effect of the Act of 1871, in its early interpretations, was not a wholesale de-recognition of tribal sovereignty; rather, it marked a change in the method of federal agreements made with Indian Tribes (from treaty-making and ratification) to legislative approval. G. William Rice argues that *Elk v. Wilkins* is a "definitive statement that the utmost effect of the statute was a change in the method of the United States' ratification of an agreement between two international bodies politic."[177]

In the 1870s and early 1880s, the Supreme Court continued to interpret the relationship between the United States and the Tribes and Nations as one of sovereign-to-sovereign, though not equal sovereigns. Did the political branches agree? Congress continued to appropriate money for Indian affairs. In 1876, in an appropriation act, Congress included a proviso that no further monies would be appropriated for the Sioux until the Sioux entered into an agreement with the President for the cession of the Black Hills.[178] If Congress believed the Sioux lacked sovereignty after 1871, there would have been no need for Congress or the President to insist on their agreement, extorted as it may have been, to cede the Black Hills.

Allotment and Assimilation

Although the Act of 1871 caused no immediate change in the United States' relations with the tribes, executive action and two pieces of Congressional legislation in the 1880s brought federal plenary power over the internal affairs of Indians down from the realm of theory to actuality. Beginning with the Major Crimes Act of 1885, the United States entered into a new era of federal-tribal relations.[179] For the first time, Congress sought to legislate Indian-on-Indian

[177] Rice, "25 U.S.C. Sec 71," *supra* note 158, at 241.
[178] Act of Aug. 15, 1876, 19 Stat. 176, 192.
[179] 18 U.S.C. §1153.

crime within Indian country, and laid the groundwork for the first of two concerted efforts by the political branches to de-recognize tribes.

Prior to the Civil War, the BIA assisted with removal and early reservation systems. Following the Civil War, the BIA aggressively sought to assimilate Native Americans into Anglo society. According to Sidney Harring, the BIA formulated an assimilationist policy and then pushed that policy on Congress, rather than the other way around.[180] Part of that effort was to extend criminal jurisdiction over Native Americans, either at the federal level or the state level.[181] Meeting resistance at both levels, the BIA undertook two parallel actions.

Codes and Courts of Indian Offenses

First, the BIA in 1883 promulgated a "Code of Indian Offenses" and established "Courts of Indian Offenses" on reservations.[182] The BIA established these rules and courts without specific statutory authority. Whereas all other courts within the United States system of government derive their legitimacy from the Constitution, Congress, or state legislatures, the Courts of Indian Offenses were created by only one department within the executive branch acting on its own. The BIA justified the creation of these courts by asserting that some tribes lacked "law and order." The BIA exempted the "five civilized tribes" from the Code of Indian Offenses due to their perceived ability to maintain "law and order" through a westernized law enforcement system. As

[180] *See* Harring, *Crow Dog's Case*, *supra* note 63, at 134-136 ("Since 1874, the BIA had been attempting to persuade Congress to extend federal jurisdiction over certain serious crimes… The Senate had rejected the BIA's original 1874 proposal for a major crimes act because such legislation was inconsistent with existing notions of tribal sovereignty").

[181] *Ibid*. at 134.

[182] *See* William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* (New Haven: Yale University Press, 1966).

will be discussed more fully herein, the BIA gave no heed to traditional Native American dispute resolution systems for criminal matters.

For years, scholars who criticize the Code of Indian Offenses and the accompanying courts as a colonizing tool have nevertheless accepted a key assumption – that it was a legal system created to address minor crimes between tribal members. To this day, the BIA maintains on its website a statement that the "original Court of Indian offenses was created to provide law enforcement …."[183] This conventional narrative is false.

A close examination of the original Code of Indian Offenses from 1883 reveals that it was a tool for the BIA to root out cultural practices it deemed uncivilized and savage, rather than a tool to maintain law and order. The head of the Department of the Interior, and the Commissioner of Indian Affairs wrote a preface to the Code of Indian Offenses in which they said that four Native American customs were a "great hindrance to the civilization of the Indians."[184] Those four customs were (1) sun-dances, scalp-dances and war dances; (2) polygamy; (3) medicine-men; and (4) lack of inheritable property rights.

The BIA claimed that traditional native dances "were not social dances," but rather were "calculated to stimulate the warlike passions" of the younger members. The BIA saw them as threats to peace. Although the BIA did not mention witch-killings in the Code of Indian Offenses, it did characterize the activities of the medicine men as "positively injurious" to the tribe by deceiving the tribal members with the art of conjuring. The BIA asserted that the traditional

[183] United States Department of the Interior, Indian Affairs website - https://www.bia.gov/WhoWeAre/RegionalOffices/SouthernPlains/WeAre/ciospr/index.htm, retrieved June 6, 2017.

[184] *See* 25 C.F.R., Part 11. *See also* Robert Clinton, "Code of Indian Offenses." https://rclinton.wordpress.com/2008/02/24/code-of-indian-offenses/.

practice of medicine men should be discontinued and replaced with that of government-provided doctors.

To address these four categories of cultural offenses, the BIA simply outlawed them and affixed punishments for their practice. The punishments set forth in the Code were short imprisonments, relatively small fines, or the withholding of rations and other governmental assistance.

The Courts of Indian Offenses generally suffered from a lack of funding during their existence. John Collier's reform efforts in the 1930s, discussed more fully herein, eliminated some of the "offenses" – such as the traditional dances.[185] Ultimately, the Courts of Indian Offenses were replaced by tribal courts who were charged with maintaining law and order in the more conventional sense of policing theft and assault.

The Major Crimes Act

The second effort of the BIA to extend criminal justice to the tribes was to establish federal police power within reservations. The BIA deliberately sought a test case by which it could either judicially establish the federal power to prosecute Native Americans for Indian-on-Indian crime or, if denied, publicize, sensationalize and use as "Exhibit A" in asking Congress for explicit criminal jurisdiction in Indian Territory. The BIA found such a case in *Ex Parte Crow Dog*,[186] in which the Supreme Court declined to extend federal criminal jurisdiction in Indian Territory for Indian-on-Indian crime in the face of ambiguous treaty provisions.[187]

Crow Dog was a Lakota Indian living on the Rosebud Reservation in the Dakota Territory. On August 5, 1881, he killed the chief of his tribe, Spotted Tail, on the Reservation. The reasons

[185] *Ibid*.
[186] *Ex Parte Crow Dog*, 109 U.S. 556 (1883).
[187] *Ex Parte Crow Dog* contrasts starkly with modern cases of Implicit Divestiture where the Court, when faced with similar ambiguity regarding federal and tribal jurisdiction generally reads into their

for the underlying dispute are unclear. Crow Dog may have been unhappy with Spotted Tail's cooperation with territorial officials in the administration of the reservation, not unlike the displeasure directed toward the alleged witch Leatherlips seventy years earlier. Crow Dog maintained he acted in self-defense as he thought Spotted Tail was about to shoot him and his wife. In any case, the families of both Crow Dog and Spotted Tail settled the matter according to tribal custom within a few weeks of the killing. Crow Dog and his family made restitution to the family of Spotted Tail through gifts of livestock and blankets. Sidney Harring, in the seminal treatment of the *Crow Dog* case, points out that many Native American systems of criminal justice differed in their goals from that of Anglo-Americans. For Native Americans, maintaining tribal harmony was more important than retribution or rehabilitation. Thus, even violent acts like the one committed by Crow Dog, were addressed through family settlements rather than individual punishment.[188] The families of Crow Dog and Spotted Tail considered the matter closed.

Territorial officials, however, did not. The federal territorial prosecutor for the Dakota Territory, after urging from the Bureau of Indian Affairs, charged Crow Dog with murder and brought him to trial in a federal territorial court, where a jury found him guilty and sentenced him to execution. Crow Dog appealed his case to the United States Supreme Court. The Court's decision in *Ex Parte Crow Dog* was one of judicial minimalism and pragmatism, refusing to divest the tribes of exclusive criminal jurisdiction when confronted with contradictory and unclear federal law. According to the Court, federal officials had no jurisdiction over the alleged crime; the Court set Crow Dog free. There is an important distinction, though, in what the Court did in *Crow Dog* compared to what it did in the earlier *Cherokee Cases*. In the *Cherokee Cases*, the

relationship a loss of tribal sovereignty. The Court in *Ex Parte Crow Dog* showed judicial restraint, presuming retained sovereignty in the absence of clear federal policy.

[188] *See* Harring, *Crow Dog's Case, supra* note 63.

Court held that the *state* of Georgia did not have authority under federal law – either the Constitution or the federal statutes – to interfere with the internal affairs of the Cherokee tribe. That is, Georgia could not, under the United States' structure of government, encroach on Indian sovereignty. In *Crow Dog*, however, the Court refused to allow the prosecution of Crow Dog only because *Congress* had not yet granted the executive branch that authority. In other words, Congress had the power to encroach on Native sovereignty if it so chose.

At the instigation of the BIA, the case received negative publicity. The *New York Times* reported, "The Supreme Court has rendered a decision which will startle most readers. The decision is that there are persons living in the United States and not subject to the jurisdiction of any State or Federal Court. Those persons are Indians living in Indian reservations who commit crimes against other Indians."[189] By 1885, then, the *New York Times* denied the idea that American federalism could allow for sovereign institutions beyond the apparatuses of state or federal governments. It continued, "The whole tendency of recent legislation has been to treat an Indian as anybody else is treated, and to hold him to an individual instead of to his share of tribal responsibility." The Times thus noted a trend in American law to bring natives within the Anglo legal system, if not political system. The *Times* also urged an acceptance of the theory that Congress could revoke Native sovereignty at any time. "Congress probably meant to repeal the exemption of an Indian murderer of an Indian in the Indian Country from the responsibility to the laws of our land. We have to take the word of the Supreme Court that Congress did not do this, but assuredly Congress ought to do it without delay."[190]

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[189] "The Rights of Crow Dog," *New York Times*, December 18, 1883, p. 4. Brian Wildenthal states that the "somewhat hysterical public reaction to this decision [was] orchestrated by the Bureau of Indian Affairs." *See* Wildenthal, *Native American Sovereignty on Trial*, *supra* note 100, at 70.

[190] "The Rights of Crow Dog," *New York Times*, Dec. 18, 1883. The *Times*, apparently unaware that the families of Crow Dog and Spotted Tail had already settled the issue prior to Crow Dog's prosecution, urged Crow Dog to go into hiding to escape the savage justice that it thought the family of Spotted Tail

Without delay, Congress proposed the Major Crimes Act of 1885, which would explicitly grant federal jurisdiction in Indian Territory over seven major Indian-on-Indian crimes. The sponsor of the bill, Senator Henry Dawes of Massachusetts was the Indian Affairs Committee Chairman and an avowed assimilationist. The later piece of legislation that would bear his name – The Dawes Act of 1887 (or General Allotment Act) – sought to break up tribes by allotting land to individuals, the goal of which was to encourage and/or force Natives to become independent, individual farmers, similar to Jefferson's vision of yeomen white settlers.[191]

During the debate on the Major Crimes Act, Senator Dawes revealed two important factors in its passage: (1) considerations of race – the bill would "for the first time propos[e] to punish Indians like white men, in the same courts for the commission of crimes" – and (2) how the Bureau of Indian Affairs had urged passage of the bill – "a very important provision and one which the Indian service are very urgent for." The same Bureau of Indian Affairs who had pushed for the prosecution of Crow Dog after the tribe had settled an intra-tribal dispute, and who had lost before the United States Supreme Court, now sought formal authority from Congress for increased power on territorial reservations, and even within state boundaries.[192]

Indeed, one of the concerns raised during the debate on the Major Crimes Act was its implications on the balance of power between state and federal governments. Senator Preston Plumb of Kansas strenuously objected to the Act on two grounds, one procedural and one constitutional. The procedural objection was that the legislation was tacked onto an appropriations

would assuredly visit upon him – scalping, evisceration and roasting, instead of the peaceful settlement that had already occurred.

[191] See Emily Greenwald, *Reconfiguring the Reservation: The Nez Perces, Jicarilla Apaches and the Dawes Act* (Albuquerque: University of New Mexico Press, 2002).

[192] Congressional Record, March 2, 1885, p. 2385.

bill, instead of brought forward as a stand-alone bill.[193] The procedural objection was substantively important to several senators, who were wary of making a major change to relationships with the tribes through an appropriations rider, as had been done with the cessation of treaty making in 1871. Senator Plumb's constitutional objection was that the Act would give the United States government authority (sovereignty) to exercise criminal jurisdiction within the boundaries of a state, even if such authority was limited to Indian Country. Senator Plumb argued that the Act violated the "treaty obligations of the nation" and was "absolutely unconstitutional."[194] Even the sponsor of the bill, Senator Dawes, conceded that the Act would impinge upon the sovereignty of the states by granting apparent jurisdiction to the national government to prosecute crimes committed by Indians in states without reservations or other "Indian Country."[195] However, because the bill was proposed in the very last hours of the session of Congress, and Congress was responding to a loud clamor for enactment of the provision, it passed the Act without amendment.[196]

The Major Crimes Act granted federal jurisdiction to the United States to prosecute certain "major" crimes committed by Indians against Indians in Indian Country, depriving Native groups of a major aspect of sovereignty – exclusive jurisdiction over the criminal code. The original seven major crimes subject to federal prosecution were murder, manslaughter, rape, assault with

[193] It appears that the idea of passing substantive legislation through appropriations bill was relatively new. Senator Plumb argued against the "utter unwisdom and legislative unsoundness of the position of the House of Representatives in assuming to legislate upon important matters on appropriations bills." *See* Congressional Record, March 2, 1885, 2386.

[194] *Ibid*.

[195] *Ibid*. Senator Dawes and Senator Plumb's interpretation that the Act gave the national jurisdiction over crimes committed by Indians outside of Indian Country but within states may not have been correct. Courts have not weighed in on the question. Senator Dawes certainly did not share Senator Plumb's concern with the violation of treaties.

[196] The Act has been amended several times. It was not until Public Law 280 was passed in 1953 that some states (but not all) were granted criminal jurisdiction over Indian-on-Indian crime occurring in Indian Country.

intent to commit murder, arson, burglary, and larceny. Congress left minor crimes and civil disputes to the tribes to handle. The national government thus obtained power to prosecute crimes anywhere in a territory, including a reservation. It could also prosecute crimes on Indian reservations located within a state. Thus, in a case similar to that of *Crow Dog*, the tribes would no longer be allowed to settle the dispute according to tribal custom. The dispute would be settled according to principles of Anglo-American law.

In evaluating the Major Crimes Act, it is important to consider not only what Congress did, but also what Congress did *not* do. Congress could have gone much further in intruding upon Native American Tribal Sovereignty. In contrast to the BIA proposal that resulted in the Major Crimes Act, the Indian Rights Association – a quintessentially progressive organization that sought to civilize and Christianize all Native Americans – proposed an "Act to Provide for the Establishment of Courts and Criminal Jurisdiction upon Indian Reservations." Harring states that this act "would have put Indians under the complete legal force of U.S. law with few due process protections" and "was a far more repressive criminal apparatus to deal with misdemeanors and offenses against white standards of morality."[197] The BIA and Congress rejected this proposal, adopting the less intrusive Major Crimes Act.

The Court upheld the constitutionality of the Major Crimes Act the year after it was passed in *United States v. Kagama*.[198] In June 1885, a Yurok Indian named Kagama was a resident of the Hoopa Valley Reservation in northern California when he killed a neighbor, Iyouse, over a property dispute. The dispute arose partly due to United States attempts to upset traditional native methods of property inheritance. Federal authorities prosecuted Kagama vigorously because his was the chosen case to test the constitutionality of the Major Crimes Act. Kagama contested

[197] Harring, *Crow Dog's Case*, supra note 63, at 134-135.
[198] *United States v. Kagama*, 118 U.S. 375 (1886).

federal jurisdiction over his alleged crime and appealed to the Supreme Court, arguing that the Major Crimes Act was an unconstitutional intrusion into tribal sovereignty.

The issue in the case was the source of Congressional power to legislate generally in Indian Territory. Interestingly, the Court specifically rejected the Indian Commerce Clause as the source of Congressional police power. (The Supreme Court would later recognize the Interstate Commerce Clause as the source of an almost plenary Congressional power to engage in many regulatory activities that critics argue should be left to state legislatures.) Rather, the Court in *Kagama* used a theory of Congressional plenary power based in conquest, paternalism and racism. The Court depicted a binary form of federalism, stating that in the United States constitutional system there can be only "these two" sovereigns, the federal government or the state government.[199] The Court therefore depicted Indian Territory as a sovereign vacuum, in need of federal plenary authority.

The Supreme Court, in upholding the constitutionality of the Major Crimes Act, adopted a very different characterization of federalism and tribal sovereignty than that espoused by the Founders in the Northwest Ordinance, John Marshall in the *Cherokee Cases*, the framers of the Fourteenth Amendment, and even that of Congress when passing the Act of 1871. It held that:

> [T]hese Indians are within the geographic limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. *There exists within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies, with limited legislative functions, but they are derived from, or exist in, subordination to one or the other of these.[200]

[199] *Ibid.* at 379. In a modern case, Justice Clarence Thomas, while criticizing *Kagama* for failing to locate a textual hook for Congressional plenary power, apparently buys into the *Kagama* framework that sovereignty can only exist in the federal government or state government. He states that tribes are separate sovereigns or they are not, implicitly rejecting Marshall's domestic dependent nations framework. Suspicious also of federal plenary power, Justice Thomas therefore lays the groundwork for the argument that tribes can only be recognized as sovereign through a treaty making process or they are otherwise subject to state jurisdiction. *See United States v. Lara*, 541 U.S. 193, 215-18 (J. Thomas, concurring).

[200] *Kagama*, 118 U.S. at 379 (emphasis added).

This interpretation of the Constitution differs from the original understanding of multiple sovereigns. First, according to the Court in *Kagama,* control of territory was a key element of sovereignty. The Court swept away the notion that multiple entities (beyond state and national governments) could exercise sovereignty within a territory. Further, any legislative or political power that Native nations had previously exercised was granted, according to the Court, as a gift from the national government, which could revoke such power at any time. The Court concluded that one of the reasons the national government needed to exercise direct sovereignty over Native peoples was for their own protection from white settlers.

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[201]

Here, we see not only the idea that the Native tribes could not govern themselves, but also the idea that *only* the national government would have the authority to enforce the laws of General Government on "all the tribes." States would not be able to govern all tribes, and, according to the Court, were probably out to take advantage of the tribes anyway. Not so for the national government.

Kagama is an early case of judicial de-recognition of tribal sovereignty. By ignoring the existence of tribal sovereignty, the Court went beyond what Congress actually said and did in the Major Crimes Act, which did not purport to extinguish the tribes or their power to prosecute criminal offenses, both major and minor. Whereas the Court was quick to depict federal plenary power as engulfing tribal sovereignty, Congress in reality had merely created concurrent jurisdiction.

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[201] *Ibid*. at 385.

The Indian Rights Association, though rebuffed by Congress in 1885 with the Major Crimes Act, did receive one big item on its wish list when Congress passed the Dawes Act of 1887.[202] In this legislation, Congress allotted land to individual tribal members to be held in trust for 25 years and thereafter to be held by the individual in fee simple. The legislation also provided for the sale of the "surplus" of the reservation to non-Indian buyers, to be held in fee simple immediately. The Dawes Act was the first of two full-scale legislative assaults on tribal sovereignty.[203] Private ownership of land within reservations would, it was thought, lead not only to Indian assimilation, but also to complete state criminal and civil jurisdiction when the last parcel was sold and the federal trust relationship ended.[204] Allotment proceeded for the next 50 years, creating a checkerboard pattern of land ownership within reservations, but never reaching its twin goals of privatizing all land ownership and extinguishing tribal sovereignty. Approximately 90 million acres were transferred from Indian to Non-Indian control during the Allotment period.[205]

Into the Twentieth Century

Assimilation efforts, like other Progressive Era policies, continued well into the twentieth century and culminated with the Citizenship Act of 1924. Native Americans had since the Founding been excluded from citizenship, with various exceptions for things like private land ownership and military service. Even the Citizenship Clause of the Fourteenth Amendment, which states that "All persons born …in the United States, and subject to the jurisdiction thereof, are

[202] General Allotment Act (or Dawes Act), Act of Feb. 8, 1887 (24 Stat. 388, Ch. 119, 25 USCA 331), Acts of Forty-ninth Congress-Second Session, 1887.

[203] The second full-scale legislative assault on tribal sovereignty occurred during the "Termination Period" in the late 1940s and 1950s, discussed herein.

[204] Dawes Act, Section 6 ("every member of the respective … tribes of Indians to whom allotments have been made shall have the benefit and be subject to the laws, both civil and criminal of the state or territory in which they may reside.") *See also* Harring, *Crow Dog's Case*, *supra* note 63, at 154.

[205] D.S. Case & D.A. Voluck, *Alaska Natives and American Laws* (Chicago: University of Chicago Press, 2002), 104-105.

citizens of the United States…" did not grant citizenship to Native Americans because they were not, generally speaking, "subject to the jurisdiction" of the United States.[206] By 1924, roughly 55% of Native Americans were already citizens, including those who had acquired citizenship through land ownership (allotted or otherwise), as well as due to service in the United States military, and through other mechanisms. The Citizenship Act of 1924 granted blanket citizenship to all Native Americans – no naturalization process was required and no consent was requested. Some tribes explicitly refused to recognize the Citizenship Act's applicability to them.[207] Progressive Era reformers who pushed for the Citizenship Act felt they were doing the tribes a favor, by easing their assimilation into Anglo-American legal and political society.[208] Congress passed the Citizenship Act the same year as the Immigration Act of 1924, which sought to preserve an "American" identity by restricting immigration from various regions.[209] Despite progressive efforts to homogenize American society, the Citizenship Act, importantly, did not require individuals to give up their tribal citizenship, as previous naturalization processes had done. The Citizenship Act sought to accomplish the goals of assimilation without explicitly de-recognizing tribal authority.

During the Allotment and Assimilationist period, the Supreme Court generally acquiesced to the desires of the political branches, not questioning Congressional plenary power to legislate for the tribes and, as we have seen in *Kagama*, sometimes expanding it beyond what Congress wanted.

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[206] *See* Berger, "Birthright Citizenship," supra note 151, at 1185.

[207] For a discussion of the withholding of consent, *see* Kevin Bruyneel, "Challenging American Boundaries: Indigenous People and the "Gift" of U.S. Citizenship," *Studies in American Political Development Vol. 18, No. 1 (2004), 30-43.*

[208] For a discussion on the progressive impulse of advocates for citizenship and their dialogue with Indian reformers, *see* Lucy Maddox, *Citizen Indians: Native American Intellectuals, Race, and Reform* (Ithaca: Cornell University Press, 2005).

[209] *See* Mae M. Ngai, "The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924," *The Journal of American History* Vol. 86, No. 1 (1999), 67-92.

Whereas in *Worcester*, the Court's characterization of the tribes as sovereign entities served to protect them to some degree from *state* intrusion, such characterization was of no avail to protect them from *federal* power. The Court's holding in *Lone Wolf v. Hitchcock* in 1903 made clear that the Court found no constitutional protection for the tribes from the national government itself.[210] There, the Court held Congress could abrogate a treaty with an Indian tribe based on its plenary power – a decision firmly rooted in paternalistic theories of the relationship between the United States and Indian tribes. Paternalism lay at the heart of another Court decision during the Progressive / Assimilation Era in *United States v. Sandoval*.[211] When New Mexico and Arizona joined the United States as the last of the 48 contiguous states in early 1912, the enabling acts of Congress called into question the status of its native peoples. The Supreme Court had previously excluded the Pueblo of New Mexico from the definition of "Indian" when interpreting the Non-Intercourse Act of 1834, based upon the Pueblo's perceived capacity for self-government as well as their fee simple ownership of land acquired through Spanish land grants.[212] The Enabling Act for New Mexico, however, extended the Non-Intercourse Act and related legislation explicitly to the Pueblo, bringing them within the guardian / ward relationship. The Court in *Sandoval* found that these provisions of the Enabling Act caused no constitutional harm either to the tribes or to the newly created State of New Mexico. The Court's justification for intrusion into tribal, and potentially state, sovereignty was Congress's plenary power first articulated in *Kagama* as well as explicitly racial categorizations underlying the guardian / ward construct.[213]

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[210] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[211] *United States v. Sandoval*, 231 U.S. 28 (1913).
[212] See *United States v. Joseph*, 94 U.S. 614 (1876).
[213] *See, e.g.*, the Court's statement that the Pueblos adhere "to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people." *Sandoval*, 231 U.S. at 39.

While not abandoning the guardian / ward relationship, federal policies toward native tribes began to change in the 1930s. The political branches' efforts to re-assert tribal culture and self-determination, if not full-scale sovereignty, began in earnest with the efforts of John Collier. Collier, a sociologist who valued community cohesion over stark individualism, sought to reverse some assimilationist policies, including allotment, by advocating Indian cultural retention and self-government. President Franklin Roosevelt appointed Collier as the Commissioner of the Bureau of Indian Affairs in 1933 and he served during the entirety of Roosevelt's administration.[214]

Collier pushed for and obtained the Indian Reorganization Act of 1934, the centerpiece of the "Indian New Deal."[215] The Indian New Deal ended the allotment process but did not effect a wholesale repeal of the Dawes Act. Rather, it allowed the United States to buy fee simple land and then return it to its pre-existing status – that of federal land held in trust for the tribes.[216] The Indian New Deal also called for constitution making among the tribes, and those tribes that accepted the New Deal adopted tribal constitutions based upon a model drafted by the BIA.[217] In this regard, the Indian New Deal "fought" one form assimilation by introducing another – the imposition of western-style constitutionalism as a condition for continued recognition.

Nevertheless, the Indian New Deal was an effort by the political branches to re-recognize aspects of Native American tribal sovereignty that had been lost in the Allotment period. Despite Collier's efforts to get away from the guardian-ward relationship, Congress insisted upon continued oversight of the tribes, and planted the seeds for the second full-scale assault on tribal sovereignty with the passage of the Kansas Act of 1940, through which it granted Kansas almost

[214] Kenneth R. Philip, *John Collier's Crusade for Indian Reform, 1920-1954* (Tucson: University of Arizona Press, 1977).

[215] 25 U.S.C. §§5101 et seq. (formerly §§461 et seq.).

[216] For a compilation of cases addressing the constitutionality of the Indian Reorganization Act, including the provisions allowing the re-purchase of former tribal lands, *see* 28 A.L.R. Fed 2d 563 (2008).

[217] 25 U.S.C. §5123 (formerly §476).

complete criminal jurisdiction within tribal territory, to be followed by grants to more states. With 75 years-worth of hindsight, the Indian New Deal looks less like a fully formed "era" of Federal-Indian relations, and more like the efforts of one man (successful as they were) to slow a longer process of de-recognition that began with the Dawes Act in 1887 and culminated with termination policies in the 1940s, 50s and early 60s. Yet policies enshrined in law during the Indian New Deal continue to provide the basis for many claims of sovereignty in the present.[218]

The Termination period from the mid-1940s until the mid-1960s was a second attempt at political de-recognition of tribal sovereignty. Despite the aims of the Indian New Deal, and perhaps in reaction to them, Congress passed a series of laws aimed at ending the special relationship between the federal government and the tribes, including the federal trusteeship of tribal lands, ending tribal self-government, and leaving Native Americans fully under the sovereignty of state governments. Termination included the granting of criminal or limited-criminal jurisdiction to some states to police Native American communities.[219] Interestingly, though, Congress adopted termination policies on a tribe-by-tribe and state-by-state basis, instead of through wholesale termination legislation. For example, Congress passed Public Law 280 in 1953, which granted full criminal jurisdiction to five states over Indian Territory. Not all states even wanted such criminal jurisdiction. The localized process suggests Congress's wish to reserve for itself some powers to continue to recognize sovereignty for some tribes, while not for others. Some of the tribes targeted for termination, despite large populations and well-developed

[218] Historians, sociologists and other scholars continue to debate Collier's legacy. For a discussion of his mixed legacy, *see* Elmer R. Rusco, "John Collier: Architect of Sovereignty of Assimilation?" *American Indian Quarterly*, Vol. 15, No. 1 (1991), pp. 49-54. *See also* Lawrence C. Kelly, "The Indian Reorganization Act: The Dream and the Reality," *Pacific Historical Review* Vol. 44 No.3 (1975) pp. 291–312.

[219] *See, e.g.*, Public Law 280 of 1953 at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326.

government structures, had abundant natural resources, calling into question Congressional motives for termination policies.[220]

One might be forgiven for a bit of whiplash in attempting to keep up with federal Indian policy in the mid-twentieth Century. After the termination policies, which attempted to end self-government of the tribes, the political branches returned to policies of self-government and tribal sovereignty in the 1960s. Presidents Johnson and Nixon began the process of re-recognizing tribes that had been de-recognized in the Termination Era. Over 100 tribes that had been de-recognized applied for recognition, and were re-recognized by the federal government as sovereign entities. Congress made further efforts to clarify the place of tribes in the American constitutional system with the passage of the Indian Civil Rights Act of 1968.[221]

A sound understanding of the Indian Civil Rights Act begins with *Talton v.* Mayes, decided in 1892.[222] There, the Court held that the protections afforded by the Fifth Amendment to criminal defendants in federal proceedings were not applicable in the context of tribal prosecutions. The court reasoned that the powers of local government in tribes pre-dated the Constitution and therefore did not derive from it. This decision was consistent with earlier cases, such as *Barron v. Baltimore* (holding that the Fifth Amendment only applied to federal action)[223] and *Cherokee Nation v. Georgia* (characterizing tribes as domestic dependent nations),[224] as well the later case of *United States v. Wheeler* (holding that tribal sovereignty was separate and distinct from that of the United States).[225] *Talton v. Mayes* also pre-dated two important twentieth-century

[220] For the legislative background of termination policies, and the abandonment of the same, *see* Michael C. Walch, "Terminating the Indian Termination Policy," 35 *Stan. L. Rev*. 1181 (1983).
[221] 25 U.S.C. §1301 et seq.
[222] *Talton v. Mayes*, 136 U.S. 376 (1896).
[223] *Barron v. Baltimore*, 32 U.S. 243 (1833).
[224] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
[225] *United States v. Wheeler*, 435 U.S. 313 (1978).

developments – the Citizenship Act of 1924 and the Supreme Court's selective incorporation process by which many Bill of Rights protections were gradually incorporated via the Fourteenth Amendment to apply against the states as well. Therefore, the idea that the Fifth Amendment of the Bill of Rights would not apply to sovereign tribal governments may not have been seen as radical in 1892 when compared with the fact that they did not apply against state governments either.[226]

The Citizenship Act of 1924 granted blanket citizenship to all Native Americans, thus affording them constitutional due process protections against federal action. As the Supreme Court gradually extended the Bill of Rights to apply against state governments, the question arose as to whether the Bill of Rights also applied, by virtue of the Fourteenth Amendment, in tribal courts. Prior to the incorporation process (and the Citizenship Act), the Court had held that Native Americans were not made citizens by the Fourteenth Amendment.[227] Thus, their citizenship was initially granted by statute, not by the Constitution. Since the Fourteenth Amendment itself did not make Native individuals citizens, the question became whether the Fourteenth Amendment could be used to incorporate the Bill of Rights against tribes. The Court has never held the Fourteenth Amendment incorporates the Bill of Rights to be applicable in tribal courts, despite having had the opportunity to do so.[228]

In any case, the process by which various provisions of the Bill of Rights have been "incorporated" against tribal governance has not been through judicial holdings, but through

[226] Interestingly, the Fifth Amendment provision at issue in *Talton v. Mayes*, the right to indictment by a grand jury, has never been held to have been incorporated against the states. Indeed, the court explicitly refused to do so in *Hurtado v. California*, 110 U.S. 516 (1884), a case arising prior to the full-flowering of the selective incorporation doctrine.

[227] *See Elk v. Wilkins*,112 U.S. 94, (1884).

[228] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978). *See also Wilson v. Marchington*, 934 F. Supp. 1187, n.3 (D. Mont., 1996) ("neither the rights guaranteed by the Bill of Rights or the Fourteenth Amendment to the United States Constitution are applicable against the Indian Tribes or their courts).

federal statute. As with traditional selective judicial incorporation, the Indian Civil Rights Act (ICRA) "incorporates" many, but not all, of the Bill of Rights against tribal governments. Provisions found within the Bill of Rights, but not in the ICRA, include the Establishment Clause of the First Amendment and the right to counsel of the Sixth Amendment.[229] Additionally, in *Santa Clara Puebla v. Martinez*, discussed herein, the Supreme Court held that the equal protection principles found within the Fourteenth Amendment and the due process provisions of the Fifth Amendment do not apply to tribal governments. The Indian Civil Rights Act officially recognizes the tribes as "possessing the powers of self-government."[230]

The ICRA is double-edged sword for tribal sovereignty because, while it recognizes the tribes as self-governing, it also imposes traditional Anglo-American values and notions of criminal procedure onto tribal cultures, many of whom have had different cultural standards and different goals of criminal justice, reflected in different criminal procedural systems and tribal governance. The ICRA also places onerous restrictions on the sentencing procedures in tribal courts. These procedures appear to have been born of a distrust of the tribal courts, but themselves have created unintended consequences and perverse incentives. Some scholarship suggests criminals, Indian and non-Indian alike, who might otherwise have been deterred from crime have not been deterred from committing crime in Indian Territory based upon (1) restrictions on tribal sentencing; and (2) a pattern of non-prosecution from federal or state authorities for felonies on reservations.[231] The sentencing restrictions have been subject to multiple revisions, most recently in 2010 and 2013.

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[229] The provisions of the Indian Civil Rights Act are codified in 25 U.S.C. §§ 1301 – 1303. The provision comparable to the First Amendment, but lacking the Establishment Clause are found in §1302(a)(1). The criminal procedure due process protections, with the modified right to counsel, are found in §1302(a) (3)-(7) and (b). The ICRA grants the right to counsel in felony prosecutions, but not for misdemeanors.

[230] *See* §1301(1).

[231] *See, e.g.*, Ed Hermes, "Law and Order Tribal Edition: How the Tribal Law and Order Act Has Failed to Increase Tribal Court Sentencing Authority," 45 *Ariz. St. Law. J.* 675 (2013). Federal authorities

Nevertheless, the ICRA codified the recognition of tribal governance, and particularly tribal courts. The ICRA, along with the process through which tribes adopted constitutions in the Collier era, are rebukes to the dicta of the Court in *Kagama* that there can only be two sovereigns in the American system. According to Congress, as expressed in the ICRA, there is room for more.

Congress has recognized tribal sovereignty continuously since the ICRA. Although the Indian Reorganization Act of 1934 created a crude preliminary process of Recognition and Acknowledgement, the formal process used today by which the United States recognizes tribal sovereignty was put in place in 1978. The Federal Acknowledgement Process is a creature of the BIA, relying on delegated authority from Congress to the Executive to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs."[232] Through the promulgation of regulations, the BIA created an application process through which tribes can apply for federal recognition (and all the benefits that go along with recognition, including funding for housing, health and other services, and potential gaming operations).[233] The BIA has set up criteria for recognition, which include elements of Indian "identity," communal cohesion, governmental structure and governing documents.[234] The BIA's Federal Acknowledgement Process is not without its critics. Matthew L.M. Fletcher offers a sharp critique of the both the theory behind the Federal Acknowledgement Process and the manner in which it has been implemented.[235] Vine Deloria, Jr. has sharply criticized the apparent ability of

declined to prosecute in *Duro v. Reina*, 495 U.S. 575 (1990) (murder) and *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. ___ (2016) (child molestation) despite the seriousness of the alleged crimes and the Tribes' inability to prosecute themselves.

[232] 25 U.S.C. § 9.

[233] *See* Mark D. Myers, "Federal Recognition of Indian Tribes in the United States," 12 *Stan. L. & Pol'y Rev*. 271 (2001).

[234] 25 C.F. R. §83.11.

[235] Matthew L.M. Fletcher, "Politics, History and Semantics: The Federal Recognition of Indian Tribes," 82 *N.D. L. Rev*. 487 (2006). *See also* the two books reviewed by Fletcher therein: Renée Ann Cramer, *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgment* (Norman: University of

low-level federal bureaucrats to negate previous acts of Congress respecting tribal recognition. For, in addition to the BIA process, tribes may obtain recognition through express Congressional legislation, something Congress has done nine times since 1978.[236]

In addition to the BIA process and Congressional policies to encourage Indian self-determination, successive heads of the executive branch have consistently lauded tribal sovereignty since the 1970s. In a special message to Congress in 1970, President Nixon affirmed the national policy of recognizing and encouraging Native American self-determination.[237] President Carter signed the American Indian Religious Freedom Act, affirming the right of Native Americans to practice religious ceremonies otherwise prohibited by law.[238] On January 24, 1983, Ronald Reagan issued a presidential proclamation regarding the relationship of the United States to Native American Tribes and Nations. There, he expressed his Administration's intent to "restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs." In furtherance of that goal, President Regan moved the White House Liaison Office for Native Tribes to the Office of Intergovernmental affairs to underscore its "commitment to

Oklahoma , 2005) and Mark Edwin Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process* (Lincoln: University of Nebraska Press, 2004).

[236] As discussed in Gerald Carr, "Origins and Development of the Mandatory Criteria within the Federal Acknowledgement Process," 14 *Rutgers Race and L. Rev.* 1 (2013). Carr calls attention to a curious statute, 25 U.S.C. § 5130 (formerly §479a) the "findings" of which found that in addition to BIA and Congressional recognition, tribes can be recognized by a "court decision." Courts, though asked to do so, have never recognized tribes in terms of extending recognition though they have judicially de-recognized various sovereign powers of the tribes. The constitutionality of the statute, or at least its "finding," is suspect, given the apparent lack of authority for an Article I Congress to take an Article II prerogative power and vest it in an Article III court.

[237] See http://www.presidency.ucsb.edu/ws/?pid=2573. Although many scholars regard Nixon's legacy in Indian affairs favorably, Carole Goldberg has recently offered a sharp critique based upon his Supreme Court appointments, including those who helped create Implicit Divestiture. *See* Carol Goldberg, "President Nixon's Indian Law Legacy: A Counterstory," 63 *U.C.L.A. L. Rev*. 1506 (2016).

[238] Public Law 95-341.

recognizing tribal governments on a government-to-government basis."[239] Presidents George H.W. Bush, Clinton, and George W. Bush have issued similar statements.[240] President Obama, during the course of announcing the United States' support for the United Nations Declaration on the Rights of Indigenous Peoples, told Native American leaders that he wanted to improve the "nation-to-nation" relationship between the United States and the tribes.[241]

Congress passed the Tribal Law and Order Act in 2010 to amend the ICRA to allow for greater flexibility in sentencing for tribal courts. Moreover, through the Violence Against Women Act of 2013, Congress allowed, for the first time since *1970s*, non-Indians committing a specie of crime (domestic violence) in Indian country to be tried in tribal courts.

Yet, despite these recent executive pronouncement lauding tribal sovereignty, there remains a strong legacy of diminished tribal sovereignty due mainly to the Supreme Court's judicially created doctrine of Implicit Divestiture, which is a heritage of Kagama. Implicit Divestiture is the doctrine that Indian Tribes and Nations lose sovereign powers not only (1) by express treaty provisions or (2) through statute, but also (3) by implication where the attempted exercise of sovereignty is "inconsistent" with their "dependent status."[242] According to the Court, the question of whether a sovereign power is "inconsistent" with a tribe's status may be decided by the Court itself in the absence of a statement from the political branches. For example, the Court

[239]*See* http://www.tribalconsultation.arizona.edu/docs/Executive%20Branch/ idc-002004.pdf

[240] For George H.W. Bush's characterization of the Federal Indian relationship as "government-to-government," *see* http://www.presidency.ucsb.edu/ws/?pid=1933; for Bill Clinton's statement using the same characterization, *see* http://www. presidency.ucsb.edu/ws/index.php?pid=55959&st=clinton&st1= native+american; for George W. Bush's statement using the same characterization, *see* https://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040430-10.html.

[241]http://www.washingtonpost.com/wpdyn/content/article/2010/12/16/AR2010121603136.html.

[242] United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status"). *See also Oliphant*, 435 U.S. at 208 ("Indian tribes are prohibited from exercising …those powers inconsistent with their status") (internal citation omitted).

has held through Implicit Divestiture that tribes: do not have criminal jurisdiction over non-Indians,[243] do not have criminal jurisdiction over non-member Indians,[244] do not have regulatory authority over non-members on fee lands within a reservation (absent very narrowly-drawn exceptions),[245] do not have jurisdiction over a member's tort and civil rights claims against state officers for acts alleged to have occurred on tribal lands,[246] do not have civil jurisdiction over a torts claim between two non-members occurring on a state highway running across reservation land,[247] do not have the power to tax non-members on non-Indian land within a reservation,[248] and do not have jurisdiction to review the sale of non-Indian land within a reservation.[249] In all of these cases, the Court used an Implicit Divestiture framework to find that the tribes had been divested of various sovereign powers that autonomous states normally exercise on the basis that such powers were inconsistent with the tribes' "status" and not essential to the health, safety and welfare of the tribe.[250]

And in all of these cases, Congress and the Executive had been silent on the specific issue before the Court, except for scattered and contradictory statements made anytime between the founding and the present. In the absence of a clear statement from the political branches affirming or de-recognizing these aspects of tribal sovereignty, the Court proceeded to de-recognize them

[243] *Oliphant*, 435 U.S. 191.

[244] Duro v. Reina, 495 U.S. 676 (1990) (overturned by Congressional statute; see Pub. L. 101-511 §8077b (1990), recognized by *United States v. Lara*, 541 U.S. 193 (2004)).

[245] *Montana*, 450 U.S. 544.

[246] Nevada v. Hicks, 533 U.S. 353 (2001).

[247] Strate v. A1 Contractors, 520 U.S. 438 (1997).

[248] Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

[249] Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008).

[250] Andrew Fletcher calls *Oliphant*, *Montana* and *Nevada v. Hicks* the "colonial trilogy," drawing a comparison with the Marshall Trilogy, discussed herein. According to Fletcher, the "colonial trilogy" continues the work of nineteenth century conquest. See Andrew K. Fletcher, *Suffocating Sovereignty: Implicit Divestiture and the Violation of First Principles*, 5 DARTMOUTH L.J. 31 (2007).

though judicial fiat.[251] Case law that sustains these restrictions derive from theories first articulated in the latter half of the nineteenth century as the United States transformed its relationship with Native Tribes in an effort to create a more homogeneous, national law and identity.

[251] For an argument that the Court's Implicit Divestiture Doctrine violates the Separation of Powers, *see* Lance Sorenson, "Tribal Sovereignty and the Recognition Power," 42 American Indian Law Review __(2018).

PART II:

SOVEREIGNTY SUBJECT TO VETO - WESTERN TERRITORIES

Introduction

Judge Elliot Sandford, Chief Justice of the Territorial Supreme Court of Utah, expressed bewilderment when President Benjamin Harrison asked him to resign in May 1889. "I beg to inquire," he wrote to the administration, "whether there are any charges of misconduct … against me. In case of such charges, I think you will agree with me that it will be unwise, unbecoming and improper to resign the office of Chief Justice until they have been either proven or disproven and disposed of." Despite Sandford's protests, the request to step down could not have surprised him. President Harrison had just defeated Grover Cleveland – the man who had appointed Sandford the previous year. Sandford had even drafted a letter of resignation during the month of Harrison's inauguration but did not send it at the behest of members of the Utah Bar. By requesting clarification regarding the reasons for his termination, Sandford demonstrated the curious position of territorial judges – supposedly impartial dispensers of the law serving at the pleasure of the President. After demanding an investigation of any alleged misconduct, he continued his letter: "I may add that if a change is necessary for *political reasons only*, the President can have my resignation as soon as the business of the court … will permit."[252]

What political reasons might necessitate a change in judicial office? The national government sought in the 1880s to terminate the Mormon practice of polygamy, especially in light of the

[252] Letter from Elliott Sandford addressed to Attorney General William H.H. Miller, May 17, 1889. Reprinted in the *Deseret Weekly News*, June 8, 1889, p. 17. *See also* "Sandford Removed," *Deseret Weekly News*, June 8, 1889.

repeated petitions for statehood from the citizens of Utah – a developing territory that was otherwise destined for statehood. Mormons' insistence on a right to polygamy tested the nation's commitment to local sovereignty in the territories.[253] President Harrison and members of Congress understood that once Utah achieved statehood, it would be far more difficult for federal authorities to regulate an area of law – marriage – that had always been a matter of local governance. However, so long as Utah was a territory, the national government could assert constitutional and legal authority to root out polygamy. Territorial officials, including judges, were enlisted to help create national standards for marriage.

Judge Sandford's predecessor in office, Charles Zane, had used Congressional legislation outlawing "cohabitation" to obtain numerous convictions against Mormon polygamists, many of whom found themselves in a federal penitentiary in the late 1880s.[254] Sandford, appointed by the Democrat Cleveland, however, was not so zealous. At the outset of his first administration, Cleveland told the son of a prominent Mormon leader that he wanted to appoint officials who would "execute and adjudicate the laws in Utah according to the most lenient Southern construction of Federal rights."[255] Judge Sandford, consistent with Cleveland's more tolerant attitude, proved to be lenient on Mormon polygamists, and Mormons took note. Church leader

[253] Even the champion of popular sovereignty in the territories, Stephen Douglas, found polygamy to be a step too far. Unlike the legality of slavery, which he insisted was a matter for territorial legislatures to determine, he stated that the federal government had the right "to apply the knife and cut out this loathsome and disgusting ulcer." Kenneth L. Alford, ed., *Civil War Saints* (Provo, Utah: Deseret Book, 2012), 161–183.

[254] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002). Charles Zane's background suggests a commitment to the use of federal power to root out local repugnant practices. He was an associate of Abraham Lincoln in Springfield and took Lincoln's place in the law office of William Herndon following Lincoln's election to President. *See* "Judge Charles Zane," Journal of the Illinois State Historical Society, Vol. 8, No. 1 (1915), 181-84.

[255] Frank J. Cannon, *Under the Prophet in Utah* (New York: Scriptura Press, 1911), p. 73; *see also* David M Whitchurch and Mallory Hales Perry, "Friends and Enemies in Washington: Joseph F. Smith's Letter to Susa Young Gates, March 21, 1889," *Mormon Historical Studies* Vol. 13, No. 1-2 (Spring/Fall 2012).

and polygamist Matthias Cowley called Judge Sandford "a man of refinement and moral courage."[256] Thus, when the Civil War veteran Harrison displaced Cleveland in 1889, Mormons and Sandford sensed the brief period of a "lenient, Southern" approach to polygamy would end. Although President Harrison ultimately proved to be remarkably forgiving of Mormon leaders following their public renunciation of polygamy, he could not afford leniency from the territorial courts until he procured such a repudiation.

This context is helpful to make sense of the reply Harrison's administration sent to Sandford. The attorney general, William H.H. Miller, wrote: "[T]he president has become satisfied that your administration of the office was not in harmony with the *policy* he deemed proper to be pursued in reference to Utah affairs, and for this reason he desired to make a change …. As you did not see fit to embrace this opportunity [to resign], the President has removed you and appointed your successor."[257] Harrison thus summarily terminated Sandford. Sandford's successor as Chief Justice was also his predecessor, Charles Zane, the proven anti-polygamist, who resumed his role in convicting polygamists and handing down maximum sentences.

Sandford was not content to let the administration have the last word. He used his parting shot to call attention to the difference between what he claimed to have been doing as Chief Justice – administering the law impartially – with the Harrison administration's request – to use his office to further policy goals. "In reply I have the honor to say that my earnest purpose while on the bench, as Chief Justice of this territory, has been to administer justice and the laws honestly and impartially to all men, under the obligations of my oath of office." While not disputing the power

[256] Matthias Cowley, *Wilford Woodruff: History of his Life and Labors* (Salt Lake City: Bookcraft, 1964), p. 563.

[257] Letter from William H.H. Miller to Elliott Sandford, May 23, 1889 (emphasis added). Reprinted in the *Deseret Weekly News*, June 8, 1889, p. 17. Although Attorney General William Henry Harrison Miller was named after President Benjamin Harrison's grandfather, they were not related.

of the President to remove him from his judgeship, Judge Sandford, nevertheless found the affair distasteful. "If the President of the United States has any policy which he desires a judge of the Supreme Court to carry out in reference to Utah affairs, other than the one I have pursued … he has done well to remove me."[258] The *Deseret Weekly News* harshly criticized the removal, as one might expect from an organ of the Mormon Church.[259] The *New York Times* also expressed alarm about the implications of the executive setting a policy agenda for courts. "If the President may dictate a 'policy' for the Utah court, there does not seem to be any good reason why he should not [pressure] the Supreme Court at Washington to carry out a more extensive policy."[260]

The explicit policy-oriented nature of judicial lawmaking in the territories and the structure of the territorial judiciary differed from the federal bench in the states. It is difficult to imagine an exchange such as the one between Judge Sandford and President Harrison taking place between the President and a federal judge commissioned under Article III of the Constitution. Article III states that the "judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, compensation, which shall not be diminished during their continuance of office."[261] The life tenure and compensation provisions of Article III serve, as Alexander Hamilton argued during the ratification debates, to "secure a steady, upright, and impartial administration of the laws."[262] Indeed, if the purposes of the separation of powers is to guard against the "gradual concentration" of power in one branch of government, then a constitutional structure that pits "ambition against ambition" is a positive feature of the system,

[258] Letter from Elliott Sandford addressed to Attorney General William H.H. Miller, June 1, 1889. Reprinted in the *Deseret Weekly News*, June 8, 1889, p. 17.
[259] "My Policy," *Deseret Weekly News*, June 8, 1889, p. 18.
[260] "Policy overriding Law," *New York Times*, June 10, 1889, p. 1.
[261] United States Const., Art. III, Sec. 1.
[262] Alexander Hamilton, "Federalist No. 78," *The Federalist Papers* (New York, N.Y: Mentor, 1999).

as Madison pointed out, not a bug.[263] The Article III judiciary has jealously guarded its own power from the Founding.[264] The independence of the federal judiciary has become a cherished hallmark of United States government. Impeachment of Article III judges is historically rare, convictions even rarer, and almost never involve disagreements over policy.[265]

The problem for Judge Sandford, however, was that he was not an "Article III" judge. Rather, his authority and legitimacy as a judge derived from the power Congress may exercise under Article IV of the Constitution to "make all needful rules and regulations respecting the territory or other property belonging to the United States."[266] Article IV authorizes Congress to set up territorial systems of government, including judiciaries. Such legal systems are creatures of Congress, not the Constitution. Territorial executive and judicial officials serve at the pleasure of Congress and, if Congress delegates its discretion, the President. The implications of this structural difference are significant, and give Congress a much freer-hand in regulating the affairs of territories in ways that are constitutionally impermissible in an organized state of the Union. The extent of Congress's power under Article IV – whether it be plenary or whether it is limited – has at times become the focus of intense debates, as will be discussed herein.

Given this territorial judicial structure, one might characterize Judge Sandford's lenient interpretation of polygamy laws also as a policy, not legal position – one seeking to implement a

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[263] James Madison, "Federalist No. 51," *The Federalist Papers* (New York, N.Y: Mentor, 1999).

[264] The first time in American history that political power transferred from one party to another, in 1801, a judicial turf war began almost immediately. Thomas Jefferson and his allies in the House of Representatives succeeded in impeaching both John Pickering and Samuel Chase, though the Senate convicted only Pickering. *See* Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic*, (New York: Oxford University Press, 1971).

[265] Of the fifteen federal judges ever impeached, only eight have been convicted. There is a strong case to be made that the first two to be impeached, John Pickering and Samuel Chase, were targeted as a matter of politics. The remainder appear to have been impeached for improper conduct – the most frequent such conduct being intoxication on the bench. For an argument that the removal of federal judges does not require impeachment, *see* Saikrishna Prakash and Steven Smith, "How to Remove a Federal Judge," 116 *Yale Law Journal* 72 (2006).

[266] United States Const., Art. IV.

"Southern construction of Federal Rights." Both Sandford and Zane's varying degrees of zealousness toward the issue reflected the position of their respective political parties, with the Republicans seeking to build upon the success of the Civil War to morally reform the entire country, and the Democrats less concerned with the peculiar institutions of local cultures. Judge Zane, too, had once been unceremoniously removed from office just as had Judge Sandford.

Even if Judge Sandford's claims to integrity and impartiality are suspect, his story nevertheless illustrates the unique nature and role of law in United States western territories as well as the role of law's administrators. Congress used its Article IV power to create an Americanized system of law in western territories in the late nineteenth century.[267] The national

[267]The history of the United States Western Territories is a subfield of the history of the American West, which historiography is discussed more fully in the Introduction. The territories of the American West garnered serious scholarly attention from Earl Pomeroy in 1947 with his *The Territories and the United States, 1861-1890* – a descriptive, rather than analytic or interpretive, examination of the mechanics of territorial administration. Pomeroy's purpose described a functioning bureaucracy charged with administering the borderlands of an empire. Earl Pomeroy, *The Territories and the United States, 1861-1890* (Philadelphia: University of Pennsylvania Press: 1947). Pomeroy's second major work on the American West was likewise structured around the political subdivisions of the United States, but described the social evolution of the states comprising the Pacific Coast and the Intermountain Region. *See* Pomeroy, *The Pacific Slope: A History of California, Oregon, Washington, Idaho, Utah and Nevada* (Reno, University of Nevada Press, 1965). Whereas Pomeroy wrote, in *Territories*, a mostly descriptive account of political administration, Howard Lamar provided a much more exhaustive and interpretive account of the management of the four-corners states during their territorial periods. Lamar situated such territorial administration in a much broader context and he described to a larger degree than Pomeroy, the historical processes at play. In *The Far Southwest, 1846-1912*, Lamar argued that the territorial periods for the four states of the old Spanish Southwest were ones where the federal government attempted to "Americanize" the people as a condition for granting statehood while simultaneously avoiding the heavy-handed administrative tactics that led to the Revolutionary War against Great Britain. Lamar contended that the federal government used "American" habits, customs, and democratic institutions – such as the two-party system, public schools, elective office, county government, and secular courts – to "nationalize" the territories to a sufficient degree before accepting them into the full brotherhood of states. Howard Lamar, *The Far Southwest, 1846-1912* (Albuquerque: University of New Mexico Press Revised Edition), 2000 (1966). Pomeroy and Lamar offered top-down interpretations of empire in the American West, where decision-makers in Washington D.C. drove events on the ground. Anne Farrar Hyde has shifted the perspective in an important way in *Empires, Nations and Families: A History of the North American West: 1800-1860*. Instead of centering her history on shifting political boundaries, Hyde situates her subjects within the social units to which they would have pledged their most pronounced loyalties – their families. Hyde argues an individual's identity in the American West was formulated by his or her family, rather than his or her nation or even ethnic group. By focusing on families, Hyde does not ignore what previous historians missed – the movement of individuals and families within the empire and how those movements

government asserted greater control over the development of law in the western territories than it did in established states. The national government sought to create a more homogenous law in the West that reflected values it hoped to impose.[268] Not only could the national government appoint and remove executive officials, it could also appoint and remove judicial officials, like Judges Sandford and Zane. When Congress combined this power of appointment and removal with the forced adoption of a uniform federal common law in the territories, the national government manipulated the development of substantive law in the territories in a way that it was incapable of doing in the states. Not only were local derivations in *marital* law extinguished as part of the process of nationalizing the common law, so were other regional innovations in torts, contracts and property. Furthermore, Congress exercised in territories powers that local citizens deemed truly egregious, such as the removal of locally elected territorial officials and the deprivation of political rights. These powers Congress could not exercise in the states.

Indeed, the legal culture of the western territories bore some similarities to the legal culture described by Mary Bilder in *The Transatlantic Constitution*. The British management of its empire, according to Bilder, developed in such a way to allow for legal *divergence* in its North American colonies, but not *repugnance*. To ensure that colonial laws had sufficient English character, a special division of the Privy Council heard and decided appeals from the colonies in

shaped the politics and economies of their spaces. Empires were created not just by political officials in Washington or Mexico City, but also by powerful families dominating the western landscape. According to Hyde, prosopography might be just as important as geography. Anne Farrar Hyde, *Empires, Nations and Families: A History of the North American West: 1800-1860* (Lincoln: University of Nebraska Press, 2011).

[268] One might argue that Congress has always used its Article IV lawmaking power to reflect national values in territories. For example, Congress banned slavery in the Northwest Ordinance. However, the same Congress that passed the Northwest Ordinance also passed the Southwest Ordinance, which specifically allowed for slavery in the Southwest Territory. If there was a national ethic of abolition in 1789-1790, it was not reflected in the Southwest Ordinance. In the West Congress was much more aggressive in using law to impose a national standard of morals.

private-party litigation. Thus, a court of the Crown ensured that a national *English* character of the law would be maintained throughout the empire, even if some variations existed in the colonies that reflected local culture, climate, and conditions.[269] Likewise, in the western territories of the United States, an exclusive federal judiciary and legislative councils, including federally appointed officials, held veto power over locally elected assemblies. These councils were similar to the Privy Council in that both ensured that a national character of law would be cultivated and maintained in the provincial territories. Additionally, arbiters of national standards appointed territorial officials, including judges, whose responsibilities included rooting out repugnancy. Those not whole-heartedly engaged in the cause, like Judge Sandford, were replaced.

The distinction between the sovereign status of states and the ambiguous status of territories was sometimes lost upon territorial citizens who, as we shall see, learned the harsh lesson that in the administration of territorial affairs their local control of government would ultimately give way to federal authority. The members of the bar in Utah, for example, were powerless to prevent both the removal of friendly Judge Sandford and the return of zealous Judge Zane. Because of these experiences, territorial citizens came to place value on statehood for the protection of local customs and political rights.

Resolving historical and legal questions about the role of law and sovereignty in United States territories seems less pressing today than in the nineteenth century. According to the 2010 census, the percentage of the geographic United States that has territorial status was less than one percent, and the percentage of United States citizens living in territories was less than two percent. Apart from Puerto Rico, where the question of sovereignty and statehood periodically finds its ways into referenda, there is little drive to change the status quo in United States territories. The Supreme

[269] *See* Mary Sarah Bilder, *The Transatlantic Constitution, supra* note 28, at 35, 49, and 73-77.

Court occasionally addresses unresolved questions of sovereignty in the territories, as it recently did in the case of *Puerto Rico v. Sanchez Valle*, but such cases and questions do not occupy the central debates of modern constitutional law.[270]

In the mid and late nineteenth century, however, the sovereign status of territories was the dominant constitutional question. After the Mexican-American war, approximately half the United States consisted of both organized and unorganized territory, with settlers pouring into the Oregon, New Mexico and Utah territories as well as the new golden state of California. The 1850 census listed the population of California at almost 100,000 for a state organized that year in an area first claimed by the United States just two years prior. Even if western populations were small relative to the East, they were growing fast. Whether the states to be carved from the region would adopt the slave economy of the south or a free labor system of the north became the leading political question.

This Part seeks to address the following questions: What were the theories of territorial sovereignty at the Founding? How did those theories develop and change throughout the nineteenth century? What tools did the federal government use to create national law in the West in the late nineteenth century? Part II is divided into three chapters. In Chapter 4, I will examine the nascent and inchoate theories of territorial administration at the Founding as well as the attempts to "put flesh on the bones" through the development and elaboration of territorial organic acts. I will also investigate the theories of territorial sovereignty promulgated during the first half of the long nineteenth century by John Marshall, Roger Taney, Stephen Douglas and Abraham Lincoln.

[270] *Puerto Rico v. Sanchez Valle*, 579 U.S. -- (2016).

Chapter 5 is an investigation of the ways in which the United States drew upon the theories of Marshall, Douglas and Lincoln (even where those theories contradicted each other) to shape the law in the West in furtherance of the creation of a national legal character. Lincoln and Congress were mindful of the need to "seize" the West during the Civil War. They did so by quickly organizing western territories and populating their governments with Union loyalists. I will review the appointment and removal of western territorial officials, including judges. I will examine the imposition of federal common law, both by Congress and territorial judges.[271] Nationalists enlisted and manipulated the common law to serve national interests – such as the development of the transcontinental railroad. I will also examine how Congress asserted greater and greater power over political rights in ways it could not in states.[272]

Chapter 6 is an investigation of the conditions Congress placed on statehood for western territories and how Congress used those conditions in an attempt to enforce "American" standards

[271] The United States' common law system is one of its heritages from Great Britain. It is a system of law in which the rules are largely unwritten, at least not in a legislatively-created code or digest. Rather, judges expound the law in opinions when deciding cases between parties. Proponents of common law systems argue that its chief advantage is the power and flexibility of the judge to adapt and modify the law to the unique circumstances of the case. In the present era, United States law is mishmash of common law unique to individual states, state codes, federal codes, constitutional law, rules created by executive agencies and some limited federal common law. "Federal common law" is a contradiction in terms to some scholars. For them, the federal government itself, including the federal judiciary, is a creature of a legislative body – the Constitutional Convention. Federal law, according to this theory, was never meant to displace state law over matters for which states traditionally exercised the police power – health, safety, morals and welfare. As will be discussed herein, in the early 1800s and throughout the nineteenth century, strong advocates for a federal common law, including Supreme Court Justice Joseph Story, dominated the legal academy. The rise of formal federal common law took place as western territories needed to adopt a legal system. Federally appointed territorial judges guided the territories to federal common law.

[272] In the modern era, politicians, judges, and the legal academy tend to lump all individual rights together under the umbrella phrase "civil rights." However, in the nineteenth century, rights were classified as political, civil and social. Political rights generally included the right to vote, hold political office and serve on a jury. Civil Rights in the nineteenth century included rights to property, contractual rights, rights to access the courts and vocational liberty. Social rights included access to places of public accommodation, access to education, and access to common carriers. The distinction had significant legal ramifications. Social rights, for example generally received far less federal protection than civil or political rights. *See* Harold M. Hyman and William M. Wiecek, *Equal Justice Under the Law, 1835-1875* (New York: Harper & Row, 1982).

in marriage, education, and the democratic process. In all of these efforts, Congress used the organization of the West, including law, to forge a national, American character.

Chapter 4:

Surveying the Scene

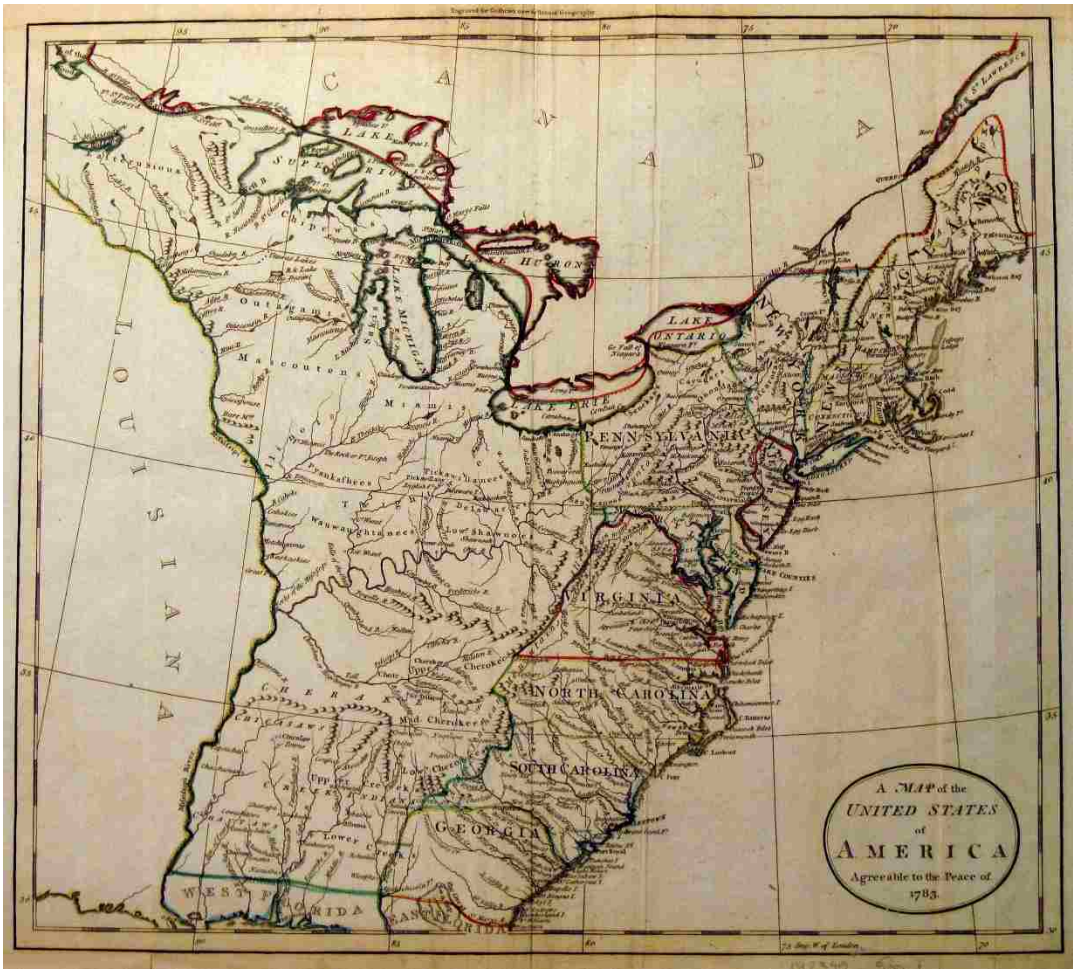

Figure 3 – A Map of the United States Agreeable to the Peace of 1783

Founding Theories: Land and Governance

When Anglo-American colonists sought to justify their separation from British rule, they turned to one of England's own – John Locke, the formidable defender of the Glorious Revolution – to find articulation for their cause. While Locke's two treatises on government played a central role in the unfolding drama, colonists also enlisted his *Some Thoughts Concerning Education* in

service of their argument.[273] Locke asserted that parents have a responsibility to treat their children as rational beings by rearing them with patience and kindness, with the goal of preparing them for the responsibilities of adulthood. Locke emphasized that parents should train their children to use their own reason. American colonists argued that British authorities did not treat the colonists as rational humans and did not allow the colonies to "mature" into self-governance. Therefore, they said, the British were violating their responsibility as a just "parent." Forcible separation was therefore justified.[274] Against this backdrop of revolutionary rhetoric, the Americans began to develop their own methods for administering a large republic … or empire.[275] The debate over whether the new nation was a republic, empire, or some kind of hybrid as James Madison suggested was part of the ongoing discussion to define "federalism" in the new nation.[276] Despite the fact that many colonists were determined to avoid rebuilding the colonial structure of Great Britain in the administration of far-flung territories, attributes of empire persisted, especially in the West. In order to mask the Britishness of the new system, Americans needed new language and

[273] For an argument that *Some Thoughts Concerning Education*, along with an *Essay on Human Understanding*, were more widely used than the *Second Treatise on Government* in framing the revolutionary debate, *see* Jay Fliegelman, *Prodigals and Pilgrims: The American Revolution Against Patriarchal Authority* (New York: Cambridge University Press, 1982). *See also* Holly Brewer, *By Birth or Consent: Children, Law & the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005).

[274] *See, e.g.*, Thomas Paine, "Common Sense," *The Call to Independence*, Thomas Wendel, ed., (New York: Barron, 1975) ("But Britain is the parent country, say some. Then the more shame upon her conduct. Even brutes do not devour their young, nor savages make war upon their families").

[275] Southerners, like James Madison and Thomas Jefferson favored the language of republic and republicanism. Alexander Hamilton, on the other hand, referred to the new country as an "empire" in the first sentence of Federalist No. 1. *See* Alexander Hamilton, "Federalist No. 1," *The Federalist Papers* (New York, N.Y: Mentor, 1999).

[276] James Madison, "Federalist No. 39," *The Federalist Papers* (New York, N.Y: Mentor, 1999). "The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national."

theories. "Territories" replaced "colonies," local sovereignty in the territories gained real traction, and territorial subjects came to expect a path to statehood.

A full-fledged and coherent theory of sovereignty in the territories is difficult to find at the Founding. Madison and Jefferson argued that territories should be temporary stepping-stones to statehood.[277] Ardent nationalists, like Gouverneur Morris, suggested the United States could govern territory acquired after 1783 as something akin to colonies.[278] Although the Northwest Ordinance became the original model and template for the administration of territories and the admission of new states, thorny issues involving territorial governance – citizenship, voting, slavery, which law to apply in civil and criminal cases – were worked out on a more or less *ad hoc* basis as the United States acquired new territory over time. Finding a cogent theory of territory only became a pressing issue when the prospect of slavery in the West became the central political question. Roger Taney, Stephen Douglas, and Abraham Lincoln all offered competing visions of territorial sovereignty in the crucible of the 1850s.

Despite the lack of a *theory* at the Founding, the *administration* of federal territory and the governance of its inhabitants was a pressing issue for Congress even before the adoption of the Constitution in 1787.[279] The Revolution began, in part, due to colonial anger at the Crown's attempts to prevent settlement west of the Appalachians.[280] Before and during the War, Anglo-

[277] *See* Reginald Horseman, "Thomas Jefferson and the Ordinance of 1784," *Illinois Historical Journal*, Vol. 79, No. 2 (1986), pp. 99-112.

[278] Morris states that he thought the United States should govern Louisiana and Canada (if it acquired Canada) as "provinces," allowing them "no voice" in Congress. *See* Max Farrand, Records of Federal Convention, Vol. III., p. 404.

[279] Some historians suggest political theory is almost always formed *ex post facto*, to justify previous events or formed out of practical experience. For a summary of those arguments regarding John Locke's justification of the Glorious Revolution, and a partial response to them, *see* Lois G. Schwoerer, "Locke, Lockean Ideas and the Glorious Revolution," *Journal of the History of Ideas*, Vol. 51, No. 4 (1990), pp. 531-548.

[280] *See, e.g.*, Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006).

Americans travelled and settled in trans-Appalachian areas, both north and south of the Ohio River. In the Treaty of Paris, the British ceded the large trans-Appalachian area to the United States – with the Mississippi River becoming the western border of the new nation, and ill-defined borders in the north and south. This largesse created immediate administrative issues – who would govern the new land, and how?

Many colonial charters had granted tracts of land from "sea to sea" at a time when Anglo settlers and their benefactors had no knowledge of the geography of North America.[281] The competing and overlapping claims to trans-Appalachian land caused sharp divisions among the states. Those with competing claims to the same land asserted primacy. Others with no western land claims, like Maryland, insisted that Congress assert control. Maryland refused to ratify the Articles of Confederation until such land disputes were resolved to its liking.[282] The Confederation Congress, derided then and since as structurally insufficient for administering a large republic, was remarkably successful in negotiating the cession of western land claims from the states to the central government.[283]

From the western land cessions, two federal administrative districts emerged under the Confederation Congress: the Northwest Territory and the Southwest Territory. Thomas Jefferson, Virginia's delegate to the Confederation Congress in 1783 and 1784, drafted a bill for the governance of federal territory. This proposal called for the creation of fourteen new states to be formed in the Northwest Territory, and required that such states should enter the Union as members

[281] *See* Christopher Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century," *Law and Social Inquiry*, vol. 26, no. 2 (2001), pp. 315-372.

[282] *See* Merrill Jensen, "The Creation of the National Domain, 1781-1784," *Mississippi Valley Historical Review*, vol. 26, no. 3 (1939), pp. 323-342.

[283] *Ibid*. *See also* Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Alfred A. Knopf, Inc., 1979); Jack P. Greene, "The Background of the Articles of Confederation," *Publius*, vol. 12, no. 4 (1982), pp. 15-44.

equal to the original thirteen. Reginald Horseman argues that Jefferson was optimistic about the American experiment and sought to curb national power by expanding the institutions of republicanism westward.[284] Jefferson's vision in 1784 did not include a role for vast and permanent federal property. Although Congress later amended Jefferson's statehood process and mercifully ignored his proposed state names, the Founding-era policy that large tracts of land should be divided and admitted into the Union as co-equal states carried the force of law when Congress passed this Ordinance of 1784. Jefferson's model permeated future Acts of Congress concerned with the administration of new territorial acquisitions.[285]

Transferring federal land into private hands was another matter, one that Congress took up the following year. In the Land Ordinance of 1785, Congress set forth a process for the systematic surveying, dividing, and selling of public land to private landholders, with reservations made in each township for the establishment of public schools. Notably, the process for transferring land to private ownership bypassed local governmental involvement. Even after statehood, the process for transferring lands from public to private hands remained a national, not state, endeavor. This process is described more fully in Part III. The sale of public lands was an important revenue source for the fledgling nation.[286] The Treasury Department initially oversaw the survey and sale of public lands until Congress created the General Land Office in 1812.[287]

The Confederation Congress saw fit to amend Jefferson's simplistic statehood process (after Jefferson had assumed his duties as ambassador to France). Congress debated and passed the

[284] Horseman, "Thomas Jefferson and the Ordinance of 1784," *supra* note 277, at pp. 99-112.

[285] Jefferson proposed names for ten new states: Sylvania, Michigania, Cheronesus, Assenisippis, Metropotamia, Illinoia, Saratoga, Washington, Polypotamia, and Pelipsia. *See Ibid*. at 108.

[286] *See, e.g.*, 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*, App. 1, 283-86. (Philadelphia: 1803; Reprint. South Hackensack, N.J.: Rothman Reprints, 1969).

[287] The history of the General Land Office is discussed more fully in Part III.

Northwest Ordinance in the summer of 1787, as the Constitutional Convention met in Philadelphia. Several members of the Convention took leave to attend Congress, likely for the express purpose of passing the Northwest Ordinance.[288] The Northwest Ordinance modified Jefferson's requirements for statehood and set forth a more detailed plan for the administration of unorganized federal territory. For territories with Anglo populations of less than 5000 free male citizens, the national government would appoint a governor, secretary and three judges. Once this population exceeded 5000, Congress permitted territorial citizens to elect a territorial legislature. The Ordinance ensured that the federally appointed officials, including the governor and members of a "Legislative Council" would be a part of the general legislature of the state to help create law. Congress was not interested in creating a separation of powers for territorial governance. The territories would be disallowed from enacting laws "repugnant to the principles and articles in this ordinance established and declared."[289] Once the population exceeded 60,000, Congress permitted territorial citizens to apply for statehood. The statehood process entailed a petition to Congress, a Congressional Enabling Act, the drafting of a proposed state constitution, and final approval of the Executive. After the Civil War, Congress took progressively harder looks at not only the population and industries of the territories applying for statehood, but also their social and legal cultures to ensure potential states followed national norms.

Today, scholars celebrate the Northwest Ordinance for its anti-slavery provisions, nods to religious freedom, and its aspirations for friendly relations with Native American Tribes.[290]

[288] *See* Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House, 2009), 216.

[289] Northwest Ordinance, Section 11. *See* Peter Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington: Indiana University Press, 1987).

[290] Akhil Amar, for example, includes the Northwest Ordinance as one of six foundational texts that are part of America's symbolic Constitution – the others being the Declaration of Independence, Publius's *The Federalist*, Lincoln's Gettysburg Address, *Brown v. Board of Education*, and Martin Luther King Jr.'s

However, perhaps the most important aspect of the Ordinance was the structural framework it created for the governance of federal territory and the systematic admission of new states to the Union "on equal footing" with the original states. As will be discussed herein, nothing in the text of the Constitution requires states be admitted into the Union on terms of equality with existing states. However, the Northwest Ordinance required such equality for states formed from the Northwest Territory. Congress reauthorized the Northwest Ordinance in its first session under the new Constitution and followed its template in the acts that governed subsequent acquisitions of land in the nineteenth century – such as that associated with the Southwest Ordinance, the Louisiana Purchase, territory acquired from Spain, and the Oregon Territory.

We shall see, though, that the two great wars of expansion in the nineteenth century – the Mexican-American War and the Spanish-American War – reshaped Congressional priorities. Following the Treaty of Guadalupe Hidalgo, Congress discarded the policies behind the Land Ordinance of 1785 and, following the Treaty of Paris in 1898, Congress discarded the spirit of the Northwest Ordinance.

Constitutional Landscape

The Constitutional Convention met the same summer that the Confederation Congress passed the Northwest Ordinance. The nature of slavery, representation, and federalism underlay many of the debates. Resolution 14 of the Virginia Plan, drafted by James Madison as he impatiently waited for the other delegates to show up, was a proposal "that provision ought to be made for the admission of States, lawfully arising within the limits of the United States."[291] This resolution passed the committee of the whole unanimously on July 18 with little discussion. Madison was

"I Have a Dream" speech. *See* Akhil Amar, *America's Unwritten Constitution* (New York: Basic Books, 2012), 245-275.

[291] Farrand, Max, ed. *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911).

not a part of the Committee of Detail, however, which the Convention commissioned to re-draft the accepted resolutions into Articles of a new constitution. That committee, led by Edmund Randolph, John Rutledge and James Wilson, worked in the last part of July and first week of August. It re-wrote the Resolution 14 as Article XVII. It read:

> New States lawfully constituted or established within the limits of the United States may be admitted, by the Legislature, into this Government. … If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States, concerning the public debt which shall be then subsisting.[292]

The Committee of Detail presented their work to the Convention on August 6 and the delegates began methodically debating each Article, finally reaching Article XVII on August 29. On that day, Gouverneur Morris moved to strike the last two sentences of the provision. He stated he "did not wish to bind down the Legislature to admit Western States on terms here stated" – equal footing – and he did not wish to "throw the power" into the hands of western states. James Madison, propounder of the large republic theory and close confidant of Thomas Jefferson, rose in opposition to Morris "insisting that the Western States neither would nor ought to submit to a Union which degraded them from an equal rank with the other States."[293] Morris's motion passed with the help of other delegates who expressed the sentiment that at some future point it might become "inconvenient" to admit new States on terms of equality.[294]

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[292] Farrand, Max, ed. *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911).

[293] In reviewing the records of the Convention in Philadelphia, especially the debates, a word of caution is warranted regarding the accuracy of the records. Most of the reconstruction of the debates draws from Madison's notes. Madison, however, revised his notes throughout his life. *See* Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2015). The debate described by Madison on August 29, 1787 is consistent with the changes made to the work of the Committee of Detail. Madison, however, may not have fully registered his objection during the Convention. The statements Madison attributes to Gouverneur Morris are consistent with Morris's later recollections of the Convention.

[294] Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, Vol. 4 (Chicago: University of Chicago Press, 1987), 544-45.

In seeking to understand Morris's opposition to this "equality" provision, it is important to remember two things. First, Morris was a proponent of a strong national government. He likely understood and even agreed with Jefferson and Madison's theory that the national government would be in a weaker position than it might otherwise be should the sovereign states multiply. Second, Morris was an abolitionist who sensed that the goals of abolitionism would more easily succeed if slavery were confined to existing states. The creation of new sovereign states, some of which would inevitably authorize slavery, would make the work of abolitionism more difficult.[295]

Due to Morris, the doctrine of "Equal Footing" lost the opportunity to become rooted in the text of the Constitution. Indeed, an interpretation of the Admission Clause based on original intent of the Founders would lead one to believe that Congress is under no constitutional obligation to admit new states into the union on equal footing. However, although Morris won the battle at the convention, he would ultimately lose the war. Equal Footing did obtain status as a constitutional principle. That status derives from (1) the Northwest Ordinance, (2) the practice of Congress to invoke "Equal Footing" in each statehood enabling act, and (3) Supreme Court precedent. All of these practices served to constitutionalize or, in the words of Madison – "liquidate" – Equal Footing.[296]

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[295] *See* William Howard Adams, *Gouverneur Morris: An Independent Life* (New Haven: Yale University Press, 2003). George Van Cleve argues that northern abolitionists, like Benjamin Franklin and Rufus King "faced very little home-state pressure to address the problem of slavery at the [Convention]." He adds, "there is little evidence that any of these delegates regarded action against slavery as part of their charge in creating a new government." *See* George William Van Cleve, *A Slaveholders'' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: University of Chicago Press, 2010), 109. Van Cleve acknowledges however, two important points: (1) Some northern states had already begun to abolish slavery by 1787; and (2) Gouverneur Morris was more vehement in his denunciations of slavery than even Franklin and King. *See A Slaveholders' Union*, pp. 109 and 149 (Morris made a "slashing attack on the [Committee of Detail's] support for slavery."

[296] *See* The Federalist No. 37, at 236 (Jacob E. Cooke, ed.., 1961). For a discussion of how concepts might obtain constitutional status after the adoption of the text, *see* William Baude, "Constitutional Liquidation," (forthcoming 2018)(copy on file with author).

The convention continued to debate other provisions of Article XVII concerning the admission of new states. In these continuing debates, the delegates primarily discussed the process of creating new states from existing states – contemporary controversies in Vermont and Kentucky being on the minds of many delegates.

Following the extensive debate in August and the first week of September, the Convention sent the document to a Committee of Style, led by Gouverneur Morris and James Madison, to rearrange and add "polish" to the Articles. They produced the Constitution in final form. The Admission and Property Clauses that went into the Committee of Style as Article XVII came out as Article IV, Section 3. The Convention agreed to that section without amendment.

Although Gouverneur Morris was not on the Committee of Detail, he took the lead in redrafting the Constitution in the Committee of Style, and his handprints are all over the final document. Sixteen years later, after the United States had completed its purchase of the Louisiana Territory in 1803 and the question of administration of new territory presented itself, not for the first or last time, Morris exchanged letters with Henry Livingston discussing the Constitutional Convention and particularly the Admission and Property Clauses. Morris stated that it was his belief that Congress could not admit a new state from any territory that did not already belong to the United States in 1787. "I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils."[297] However, he was quick to add that the reason he did not insert more explicit language to that effect was that because a "strong opposition would have been made," suggesting he was in the minority at the Convention on this point.

[297] Max Farrand, *Records of Federal Convention*, Vol. III., p. 404

Although the territory clauses of Article IV, Section 3 garnered some attention during the ratification debates, the discussion centered mainly around its implication for existing states, as it had during the convention – that is, whether territory from existing states might be carved out for new states. The proposition that Congress could institute rules and regulations for the territories was not a major point of disagreement, though it would become one in the years leading to Civil War.

Putting Flesh on the Bones:

Southwest Ordinance, Spanish Territories and the Louisiana Purchase

Congress, now operating under the Constitution, reauthorized the Northwest Ordinance in 1789 with little change. One year later, Congress passed the Southwest Ordinance. The Southwest Ordinance was similar to the Northwest Ordinance in almost all respects except with regard to slavery, which it explicitly permitted. The Southwest Ordinance created a formal federal territory and outlined the steps to statehood for what would ultimately become Tennessee in 1796.[298]

Also in the 1790s, the United States settled its border disputes with Spain and asserted title to territory that would become the states of Alabama and Mississippi.[299] The Act authorizing the creation of the territory of Mississippi stated that the new territorial government should be "in all respects similar to that now exercised in the territory northwest of the river Ohio" except in the prohibition of slavery, although it did ban the importation of slaves into the territory. It also directed that all land sales be used to dispose of the public debt. Interestingly, the Act also stated that the territorial people of Mississippi should enjoy the same "rights, privileges and advantages"

[298] *See* John Craig Hammond, "Slavery, Settlement, and Empire: The Expansion and Growth of Slavery in the Interior of the North American Continent, 1770-1820," *Journal of the Early Republic*, Vol. 32, No. 2 (Summer 2012), pp. 175-206.

[299] *See* Samuel Flagg Bemis, *Pinckney's Treaty: A study of America's Advantage from Europe's Distress, 1783-1800* (Baltimore: The Johns Hopkins Press, 1926).

as the people occupying the Northwest Territory. It did not say that they would enjoy the rights privileges and advantages of citizens of the states.[300]

From the territory acquired from France in 1803, Congress created two administrative districts – the Territory of Orleans and the District of Louisiana. The Act to organize Louisiana is notable for two reasons: (1) it specifically vested the appointed governor with power over Indian Affairs; and (2) it specifically vested the governor and the three territorial judges with legislative power.[301] The greater distance from the nation's capital necessitated greater delegations of executive and legislative powers. Congressional innovation continued with the creation of the Florida territorial government. Congress created a "legislative council" and vested it, and the governor, with legislative power in the territory. The President initially appointed the Florida legislative council, but it later became an elective body.[302] The territorial court in Florida was the forum of litigation in a case that led to the first cogent theory of territorial sovereignty – an opinion of John Marshall.

[300] *See* Statutes at Large, 5th Congress, 2nd Session, Chapter XXVII "An act for an amicable settlement of limits with the state of Georgia, and authorizing the establishment of a government in the Mississippi territory," April 7, 1798.

[301] "An Act Further Providing for the Government of the District of Louisiana," Sections 1 and 3. Statutes at Large, 8th Congress, 2nd Session, Chapter XXXI, p. 331.

[302] "An Act For the Establishment of a Territorial Government in Florida," Sections 5. Statutes at Large, 17th Congress, 1st Session, Chapter XIII, p. 654.

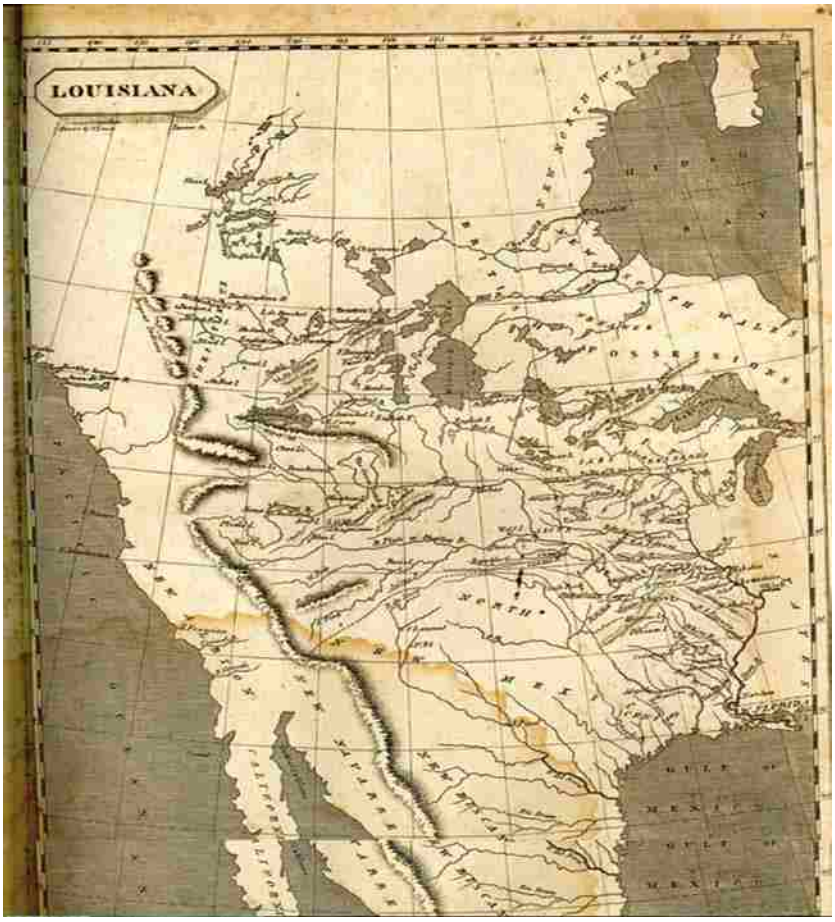

Figure 4 – Map of Louisiana Territory, 1804

John Marshall and Congressional Plenary Power

One of John Marshall's biographers calls him the "definer" of the nation.[303] If the Constitution is the skeleton of the government, then Marshall put the flesh on the bones. His opinions created constitutional law out of concepts that are not explicit in the text of the document – such as judicial review, the reach of the bill of rights, and the contours of national and state power. As seen in Chapter 1, he created a framework for the nation's interactions with native tribes and nations. He also proffered, as Chief Justice of the United States, a theory of territorial

[303] Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Macmillan, 1998).

law. As with his opinions on tribal sovereignty, his interpretation of territorial sovereignty suggested real local autonomy, but subject to Congressional Plenary power. Unlike his cousin, Thomas Jefferson, Marshall was a moderate Federalist; his view on the nature of territorial courts reflected his belief in a vigorous central government.

Article III of the Constitution creates a Supreme federal court and authorizes Congress to create "inferior" federal courts "from time to time." The judges of these "Article III" courts have life-tenure and a guaranteed salary. The Northwest Ordinance and similar territorial organic acts authorized Congress to establish territorial governance, including courts. Neither the Constitution nor the Organic Acts tell us whether judges commissioned in the territories are Article III judges or something else. The issue has significant ramifications. Article III courts have a limited, enumerated jurisdiction, specified in Article III, Section 2. Federal courts do not generally have jurisdiction to decide cases not pertaining to federal law. Traditional areas of law addressing property, torts, contract, family, and most crimes belong to state courts. What, then, was the jurisdiction of a territorial court? Like so many other constitutional questions, the Founders and lawmakers did not resolve the issue in 1787, but left it for future definition. And, like many other constitutional questions, John Marshall's opinion dominated the legal landscape in the early nineteenth century.

The cause for Marshall's examination of the validity and nature of territorial courts was the wreckage of the Point à Petre, a ship carrying cotton from New Orleans to France in 1823.[304] The ship wrecked off the coast of Florida, but salvagers managed to recover 356 bales of cotton. By decree of a territorial court in Florida, David Canter purchased the cotton, with 76 percent of the proceeds paid to the salvagers. The insurer of the Point à Petre, The American Insurance

[304] *American Insurance Co. v. Canter*, 26 U.S. 511 (1828).

Company, paid its customer's claim and then asserted legal claims under a right of subrogation. It sought a court order, first from a district court in South Carolina, and ultimately from the United States Supreme Court, seeking a return of the cotton from Canter. The insurance company argued that the territorial court was "incompetent" to decide the case by virtue of not having the same jurisdiction as a federal district court – i.e., admiralty jurisdiction. Under federal admiralty law as promulgated by Article III courts, the salvagers would have recovered only 50%; the insurance company would have therefore recovered a larger percentage of the value of their insured property.

In deciding the case, Marshall first addressed an issue raised 25 years earlier with the purchase of the Louisiana territory – where does the President get power to purchase foreign territory. The problem was an important and contentious one in 1803, but by the time Marshall addressed it in 1823, the constitutional question had been more or less settled in favor of the power. It is unclear why Marshall felt the need to offer an opinion on the question other than he was unable to avoid saying *something* about large constitutional questions. On that issue, he stated that the purchase power was part of the treaty-making power vested in the Executive.

He next turned to the question of the authority of the territorial court to decide the case. Marshall conceded that Congress did not create territorial courts under Article III of the Constitution. Rather, Congress used its Article IV powers – authorizing legislation for all "needful" rules and regulations in the territories – to create territorial courts. Further, Congress had granted admiralty jurisdiction to these "legislative" courts and that the grant of such concurrent jurisdiction was justified under the Constitution.[305] Thus, the admiralty jurisdiction of the Article IV legislative courts was legitimate, even though the particulars of that law diverged from Article III federal admiralty law. Marshall did not attempt to resolve the contradictions in territorial

[305] *Ibid. at* 543-44.

admiralty law with that of the Article III courts. It would be Congress's job, not the Supreme Court's, to "fix" admiralty law in the territories.

Marshall announced two important propositions that would have further reaching consequences in western territories: (1) federal court systems organized under Article IV with removable judges were legitimate under the Constitution; and (2) "in legislating for [the territories] Congress exercises the combined powers of the general, and of a state government."[306] That is, Congress was a general legislature for the territories, even if it delegated lawmaking authority to a territorial government. By extension, territorial courts had both a general local jurisdiction and a federal one. This second point is important for two reasons. First, it became a point of contention for the various proponents of differing theories of territorial sovereignty as discussed in the next sections. Second, Marshall's opinion imbued territorial courts with the ability to create a general federal common law in the territories for areas of substantive law traditionally reserved for states. As will be discussed in Chapter 5, Congress, the President, and territorial courts in the West used this power more aggressively in western territories to forge a homogenizing and unifying federal common law, diminishing the regional and ultimately state divergence in substantive law.

The notion that Congress had plenary authority to make all needful rules and regulations in territories was relatively non-controversial at the Founding. Following the adoption of the Constitution, Congress re-authorized the Northwest Ordinance, which banned slavery north of the Ohio River. The next year, Congress passed the Southwest Ordinance, which permitted slavery south of the Ohio River. Mark Graber argues that the bisectional constitutionalism of the Founding period – particularly the compromises over slavery – preserved peace and allowed both the northern and southern economies to reap the benefits of a federal union.[307] Marshall's opinion in

[306] *Ibid. at* 546.
[307] *See* Graber, *Dred Scott and the Problem of Constitutional Evil*, *supra* note 6, at 5, 9-10.

Canter generated little controversy and did not precipitate any great crisis. Yet Congressional authority to fashion substantive law for the territories became the central constitutional question in the 1850s due to westward expansion. Three competing theories of territorial governance emerged then and found expression in the words of Roger Taney, Stephen Douglas and Abraham Lincoln.

Roger Taney and Congressional Impotence

The Supreme Court articulated a new theory of territorial governance in 1856 in the *Dred Scott* case. The central issue of the case was whether Dred Scott was a citizen with the right to sue in federal court. The Court held 7-2 that he was not. All nine justices wrote opinions. Chief Justice Roger Taney's opinion generally garners the most attention from historians and legal academics.[308] Although it was not necessary to the holding, Taney addressed the pressing issue

[308] The conventional history of the Dred Scott case is best summarized in Don E. Fehrenbacher's Pulitzer Prize-winning *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1979). Fehrenbacher depicts Taney as provincial in outlook and emotionally committed to slavery. The *Dred Scott* decision received a fair amount of scholarly attention from the late 1990s through the 2000s. In 1997, Paul Finkelman published relevant historical documents along with an essay on the case, arguing that legal precedent favored Scott but that ultimately both the Missouri Supreme Court and the United States Supreme Court bowed to politics and popular prejudice. Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Boston: Bedford Books, 1997). In 2006, Melvin Urofsky produced an important and fascinating examination of various public backlashes to controversial Supreme Court decisions, including *Dred Scott*, and how these backlashes shaped American law and society. Melvin Urofsky, *The Public Debate over Controversial Supreme Court Decisions* (Washington, D.C.: CQ Press, 2006). Earl Maltz examined *Dred Scott* in the context of other antebellum cases, like *Swift v. Tyson* and *Pease v. Peck*, finding that although *Dred Scott* demonstrated judicial hubris, it was not altogether out of line with contemporary opinions in its foray into politics. Earl Maltz, *Dred Scott and the Politics of Slavery* (Lawrence: University Press of Kansas, 2007). Two important revisionist accounts of *Dred Scott* appeared in the mid-2000s. Austin Allen argued that slavery and sectionalism were only two of many factors that helped to produce the *Dred Scott* opinion. According to Allen, the Court also sought to restore a doctrinal consistency in its jurisprudence that had disappeared in the twenty years prior to *Dred Scott*. Allen's argument, like that of Maltz, complicates the Dred Scott narrative. Austin Allen, *Origins of the Dred Scott Case, Jacksonian Jurisprudence and the Supreme Court*, 1837-1857 (Athens, GA: University of Georgia Press, 2007). Perhaps the most aggressively revisionist account of *Dred Scott* comes from Mark Graber, who attempts to rehabilitate the Scott decision by contextualizing it in the complicated antebellum constitutional system. The Court had a far more politicized role in mediating constitutional disputes. Graber suggests the *Dred Scott* may have even been the "right" decision politically, if not doctrinally. Graber, *Dred Scott and the Problem of Constitutional Evil*, *supra* note 6. Lea Vandevelde provides a look into the life of Dred Scott's wife, Harriet, and suggests she was the prime mover in the

of the decade – whether Congress had constitutional authority to ban slavery in federal territories. Taney held that Congress did not have such a power. Taney adopted a state-superior theory of constitutionalism sovereignty – that the federal government's sovereign authority was express, limited and delegated to it from the sovereign states. Without an enumerated delegation of power in the Constitution expressly granting Congress the power to regulate and ban slavery in the territories, Congress was powerless. "If the authority is not given by that instrument [the Constitution], it is the duty of this court to declare [Congressional legislation] void and inoperative, and incapable of conferring freedom upon anyone who is held as a slave under the have of anyone of the States."[309]

To reach such a conclusion, Taney had to contend with two problems: (1) the Territory Clause of Article IV granting Congress authority to "make all needful rules and regulations respecting the Territory or other Property belonging to the United States," and (2) Marshall's opinion in *Canter v. American Insurance*.

Taney grappled with Article IV by arguing that the Territory Clause applied only to territory existing at the adoption of the Constitution in 1787, i.e., the Northwest and Southwest territories ceded by Britain in the Treaty of Paris of 1783, and not to any subsequent acquisitions of territory.

> The power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special

litigation. Lea Vandevelde, *Mrs. Dred Scott: A Life on Slavery's Frontier* (New York: Oxford University Press, 2009). As for biographies of Roger B. Taney, there was considerable academic interest in him from the 1930s through the 1960s, including some sympathetic accounts. *See, e.g.*, Carl Brent Swisher, *Roger B. Taney* (New York: Macmillan, 1935), Charles W. Smith, Jr., *Roger B. Taney: Jacksonian Jurist* (Chapel Hill: University of North Carolina Press, 1936), and Walker Smith, *Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney* (Boston: Houghton Mifflin, 1965). Since then, though, few biographies of Taney have appeared.

[309] *Dred Scott v. Sanford*, 60 U.S. 393, 432 (1857).

provision for a known and particular territory, and to meet a present emergency, and nothing more.[310]

Taney used ten pages of his opinion to justify this interpretation of Article IV, the essence of his claim being that at the time of the adoption of the Constitution, the Framers intended only to address the present territorial administrative needs, but not to create new powers for the federal government in new territories.

Taney then turned to *Canter*. Although overturning a previous Supreme Court opinion was not unheard of in 1857 – Taney himself in 1851 had explicitly overturned a previous Supreme Court opinion authored by Joseph Story – the upsetting of precedent was extremely rare.[311] Taney chose in *Dred Scott* not to explicitly overturn *Canter*, which was, after all, a John Marshall opinion.[312] Rather, he spent five pages of his opinion distinguishing, or attempting to distinguish, the facts and legal issues of *Dred Scott* from those of *Canter*, finding that there was not "the slightest conflict between the opinion now given" and that of *Canter*. According to Taney, Marshall offered not one but two alternative theories of Congressional power in the territories. One theory was based in Article IV and applied, according to Taney, only to the Northwest and Southwest Territories. The alternate theory was that Congressional power in the territories derived from the "inevitable consequence of the right to acquire territory." Taney called attention to Marshall's language that "[w]hichever may be the source from which the power is derived, the possession of it is unquestionable" as proof that Article IV need not be in play.[313] Taney then

[310] *Ibid*.
[311] See *The Propeller Genesee Chief*, 53 U.S. 443 (1851).
[312] I have not found a case in which an opinion by John Marshall has been overruled unless one counts the Court's opinion in *Hudson v. Guestier*, 10 U.S. 281 (1810). In that case, the Supreme Court rejected a principle of admiralty law that Marshall propounded in *Rose v. Himley*, 8 U.S. 241 (1808). It is not clear, though, that Marshall was in the majority in *Rose*. The confusion stems from the Court's early practice of seriatim opinions – each judge writing for himself.
[313] *Dred Scott*, 60 U.S. at 442-43.

squared the circle by arguing that the second source of Congressional power in the territories was limited and did not extend to regulating slavery. This argument was tied the third major claim of his opinion – that the due process clause protected the right of slave owners to be secure in their right to "property," even human property, when in federal territory.[314]

The two dissents in *Dred Scott* both criticized Taney for ignoring what they deemed to be Marshall's plain language articulating Congressional power in plenary terms under Article IV. Nevertheless, Taney's opinion ruled the day. Whether the sections of Taney's opinion addressing the Territory Clause of Article IV, the due process clause of Amendment V, and the *Canter* opinion were dicta and therefore not binding, as some Republicans argued, was ultimately irrelevant to northerners outraged by *Dred Scott*. Such legal technicalities did not placate those who felt locked out of the process by which the future of the nation would be determined. Contrary to Taney's hopes, the *Dred Scott* opinion served to fuel, not extinguish the political firestorm. At the center of the storm stood a little giant.

Stephen Douglas and the Great Principle

Following the tense Congressional session of 1848-49, Henry Clay drafted the Compromise of 1850 with something for everyone: a new free state in California; the banning of the slave trade in the District of Columbia; the final defeat of the Wilmot Proviso;[315] a stringent fugitive slave

[314] *Ibid*. at 441-49.

[315] In 1846 and 1847, President James Polk sought an appropriation from Congress to fund the Mexican-American War and a potential settlement. Representative David Wilmot, a Democrat from Pennsylvania, sought to add a rider to the appropriations bill that would prevent slavery in any territory acquired from Mexico. The proviso passed the House in two separate votes, but failed to pass the Senate both times. The votes are notable because they broke along sectional, not party lines. Northern Democrats, like Wilmot, who were generally in favor of Polk's expansionistic goals voted in favor of the proviso as did northern Whigs. Southern Whigs joined southern Democrats in opposition. The north / south dichotomy emerged in clear relief. *See* Eric Foner, "The Wilmot Proviso Revisited," *Journal of American History* Vol. 56, No. 2 (1969), pp. 262-279 and Chaplain W. Morrison, *Democratic Politics and Sectionalism: The Wilmot Proviso Controversy* (Chapel Hill: University of North Carolina Press, 1967).

law; and popular sovereignty in the new territories of New Mexico and Utah on the slavery question. However, when Clay presented the bill as omnibus legislation, it went nowhere. Stephen Douglas, the rising star of the Democratic Party, rescued the compromise by breaking up the elements and introducing them separately. Each piece of the comprise garnered enough support when presented as stand-alone legislation, with crucial swing votes coming from those representing what would become border states during the Civil War. When Clay died in 1852, Douglas became the de facto leader of the Senate.[316]

In that role, Douglas engineered another, more controversial compromise in 1854. In exchange for a northern railroad route with Chicago as a terminus, Douglas pushed through Congressional legislation that would allow for slavery not only in the eventual *states* of Kansas and Nebraska, but in their nascent *territories* as well – if that is what the local citizens wanted. It is in this context that Douglas developed and promoted his "great principle" – popular sovereignty. For Douglas, the defining characteristic of the American form of government was that local citizens should determine local law, including whether slavery should be legal.[317]

[316] For book-length treatments of the Compromise of 1850, *see* Mark J. Stegmaier, *Texas, New Mexico, and the Compromise of 1850: Boundary Dispute and Sectional Crisis* (Kent, Ohio: Kent State University Press, 1996); Holman Hamilton, *Prologue to Conflict: The Crisis and Compromise of 1850* (Lexington: University of Kentucky Press, 1965).

[317] For a review of the popular sovereignty espoused by Douglas, *see* Eric T. Dean, Jr., "Stephen A. Douglas and Popular Sovereignty," *The Historian*, Vol. 57, No. 4 (1995); James L. Huston, "Democracy by Scripture v. Democracy by Process: A Reflection on Stephen A. Douglas and Popular Sovereignty," *Civil War History*, Vol. 43, No. 3 (1997); James L. Huston, *Stephen Douglas and the Dilemmas of Democratic Equality* (Lanham: Rowman and Littlefield, 2007); and Harry V. Jaffa, *Crisis of a House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (New York: Doubleday, 1967). There was a great deal of interest in Douglas in the early 1900s as the North and South became more fully reconciled. *See* William Brown, *Stephen A. Douglas* (Boston: Houghton Mifflin, 1902); Clark Carr, *Stephen A. Douglas, His Life, Public Service, Speeches, and Patriotism* (Chicago: A.C. McClurg, 1909); and William Gardner, *Life of Stephen A. Douglas* (Boston: Roxburgh Press, 1905). For a relatively recent biography of Douglas, *see* Martin H. Quitt, *Stephen Douglas and Antebellum Democracy* (New York: Cambridge University Press, 2012).

Although Douglas argued for popular sovereignty in Congress, in public speeches and in public debates with Lincoln throughout the 1850s, his most extensive and cogent exegesis of the topic is found in an article he wrote for Harper's Magazine in September of 1859 titled "The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories." There, Douglas specifically addressed the question of the "rights, privileges and immunities" of territorial citizens, and the "disputed" question of the right of territorial citizens to govern themselves.[318] Douglas argued that the dividing line between federal and local authority had always been clear. He drew upon colonial history to make an originalist claim that the founding generation first asserted their right to local self-government over matters of "internal" affairs and only after the Empire's intrusion into colonial affairs did they fight for independence. Douglas cleverly contended that one of the primary reasons for revolt from England, at least in Virginia, was because England tried to liberalize the slave trade in Virginia, while Virginians wanted to restrict it. This argument would appeal not only to southerners who wanted local control over the institution, but also to northern Democrats by demonstrating local governments could be trusted to make the "right" decision. Douglas also implicitly responded to the *Dred Scott* decision that attempted to force slavery into the territories. While trying to avoid a direct attack on *Dred Scott* due to its popularity in the South and his continued presidential aspirations, Douglas nevertheless criticized it, as he had done in his debates with Lincoln, for its affront to the "great principle."

With respect to the Territory provision of Article IV of the Constitution, which garnered so little attention during ratification and with which Taney grappled at length in *Dred Scott*, Douglas argued that the word "territory" meant only that Congress had authority over land, but not over people who would inhabit the land. Congress's responsibility with respect to federal land, said

[318] Stephen Douglas, "The Dividing Line between Federal and Local Authority: Popular Sovereignty in the Territories," *Harper's New Monthly Magazine* 19, no. 112 (September 1859).

Douglas, was to get it into private hands and to ensure that territorial administration was on the path to local self-governance. The people in territories were to be governed under principles of popular sovereignty – deciding for themselves how to arrange their own laws. "[Article IV] refers exclusively to property in contradistinction to persons and communities,"[319] according to Douglas.

In making these arguments, Douglas blurred the lines between states and territories. In his view, there was no meaningful distinction between them. The Constitution, according to Douglas, "does not authorize Congress to control or interfere with the domestic institutions and internal polity of the people (either in the States or the Territories) who may reside upon lands which the United States once owned. Such a power, had it been vested in Congress, would annihilate the sovereignty and freedom of the States as well as the great principle of self-government in the Territories."[320] For Douglas, the citizens of territories enjoyed the same right to govern themselves as the citizens of states.

Douglas's statements were responses to both the Supreme Court and actors on the ground in Kansas. Criticizing *Dred Scott* was a precarious position for the ambitious Douglas, who hoped to toe a fine line that divided northern Democrats, who disliked the decision, from Southern firebrands who accepted it as gospel truth. Douglas tried to avoid directly criticizing *Dred Scott* when Lincoln sought to pin him down during their debates of 1858. Lincoln forced Douglas to concede that even if Congress and territorial legislature could not ban slavery outright, they could nevertheless hinder it to the point of extinction through various legislative means. This political position helped Douglas keep his Senate seat in 1858 but cost him support in the South and probably the presidency in 1860. Following the unfolding events of Bleeding Kansas in 1858, Douglas became more strident in his criticisms of *Dred Scott* and more ardent in his defense of

[319] *Ibid*. at 546
[320] *Ibid*. at 546

popular sovereignty, which solidified his support among northern Democrats. As will see in the following chapters, Douglas's commitment to popular sovereignty had limits. Though he supported local determination regarding slavery, he opposed it for polygamy.

Abraham Lincoln and the Ghost of Marshall

Lincoln, the one-time prolific wrestler, engaged in polemical pugilism with both Douglas and Taney.[321] Like Douglas, Lincoln defended his position in a series of speeches and debates, often times with Douglas as his foil, but he also expressed his views in a systematic and cogent way in a widely publicized speech in February 1860 that launched his national political career. The occasion was an invitation to speak at the Cooper Union School in New York City. The invitation arrived in October 1859. After Lincoln requested a postponement, he took four months to prepare his address carefully. The presidential election of 1860 was destined to be the one that finally put slavery – and territorial sovereignty – on the national ballot. Lincoln would use the opportunity to respond to Taney and Douglas.[322]

Lincoln did not accede to either Taney or Douglas's interpretation of Article IV. Rather, in a bit of constitutional historical inquiry that would make modern originalists proud, he thoroughly investigated the views of the Founding Fathers – who he considered to be the 39 men who signed Constitution – on the question of whether there was a line "dividing local from federal authority"

[321] According to Time Magazine, there have been over 16,000 books written about Abraham Lincoln. *See* "the Lincoln Compulsion," Time Magazine, January 31, 2008. For an examination of Lincoln's views on the Constitution, see Herman Belz, *Abraham Lincoln, Constitutionalism, and Civil Rights in the Civil War Era* (New York: Fordham University Press, 1998) and Mark Neely, *Lincoln and the Triumph of the Nation: Constitutional Conflict and the American Civil War* (Chapel Hill: North Carolina Press, 2011). For biographies, *see* David Herbert Donald, *Lincoln* (New York: Simon & Schuster, 1995) and James McPherson, *Abraham Lincoln* (New York: Oxford University Press, 2009).

[322] The most thorough historical investigation of Lincoln's Cooper Union Speech is in Harold Holzer, *Lincoln at Cooper Union: The Speech that Made Abraham Lincoln President* (New York: Simon & Schuster, 2004).

that would "properly [forbid] Congress to prohibit slavery in the federal territory."[323] He examined the positions of those men on various other pieces of legislation that addressed the issue of slavery in the territories – such as the Northwest Ordinance, the Southwest Ordinance and the Act organizing the Mississippi Territory. He found that a "clear majority … certainly understood that no proper division of local from federal authority, nor any part of the Constitution forbade the federal government to control slavery in the federal territories." In addition, of those Framers who did not have the opportunity to express their views through legislative enactment, many of them – Gouverneur Morris, Benjamin Franklin, Alexander Hamilton – had well-known anti-slavery positions. Thus, Lincoln found that of the Framers, almost all of them would have no constitutional problem with Congressional control of slavery in territory.

Lincoln also noted that Taney and Douglas relied on provisions of the Bill of Rights – the Fifth and Tenth Amendments respectively – to argue that Congress could not control slavery in the territories. Lincoln noted, however, that the same Congress that passed the Bill of Rights also voted to enforce the Northwest Ordinance – which expressly forbade slavery in federal territory. For Lincoln, Congressional authority to control slavery in the territories was clear and absolute as a matter of history. In making the historical argument, Lincoln cast himself and the Republicans as conservatives – conserving the same system as the Founders. He cast Douglas, Taney and southern Democrats as the radicals seeking to upset the old constitutional order.

Lincoln's originalist scholarship (and his repeated mockery of both Douglas's arguments and his oratorical style) was met with laughter and applause from the crowd at Cooper Union.[324] The address propelled Lincoln to the national stage and helped him secure the Republican nomination

[323] *See ibid.*, Appendix A.

[324] Lincoln was intimately familiar with Douglas's speaking style. Transcripts of Lincoln's speech spell "great principle" as "gur-reat pur-rinciple," followed by laughter. *Ibid.*

as well as the presidency. Ultimately, though, bullets, not ballots, would decide the question of sovereignty in the territories. Moreover, the implementation of federal sovereignty in western territories would be worked out during and after the war.

Chapter 5:

The Ordering of the West

Figure 5 – Map of Mexico, 1847

Civil War: Seizing the West

Control of the economy and culture of the West was at the heart of the debates that led to the Civil War. When David Wilmot proposed to ban slavery in territory ceded from Mexico, the battle lines between North and South were drawn, with Southern Whigs opposing the proviso and Northern Democrats, like Wilmot, in favor. The Kansas-Nebraska Act ignited debate over who would get to decide the character of the West. As Michael Green has shown, the final straw for southerners was the realization, brought home by the election of Abraham Lincoln, that they would not be able to control the levers of the federal government during the organization of the West.[325] The Civil War began not as an effort to reconstruct the South, but as a debate over construction of

[325] Michael S. Green, *Lincoln and the Election of 1860* (Carbondale: Southern Illinois University, 2011), 1, 105-112.

the West. The onset of the War did not stop either the North or South from seeking control of the West.

Those advocating for the national expansion that brought territorial issues to the fore were generally, though not uniformly, from the South. Thomas Jefferson bought Louisiana and James Polk achieved his goal to obtain Pacific ports one way or another.[326] Before and during the War, southern filibusters went to Mexico and points further south.[327] Some members of the Confederacy hoped to control Mexico, parts of the Caribbean and Central American – even Brazil. The Confederate States of America did not abandon its designs on the West simply because it launched a costly war with the North. It would be wrong to assume that the Confederate States forsook their expansionistic tendencies when they announced their secession. Before and during the war it maintained the expansionist views of Jefferson and Polk. The Confederate Constitution stated:

> The Confederate States may acquire new territory; and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several states; and may permit them, at such times, and in such manner as it may by law provide, to form states to be admitted into the Confederacy. In all such territory, the institution of … slavery as it now exists in the Confederate States, shall be recognized and protected by Congress, and by the territorial government: and the inhabitants of the several Confederate States and Territories, shall have the right to take to such territory any slaves lawfully held by them in any of the states or territories of the Confederate states.[328]

Southern sympathizers were to be found in the Arizona and Colorado areas of the New Mexico territory. Many southerners had settled in Colorado and, after the firing on Fort Sumter, they raised the Stars and Bars in Denver. Southerners in the West also convinced the Confederate States

[326] *See* Thomas R. Heitala, *Manifest Design: Anxious Aggrandizement in Late Jacksonian America* (Ithaca: Cornell University Press, 1985).

[327] *See, e.g.*, Brady Harrison, *Agent of Empire: William Walker and the Imperial Self in American Literature* (Athens: University of Georgia Press, 2004).

[328] Confederate Constitution, Article IV 3(3).

government that financing the war might be accomplished through the control of gold and silver mines in their areas.[329]

Most of the fighting after Fort Sumter took place east of the Mississippi and the historiography of the Civil War understandably reflects this. The "western" theater of the war was in the Mississippi River Valley. Nevertheless, Southern sympathizers in the southern part of the New Mexico organized a new Arizona Territory in early 1860 without Congressional approval, and then petitioned to join the Confederacy. The CSA granted the petition and established headquarters for that territorial government in Mesilla, New Mexico. However, the territorial government soon relocated to Texas after Confederate troops lost a series of small battles with Union troops from California. The decisive battle of this "far-western theater" occurred at Glorieta Pass, New Mexico in March 1862. Following Glorieta Pass, the Confederacy never attempted again to control the valuable minerals and ports of the West. Even so, the confederacy continued to stir up rebellion in Mexico and maintained designs on much of the western hemisphere.[330]

For its part, the United States Congress took advantage of its strength in the West during the War to quickly organize western territories and populate their administrations with loyal Unionists. Congress had previously organized Oregon, New Mexico, Utah and Washington as large territories

[329] *See* Daniel E. Connor, *A Confederate in the Colorado Gold Fields* (Norman: University of Oklahoma Press, 1970); Duane A. Smith, *The Birth of Colorado: A Civil War Perspective* (Norman: University of Oklahoma Press, 1989); Flint Whitlock, *Distant Bugles, Distant Drums: The Union Response to the Confederate Invasion of New Mexico* (Boulder: University of Colorado Press, 2006); L. Boyd Finch, *Confederate Pathway to the Pacific: Major Sherod Hunter and Arizona Territory, C.S.A.* (Tucson: Arizona Historical Society, 1996); Andrew Masich, *The Civil War in Arizona: The Story of the California Volunteers, 1861-1865* (Norman, University of Oklahoma Press, 2006).

[330] *See* Ray C. Colton, *The Civil War in the Western Territories* (Norman: University of Oklahoma Press, 1959); Don Alberts, *The Battle of Glorieta: Union Victory in the West* (College Station: Texas A&M University Press, 2001); Daniel Connor, *A Confederate in the Colorado Gold Fields* (Norman: University of Oklahoma Press, 1970); Steve Cottrell, *Civil War in Texas and New Mexico Territory* (Gretna: Pelican Publishing Co., 1998); Steve Cottrell, *Civil War in Indian Territory* (Gretna: Pelican Publishing Co., 1998); Thomas S. Edrington and John Taylor, *The Battle of Glorieta Pass: A Gettysburg in the West, March 26-28, 1862* (Albuquerque: University of New Mexico Press, 1998).

prior to the war, and California had no territorial period, joining a union as a state in 1850. During the war, Congress kicked into high gear and organized Nevada, Colorado and the Dakota territories in 1861 (Nevada joined the Union as a state in 1864), Arizona and Idaho in 1863, Montana in 1864, and Wyoming in 1868 as southern states were still re-joining the union and the nation was adopting the Fourteenth Amendment. After 1868, the only area of the continental United States that remained without a territorial government was the Indian Territory that would eventually become the state of Oklahoma.[331]

With Congressional territorial acts in place, Lincoln proceeded apace with the appointment of territorial governors and judges. A review of the persons initially appointed reveals that Lincoln appointed close associates or party loyalists.[332] James Nye, the first and only territorial governor of Nevada, had been a free-soiler politician in New York at the time of his appointment.[333] Colorado's first governor, William Gilpin, was a western explorer living in Missouri at the time of his appointment. By appointing Gilpin, Lincoln hoped to garner support in the loyal slave state of Missouri. After Gilpin resigned following a financial scandal, Lincoln appointed his friend John Evans to replace him.[334] Lincoln appointed other friends, William Jayne and William Wallace as the first governors of the Dakota and Idaho territories, respectively.[335] Lincoln's first selection for governor of Arizona, John Gurley, died before taking office. His next choice was

[331] *See* J.W. Smurr, *Territorial Jurisprudence* (Ann Arbor: University of Michigan, 1971).

[332] *See* Vincent G. Tegeder, "Lincoln and the Territorial Patronage: The Ascendancy of Radicals in the West," in *Lincoln Looks West: From the Mississippi to the Pacific*, Richard Etulain, ed. (Carbondale: University of Illinois Press, 2010).

[333] *See* David Alan Johnson, *Founding of the Far West: California, Oregon, and Nevada, 1840-1890* (Berkeley: University of California Press, 1992).

[334] *See* Thomas L. Karnes, *William Gilpin, Western Nationalist* (Austin: University of Texas Press, 1970).

[335] *See* Jon Lauck, *Prairie Republic: the Political Culture of the Dakota Territory, 1879-1889* (Norman: University of Oklahoma Press, 2010); Malcolm Clark, *Eden Seekers: the Settlement of Oregon, 1818-1862* (Boston: Houghton Mifflin, 1981).

John Goodwin of Maine who, like Gurley, had been defeated in his reelection campaign for the House in 1862.[336] For Montana, Lincoln appointed Sidney Edgerton, who had lobbied for the creation of the territory by presenting gold nuggets to Lincoln and members of Congress.[337] Lincoln also appointed new governors for the western territories that had been organized prior to the Civil War.[338] Finally, in Wyoming, Ulysses S. Grant appointed John Allen Campbell as governor, who had served as a brigadier general during the War.[339]

As with territorial governors, Lincoln selected territorial judges based on loyalty – either to Lincoln himself or to the Union. Legal background appears to have been a secondary consideration. For example, in Idaho, the first three judges of the territorial Supreme Court were Aleck Smith, Sidney Edgerton (first governor of Montana) and Samuel Parks. All three were either friends or "friends of friends" of Lincoln, with only Parks having an extensive legal background, having ridden the circuit with Lincoln in Illinois.[340] In Colorado, Benjamin Hall, Charles Lee Armour, and S. Newton Pettis were Republican Party operatives from the East, with the latter two having been delegates to the 1860 Republican convention that nominated Lincoln.[341] In Arizona, William Turner left his law practice in Keokuk, Iowa to become Chief Justice of the Territorial Court; William Howell was a prominent Michigan Republican in the 1850s who helped transition Arizona from the New Mexico legal code when Arizona became a territory; and Joseph

[336] *See* Jay J. Wagoner, *Arizona Territory, 1863-1912: A Political History* (Tucson: University of Arizona Press, 1970).

[337] *See* Ken Robison, *Montana Territory and the Civil War: A Frontier Forged on the Battlefield* (Charleston, S.C.: The History Press, 2013).

[338] *See* Tegeder, "Lincoln and the Territorial Patronage," *supra* note 332.

[339] *See* John D.W. Guice, *The Rocky Mountain Bench: the territorial Supreme Courts of Colorado, Montana, and Wyoming, 1861-1890* (New Haven: Yale University Press, 1972).

[340] *See* James Henry Hawley, *History of Idaho: The Gem of the Mountains* (Boise: Syms-York Company, 1920), 289.

[341] *See* Guice, *The Rocky Mountain Bench*, *supra* note 339.

Allyn was a journalist with close ties to the Lincoln administration.[342] The tenure of territorial judges was generally short, with judges often leaving their posts before their four-year terms had expired.[343] By the beginning of the reconstruction period in the South, and the "construction" period in the West, the federally appointed territorial officials were all in place and ready to do the bidding of the federal government.

Which competing theory of sovereignty in the territories won the day? The issue, at least with respect to slavery, was not decided in Congress or the Supreme Court, although those institutions attempted to resolve the issue in 1854 and 1857 respectively. Rather, the issue was decided through the most potent form of executive power – war. However, it would be wrong to assume that the contestations over territorial sovereignty ended with Appomattox. The Union victory gave the national forces the upper hand in the debates, but the debates continued. For many, the war resolved only slavery, but not other areas of law.[344] National control of the legal structure of the American West occurred through the appointment and removal of territorial governors, judges, and other officials, through the control of the common law, through the control of political rights, and through conditions placed on statehood.

Appointment and Removal of Territorial Judges

The political nature of the removal of Judge Sandford, discussed at the beginning of this Part, was not unique to Utah. Judges in other territories were removed "at will" in all western territories, sometimes due to administrative change in Washington, and sometimes not. The two administrations of the Democrat Grover Cleveland during an otherwise lengthy period of

[342] *See* Jay J. Wagoner, *Arizona Territory, 1863-1912: A Political History* (Tucson: University of Arizona Press, 1970).

[343] *Ibid*.

[344] For a discussion of issues facing the nation after the Civil War, and of the forces pushing for a national identity, *see* Richardson, *West from Appomattox, supra* note 154.

Republican executive administrations helped clarify that in all western territories judges served at the pleasure of the President. In Arizona, for example, at least six judges were removed from office due to the change in a national administration, even though they had a substantial amount of time left in their terms. When Cleveland was first elected, all three Republican appointees to the Arizona Supreme Court were removed or resigned under threat of removal within months of the inauguration. The protest of their friends to the Cleveland administration went unheeded.[345]

When Benjamin Harrison displaced Cleveland in the White House, Arizona Judge James Wright suffered the same fate as Judge Sandford in Utah. Like Sandford, he protested his removal to Harrison. Unlike Sandford, though, he did not formulate his plea by reference to his ability to administer the law impartially. Rather, he pled for mercy because of his poverty:

> I am a poor man and you know that when judicial habits have been acquired, it takes some to reacquire the habits of the practitioner. And, when you consider that I gave up my law practice--the result of 18 years of continuous effort at one place -- and went to the expense of moving my family out here, I hope you will conclude that it would be fair to me to postpone my removal.[346]

No mercy was granted to Judge Wright. He could not overcome the investigation of the attorney general who found no evidence of wrongdoing, but did discover that Wright had criticized the Republican convention that nominated Harrison as "a howling mob composed of thieves, bribers and bribe-takers, scoundrels and unprincipled persons who, if they had their dues, would be in prison."[347] No better contrast could be made to illustrate the difference between the federal and the territorial judiciaries than that of the poor Judge Wright and his counterparts in Article III

[345] De Forest Porter to President Cleveland, October 26, 1885, Appointment Papers, Arizona, National Archives; Alexander Campbell and Selim M. Franklin to President Cleveland, telegram, October 23, 1885, Appointment Papers, Arizona, National Archives; *see*, generally, John S. Goff, "The Appointment, Tenure, and Removal of Territorial Judges: Arizona – A Case Study," *American Journal of Legal History*, Vol. 12, No. 3 (July 1986), 211-236, 226.

[346] *Ibid*. at 211-236, 226.

[347] *Ibid*.

courts who enjoyed life tenure and no reduction in salary per constitutional mandate. Those judges, though they may have had other complaints, had no need to beg for mercy from the Executive as Judge Wright had done. Although it may have been of no comfort to Judge Wright, when Cleveland defeated Harrison in the next election, he fired Judge Wright's successor and replaced him with a Democrat.[348]

Kermit Hall, in his study of territorial judges from 1789 to 1959, noted that most territorial judges had short-lived careers – over three-fifths of them served for four years or less. The most instable time-period for the territorial judiciary was between 1829 and 1897. Prior to 1829, the prestige of a territorial judgeship, according to Hall, rivaled that of a lower Article III appointment. After 1897, during the lengthy territorial periods of Hawaii, Alaska, Guam, Puerto Rico and the Philippines, territorial judges were drawn mainly from the ranks of the territorial citizens. However, during the critical settlement of the West, particularly in the post-bellum period, territorial judgeships were awarded mainly to ambitious men from the East hoping to advance their careers. The territorial judgeship was a stepping stone to something else.[349]

Resignations outpaced both removal and failures to reappoint as the number one reason territorial judges in the West left the bench. However, judges often chose to resign when faced with a threat of removal or a failure to reappoint. Such was the case with Benjamin Stanton Baker of New Mexico. Baker was serving as a territorial judge when Theodore Roosevelt abruptly fired him in 1904. Baker somehow convinced the President to rescind his termination so that he could

[348] *Ibid*.

[349] See Kermit L. Hall, "Hacks and Derelicts Revisited: American Territorial Judiciary, 1789-1959," *Western Historical Quarterly*, Vol. 12, No. 3 (July 1981), pp. 273-289

resign.[350] A resignation allowed a judge to pursue further career opportunities without the stain on his record.

Some historians have criticized western territorial judges as being less sophisticated than their eastern counterparts. Lawrence Friedman argued that the dependent nature of the territories on Washington combined with the undesirability of most western posts to produce a "mixed controversial breed … of territorial hacks … ill-prepared for their jobs" on the bench.[351] Others have fought against this caricature; something of a revisionist school developed in the 1970s and early 1980s that described a territorial bench "capable of administering effective and innovative justice."[352] The truth lies somewhere in between. The work of Hall shows that territorial judges came from similar socio-economic and educational backgrounds as those appointed to the lower Article III benches. However, a multitude of factors combined to create instability in western territorial benches, including harsher climates and meager pay. Most importantly, territorial judges served at the pleasure of the executive. Due to their political nature, territorial judges were not servants of informal law, but implementers of national policy. This role can be seen in their battles with territorial legislatures over the common law.

[350] "Judge Baker Allowed to Resign from Office," *The Albuquerque Morning Journal* (December 20, 1904), p. 1.

[351] Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 326.

[352] *See* Hall, "Hacks and Derelicts Revisited," *supra* note 349; Guice, *The Rocky Mountain Bench*, *supra* note 339; Clark C. Spence, *Territorial Politics and Government in Montana, 1864-89* (Urbana, Illinois, 1975), 212-31; John S. Goff, *Arizona Territorial Officials I: The Supreme Court Justices, 1863-1912* (Cave Creek, Arizona, 1975); Gordon M. Bakken, "The English Common Law in the Rocky Mountain West," *Arizona and the West*, 11 (Summer 1969), 109-28; Robert B. Murray, "The Supreme Court of Colorado Territory," *Colorado Magazine*, XLIV (Winter 1967), 20-34.

Federal Common Law in the West

In one of the opening scenes from John Ford's western classic *The Man Who Shot Liberty Valance*, the personification of western lawlessness – Liberty Valance – ambushes and robs the stagecoach of young eastern lawyer Ranse Stoddard who is headed west to settle in an unnamed territory. During the course of the robbery, Valance discovers that Stoddard is carrying numerous law books. To demonstrate his disdain for eastern "law" and lawyers, Valance savagely beats Stoddard and tears out the pages of the law books. Regardless of whether the historical record supports Ford's depiction of the confrontation between eastern law and western lawlessness, the scene nevertheless raises an interesting question – what law books did lawyers and territorial judges bring with them to the West? Or, more succinctly, what "law" came to govern the West?

Original English colonies in North America brought with them the English common-law making system, or "common law" for short. Under a common law system, the general rules by which a civil society are governed are worked out through an adversarial case system. An aggrieved party, usually with the assistance of a lawyer, brings a claim against another party to be decided by a judge or jury. While the jury determines the facts of the case based on evidence, the judge determines the law based on precedent. The "law," then, in common law systems is found in judicial decisions, not in legislative statutes or codes. In England and the colonies, the common law governed most areas of substantive law. Legislation, especially that based on model codes drafted in the mid-twentieth century, has come to supplant the common law in the United States for many areas of traditional substantive law, like criminal law.

Though rooted in a common legal history, the colonies over the course of two centuries developed their own twists on the common law, such that the law became more reflective of their local customs, values and institutions. Joseph Story, as we shall see, characterized these local

innovations as "corruptions." Mary Bilder has demonstrated that British legal authorities were tolerant of colonial *divergence* from British law, but not of colonial *repugnancies*.[353] A colonial law that was repugnant (and therefore unconstitutional) was one that not merely diverged from the national norm, but was so different that it violated a core British standard to the extent that it could in nowise be considered British. It became a threat to British identity itself.

Not only did common law in the colonies diverge from that in the mother country, but it diverged among the colonies themselves. Thus in the colonies there was not one "common law" but multiple common laws. For example, William Nelson writes that by 1660, "two regional bodies of law had begun to emerge in the continental English colonies, one in the North and one in the South. The North's law already was more egalitarian; the South's, more hierarchical."[354] As one example of divergence, Nelson points to debt-collection law. The religious roots and subsistence farming of New England differed from the planation style of the Chesapeake region. "Young, male immigrant servants were not the norm [in New England] as they were in the Chesapeake; most servants were the children of people who lived in the neighborhood." These circumstances caused the law to develop in different ways in the respective regions. For example, in Virginia, through interpretation of the English common law as well as through the adoption of some statutory schemes, lawmakers created a rigorous debt-collection structure, with harsh penalties for delinquent debtors, to encourage investors and creditors to invest in the Virginia economy by putting their minds at ease regarding the likelihood of repayment. In Massachusetts, however, especially outside of Boston, credit was not as important, and debt collection was even discouraged.[355] Nelson continues, "We might think of colonial American law in 1660 as reflecting

[353] *See* Bilder, *The Transatlantic Constitution*, *supra* note 28.
[354] Nelson, *The Common Law in Colonial America, supra* note 28, at 129.
[355] *Ibid. at* 44-46 and 62-63.

a sort of nascent federalism, with law being pushed toward uniformity, on the one hand, and toward diversity, on the other."[356]

Nelson argues, "[T]his nascent federalism differed from modern federalism in at least two profoundly important respects. First, no court or other formal institution with coercive power, comparable to the Supreme Court of the United States, sat above the individual colonies and required their law to be uniform."[357] (Bilder, for her part, suggests that the Crown's Privy Council was able to serve such a role, though its coercive power was more limited than modern institutions.) Second, the mid-seventeenth century North American colonies lacked nongovernmental institutions, such as an "organized bar or a structured system of legal education, that generated a cadre of practicing attorneys with like-minded professional values."[358] As we shall see, the western territories of the United States did exist under the "coercive power" of formal institutions. Congress, the Territorial Courts, and the United States Supreme Court all had the power to create and otherwise determine local law in the territories. Further, eastern appointees to western territorial courts were instruments in the creation of a uniform national common law. These institutions mitigated the forces favoring diversity in the territories.

After the Founding, and each time the United States acquired new territory, the question of what general law applied in the territory presented itself. If the territorial governments were to be able to address and resolve the disputes that would inevitably arise, territorial administrators needed to know to what body of law to look to resolve such disputes. Due to the federal nature of the nation, the question was not as straightforward or simple as one might expect. There was no national civil code to map onto new territories. In territories where a European civil code had

[356] *Ibid.*
[357] *Ibid.*
[358] *Ibid.*

previously existed, such as in the Louisiana Territory (France), as well as Florida and New Mexico (Spain), Congress initially adopted the code systems of those continental powers as the law of the territory to provide continuity for its residents.[359] In most territories, however, Congress formally adopted the "common law" as the governing law of the territory, and explicitly stated so in the Organic Acts.[360] Only Louisiana maintained a civil code for the duration of its existence.

But whose common law was to be used? England's? Virginia's? Massachusetts'? Just as there was no civil code to map onto new territories at the Founding, there was likewise no federal common law. For early states formed from the counties of existing states, such as Kentucky and Vermont, adopting the common law of its "host" made sense. However, as states ceded land to the federal government and as the federal government acquired new property from foreign countries and Indian tribes, there was no clear answer to the question of whose law governed.

Prior to westward expansion, the common law adopted in the territories was generally understood to mean English common law.[361] During the first decades of the nineteenth century, Jeffersonians successfully resisted efforts to create an American federal common law, preferring instead that the power to alter the English common law remained in the hands of state judges and state legislators. In the cases of *United States v. Hudson & Goodwin* (1812) and *Wheaton v. Peters* (1834), the Supreme Court held that the common law was *not* one of the "laws of the United States" as mentioned in the United States Constitution, and that the common law was alterable by

[359] Florida and New Mexico eventually adopted a common law system, while Louisiana is the only state to have kept the civil code system inherited from its European power.

[360] J.W. Smurr, *Territorial Jurisprudence: What Judges Said About Frontier Government in the United States of America During the Years 1787-1900* (Indiana University, 1970), 212. Some western states experimented with David Dudley Field's substantive codes. The relationship between Field's Codes and the common law will be discussed herein.

[361] *Ibid*. at 495.

the states.[362] However, nationalists in the federal government took advantage of westward expansion to create a federal common law and to use that law to assert national interests in the West.

The federal nature of the American legal system posits that federal judges decide matters of federal law and state judges decide matters of state law. State judges sometimes decide matters of federal law, usually when claimants make claims under both federal and state law, but the federal courts have ultimate authority to review and overrule state courts' interpretations of federal law. Lawyers are required to notify federal officials when they make federal constitutional and legal claims in state courts. Further, federal judges often confront questions of state law under a federal court's "diversity" jurisdiction. A federal court has jurisdiction to hear claims made under state law when the claimants come from different state jurisdictions. The theory behind this rule is that the federal court is a fair and impartial forum for "diverse" litigants, whereas a state court is institutionally biased against an out-of-state litigant.[363] Ever since the Supreme Court decision in *Erie v. Tompkins* in 1938, federal judges are obligated in cases arising under their diversity jurisdiction to apply both the state statutory law as well as the common law unique to that state. That is, if a garden-variety tort, property, contract or other case governed by common law comes before a federal judge because the litigants are from different states, the judge must look to the common, judge-made law of the state in which she sits, and apply it to the facts at hand. If the law is not clear, the federal judge may either certify the question to the Supreme Court of the state, or

[362] *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812); *Wheaton v. Peters*, 33 U.S. 591 (1834). For a discussion about why the federalist Justices Marshall and Story did not write dissenting opinions in Hudson, and whether they dissented at all, *see* Gary D. Rowe, "The Sound of Silence: United States v. Hudson and Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes," 101 *Yale L.J*. 919 (1992).

[363] *See, e.g.,* Alexander Hamilton, "Federalist No. 80," *The Federalist Papers* (New York, N.Y: Mentor, 1999); *see also* Patrick J. Borchers, "The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for *Erie* and *Klaxon*," 72 *Tex. L. Rev*. 79 (1994).

she can take an "*Erie* guess" as to what the answer might be. That "guess" is then reviewable by the Supreme Court of the state.[364]

This deference to state common law did not exist during the latter half of the nineteenth century. From the 1840s until the *Erie* case in 1938, federal judges had free hand to construct a federal common law. In 1842, just as a great wave of westward expansion was about to begin, the United States Supreme Court held in *Swift v. Tyson* that although federal judges sitting in diversity jurisdiction were obliged to apply the *statutes* of the local state to a case, they did not need to apply state *common law*. Rather, according to the Court in *Swift*, they should apply a federal common law – a single uniform common law for the nation as a whole. This holding derived from a formalistic view of law. According to the unanimous court in *Swift*, a platonic form of law exists, and it is the judge's job and duty to discover and apply it aided, of course, by the judges who have gone before him:

> [T]he true interpretation and effect [of law] are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines. ... Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law … may be truly declared in the languages of Cicero, adopted by Lord MANSFIELD … to be in a great measure, not the law of a single country only, but of the … world.[365]

The theory of forms imbues the Court's characterization of state common law decisions. "[State court decisions] are, at most, only evidence of what the laws are, and are not, of themselves,

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[364] The definitive work about the Erie case is Edward Purcell's *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth Century America* (New Haven: Yale University Press, 2000). There, Purcell addresses of why, in the midst of a great nationalizing moment in the late 1930s, the Supreme Court's progressive wing limited the reach of the federal courts. Purcell argues that the federal courts had, in the eyes of Brandeis and other liberal justices, served the interests of large corporations, hostile to progressive legislation that sought to even the playing field. In their view, state courts and legislatures were progressive in nature and the federal courts were bastions of conservative corporate interests.

[365] *Swift v. Tyson*, 42 U.S. 1, 12 (1842).

laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect."[366] The "real" law, discoverable by federal judges, was higher and better than state laws, which were corruptions of true legal principles.

The federal common law maintained its roots in England, but took on an increasingly American flavor. The author of *Swift v. Tyson* was Joseph Story. Consistent with his view that the practice of law was a science like chemistry or astronomy, Story took a strong interest in the propounding of legal treatises to describe the "findings" of judges and legal academics. Today, constitutional scholars celebrate Story's *Commentaries on the Constitution*, but he also authored or co-authored many more legal treatises addressing such topics as equity pleading, agency and commercial exchanges. It is not surprising that Story cites to a legal treatise (not his own) in *Swift v. Tyson*. "Mr. Justice Bayley, in his valuable work on bills of exchange and promissory notes, lays down the rule in the most general terms."[367]

Story did not begin the American legal treatise enterprise. St. George Tucker, a revolutionary war veteran, lawyer and professor of law at William & Mary taught from Blackstone, but also "updated" Blackstone to speak to the American experience. Tucker offered his own commentaries at the end of each chapter in Blackstone and published it in 1803 as Blackstone's Commentaries, with Notes of Reference. James Kent published his celebrated treatise on American law in a series of volumes between 1826 and 1830. Other lawyers and judges offered more specific contributions

[366] *Ibid*.
[367] *Ibid*. at 14.

to the effort by addressing particular legal topics. In all these commentaries, the authors sought to determine and explain the "true" rule of common law.[368]

The development of American legal treatises helped to create a more homogeneous common law in the American West, as a region, than existed in other regions. Territorial judges (who were federally appointed and served at the pleasure of the federal government) brought with them to the West not only casebooks from other American jurisdictions, but also American legal treatises to which they referred during their opinion making. And superior tribunals at the circuit level or Supreme Court level could correct and overturn territorial court decisions regarding common law subjects; those same tribunals could not "correct" common law decisions in states unless they had the chance to review a federal court decision sitting in diversity. Further, national leaders could command territorial judges how to rule in any case, under threat of removal. They could not do the same thing with Article III judges or state judges.

To investigate the use of common law and legal treatises in the federal territories, and their continuing impact in western states, I undertook a two-step statistical examination of all territorial Supreme Court decisions, and initial state Supreme Court decisions involving Contract Law in the following territories: Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington and Wyoming. I did not examine California because it had no territorial period and I did not examine Nevada because its territorial period was not long enough to generate enough usable data. Further, California adopted an amended version of David Dudley Field's Civil Code in 1872, which did not completely supplant the common law, but nevertheless became the law of

[368] Daniel Hulsebosch suggests that Alexander Hamilton and James Kent reconfigured British constitutionalism to meet the needs of a new American Empire, and that their reconfiguration would have been the envy of British imperial agents. *See* Hulsebosch, *Constituting Empire*, *supra* note 25.

the land for the particular issues to which it spoke.[369] The purpose of the investigation was to answer the questions: (1) where did the law come from that governed the territories, and (2) was that same law imported into the states that were born from those territories? Specifically, I wanted to know whether the common law adopted in the territories came from English common law or American common law. Further, if it came from American common law – from where did it come? What United States jurisdictions provided the basis for common law in the West?

I chose to focus on contract law because it is a quintessential area of common law, in which judges resolve virtually all cases by reference to previous judicial decisions. Other areas of law, such as property and tort, are also largely governed by the common law but are more likely to become subject to legislative interference. To conduct the research for the first step of the investigation, I used Westlaw's organizing and indexing system to review all territorial decisions involving contracts. For each territory, I researched how many total opinions the Supreme Court issued regarding contracts. I then read each opinion and counted the number of citations the Court made to sources of law. I classified these authorities in the following ways: (1) Legal Treatise; (2) U.S. Supreme Court decision; (3) Decision of another U.S. State; (4) Decision of a court in England; and (5) Previous territorial court decision. The results of this investigation are found in Appendix A.

The second part of the study was similar to the first. I reviewed state Supreme Court decisions addressing issues of Contract Law for the same territories following statehood. I reviewed all decisions issued during the first 15 years of statehood. The purpose of this part of the investigation was similar to the first – to determine where the highest tribunal of a new sovereign state would

[369] Montana and Idaho also briefly adopted Field's Civil Code, but abandoned the project after a period of experimentation. *See* William B. Fisch, "Civil Code: Notes for an Uncelebrated Centennial," 43 *North Dakota Law R.* 481 (1966).

look to find the ruling authority – the "law." I classified the ruling authorities as follows: (1) Legal Treatise; (2) U.S. Supreme Court decision; (3) Decision of another U.S. State; and (4) Decision of the territorial Supreme Court. The results of this study are found in Appendix B.

The nine western *territorial* Supreme Courts issued 113 total decisions discussing common law principles of contract law. Taken together, these Courts cited to American legal treatises 137 times as a ruling authority. They also cited to the United States Supreme Court cases 90 times as a ruling authority. In many cases, the Court would expound a "black-letter" rule of law and then cite to both a treatise and a United States Supreme Court decision as supportive of the rule. These courts cited directly to English law only 17 times with over half of those citations coming from one court in New Mexico. One plausible supposition from these concentrated citations to English law is that for a period of time in New Mexico, the only law book addressing contracts that was accessible by the territorial Supreme Court was one aggregating English cases. The "law" in those cases was what was available to the judges – an English casebook.

However, it is apparent from the record that the most commonly consulted sources of law in western territories were American Legal Treatises. These treatises set forth "black-letter" rules of law – meaning the Platonic law in its perfect form. In addition to the vaunted treatises of Tucker, Story and Kent, territorial Supreme Courts cited to "black-letter" rules of law in more topically specific treatises. The following list shows the types and varieties of treatises that might occupy the book shelves of a territorial court – they were all cited by territorial courts: Thompson on Trials, Greenleaf on Evidence, Cooley on Torts, Chitty on Contracts, Story on Contracts, Addison on Torts, Burrill on Assignments, Graham on Pleading and Procedure, Watson on New Trials, Parsons on Contracts, Dunlap on Admiralty, Lindley on Partnership, Sedgwick on Damages, Angel and Ames on Corporations, Daniel on Negotiable Instruments, Story on Promissory Notes,

Story on Agency, Brown on the Statute of Frauds, Chitty on Bills, and Bayley on Bills. Even the two treatises originating in Great Britain – Blackstone and Lindley – had American editions to speak to the American experience.

Citations to the United States Supreme Court as the ruling authority in common law contract cases is virtually unheard of since 1938 but was not unusual during the time period when *Swift v. Tyson* was the judicial rule and federal common law reigned supreme. The United States Supreme Court, as shown by the 90 citations to it, and lower appellate courts, were more directly involved in resolving common law cases in the West. Litigants could appeal common law cases directly to those courts from territories. In the states, however, such cases only reached federal tribunals in rare diversity cases. Thus, the Supreme Court had a heavier hand in the territories than in the states. As it was a single tribunal, the Supreme Court had a homogenizing effect on law in the territories, as did the legal treatises.

From these 113 decisions during the territorial period, I found 345 citations to case decisions from other states, which raw number outnumbers the citations to the treatises and the U.S. Supreme Court combined. However, this does not mean that the Supreme Court considered the law of another state to be binding on their court. They turned to other states for guidance, but were also quick to reject those decisions. Further, the numerous citations to state court decisions does not necessarily indicate the adoption of another state's common law rule, unless it was offered in support of a federal common law rule, as expressed in a treatise.

Indeed, territorial Supreme Courts often cited the decisions of other states only to support a "black-letter" rule from a treatise. The case citation usually came directly from the treatise book. For example, in *Ming v. Woolfolk* (1879), the Supreme Court of Territorial Montana invoked the legal treatise *Parsons on Contracts* for the common law plain meaning principle that "where the

language of an instrument has a settled legal meaning, its construction is not open to evidence."[370] The Court then drew from the treatise an eastern case to support the point and cited to it. Another example comes from the territorial Supreme Court of Wyoming in *Ware v. Wanless* (1879), where the Court, in one of many citations to the treatise "Burrill on Assignments," quoted the treatise for the general rule, and then followed the general rule with a long list of cases from multiple jurisdictions supporting the rule.[371] In 1889, the New Mexico territorial Supreme Court faced an issue regarding the assignability of liens that had not been previously decided by the Court. "[This] is a question upon which the courts are divided and has not been decided in this territory. … [I]t is for this court to determine as an original question in this territory which view is founded in the better reason, and is most calculated to secure the ends of justice." Faced with conflicting state court laws, the Court turned to a treatise, Jones on Liens, and adopted its "black-letter" rule as the law of the territory.[372]

From the record of territorial courts, a pattern emerges regarding common law. Federally appointed territorial judges generally came from the East and brought with them legal treatises written by eastern lawyers and judges who supported the conception of a national, federal, "true" common law. These judges implemented the national common law, sometimes over the objections of the local legislature and populace, as will be shown in the next section addressing railroad torts. Despite its aridity, the West was fertile ground for the implementation of a national common law.

When a territory became a state, the local population gained control of the local judiciary. The local appointment of state court judges upon statehood would suggest more local control over the common law. The second part of the investigation was similar to the first – to determine the

[370] *Ming v. Woolfolk*, 3 Mont. 380, 384 (1879).
[371] *Ware v. Wanless*, 2 Wyo. 144 (1879).
[372] *Bates v. Childers*, 5 N.M. 62 (1889).

source of common law in new western states. Specifically, I wanted to see whether state judiciaries rejected the federal common law. Citations to the United States Supreme Court dropped precipitously after statehood, by 43 %. One would expect this, though, considering that the United States Supreme Court had no more binding authority in common law cases in state courts, and their common law rulings in federal diversity cases bound only federal judges. Although this drop in Supreme Court citations represents a loss of one of the homogenizing agents of law in the West, state Supreme Courts continued to use American legal treatises as the primary source of law. Of the 379 contracts cases in these states in the first 15 years of statehood, the courts cited to American legal treatises 241 times, representing more than 50% of all citations. Further, state Supreme Courts also used territorial Court decisions as precedent for state cases. Federally appointed judges had made those binding territorial decisions by following federal common law. In *Gooch v. Coleman* (1916), for example, the New Mexico state Supreme Court re-adopted a "well-known, general rule" of contract interpretation as set forth in treatises, and rejected a claim that the different "custom of cattle men" should govern the parties' relationship. National common law continued to trump local derivation.[373]

Three areas of common law deserve special consideration and investigation to illustrate its implementation in the West – torts involving railroads, property involving water, and marriage. In railroad torts, territorial judges elevated common law principles to constitutional status in the service of the great nationalizing project of the nineteenth century –stitching the nation together through the building of interstate railroads. With regard to water rights, national administrators allowed western states to innovate and diverge from eastern common law traditions. Doing so did not hinder, but helped nationalizing efforts. Western climate led to western law. Finally, in

[373] *Gooch v. Coleman*, 22 N.M. 45 (1916).

marriage law, national law asserted its primacy, obliterating local declarations of sovereignty over the issue.

Case Study #1: Railroad and Livestock

Figure 6 – Cattle Catcher on Locomotive

The completion of the transcontinental railroad and the installation of other rail lines throughout the West in the late nineteenth century was beneficial to western cattlemen. By providing quick transportation to a variety of markets, it opened up new, usable ranges. One downside for both cattlemen and railway companies was the tendencies of locomotives to hit and kill livestock. This previously unknown tort led to the development of not only new technological innovations, such as the "cattle catcher" on the front of trains, but also conflict between traditional common law and western territorial innovation.

When a locomotive would strike and kill livestock, the owner would demand justice in a territorial court. Early territorial courts, populated with federally appointed judges from the East and applying traditional common law rules of negligence, found that the mere construction of the

railroad and the operation of trains thereon, was not sufficient to qualify as negligent behavior even when the trains hit and killed livestock. If the owner of livestock wanted compensation, territorial courts held that he would need to prove additional facts to establish negligence – perhaps a drunken engineer or faulty brake system. Using this common law interpretation of negligence, territorial Supreme courts routinely held in favor of the railroads, often overruling lower courts who favored the livestock owners. For example, in *Williams v. Northern Pacific R. Co.*, an 1882 case in the Dakota Territory, the territorial Supreme Court reversed the judgment of the lower court that had found in favor of the aggrieved cattle owner. Finding that the railroad company acted reasonably in the operation of its train, the Court held that the duty to take extra care to protect the cattle belonged to the cattle owners – not the railroad.[374]

In reaction to this judicial application of the common law that favored national railroads, cattlemen and their friends in territorial legislatures successfully passed laws that created a specie of strict liability for railroads whose trains struck livestock. In general, these laws a) required railroads to post notice of all cattle struck, b) declared that striking cattle was prima facie evidence of negligence, and c) required railroads to compensate the owners an amount set by statute. By the mid-1870s, Wyoming, Montana, Utah, Arizona, New Mexico and Colorado had all passed a version of these strict liability statutes.[375]

Territorial legislatures acted as one would expect locally elected legislative assemblies to act – in the interest of their constituents. Such statutory adjustment of the common law had become

[374] See *Williams v. Northern Pacific R. Co.*, 3 Dakota 168 (Dakota Territory, 1882). See also *Northern Pacific. R. Co. v. Holmes*, 3 Wash. Terr. 202 (Wash. Territory, 1887).

[375] Laws of Wyoming, 4th session, Act of December 9, 1875 (An Act to Provide for Payment for Live Stock Killed by Railroads or Railway Companies) was re-enacted and amended by Ibid, 10th session, p. 109. Laws of Montana, 13th session, p. 51 amended section 2 of the basic statute of February 23, 1881. Laws of Utah, (1876 ed.), p. 214. Laws of Arizona, 12th session, p. 26. Ibid, 18th session, p. 30. Laws of New Mexico, 23rd session, p. 17. Ibid, 26th session, p. 68. Ibid, 27 session, p. 2. Ibid, 28th session, p. 164. Laws of Colorado, 9th session, p. 185.

by the late nineteenth century just as an important part of American law and constitutional structure as the common law itself. Under the United States traditional constitutional structure, legislatures may adjust or overrule the common law through the adoption of statutes, which then take precedence.

However, in western territories, territorial courts looked with an eye of suspicion upon legislative innovations. In reference to one such innovation, a territorial Supreme Court judge complained that:

> "[t]he difficulties involved in this question grow out of our rather crude legislative innovations upon the common law, whereby we have attempted to sweep away a portion of the old landmarks, and retain a portion, leaving our system, in this respect, more or less imperfect, uncertain, and contradictory. The old rule - hoary with time, and the wisdom of which, it was supposed, had been proven by the experience of ages … has given away before modern legislation.[376]

The strict liability railroad legislation was costly to the railroad companies and, in their view, unfair. Territorial courts, populated mainly by eastern lawyers and politicians serving at the pleasure of the national government, were sympathetic to the railroad interests. One by one, territorial courts in Idaho, Utah, New Mexico and Montana struck down the territorial strict liability railroad legislation.

Those courts recognized a constitutional structural conundrum: under the United States constitutional system, the common law – even the pure, sacred and Platonic version of the common law – was not invincible to legislative attack, no matter how much Joseph Story or other like-minded judges thought it should be. Legislatures, even the not-fully sovereign territorial ones, could adjust the common law to meet local needs and conditions and there was little courts could do about it – absent a violation of the Constitution. Territorial courts therefore found a constitutional violation. They held that the strict liability railroad legislation violated the railroads

[376] *Sanders v. Reister*, 460 Northwest 680 (Dakota Territory Supreme Court, 1875).

companies' constitutional due process protections – the right not to have property taken without due process of law. Strict liability statutes, they held, deprived the railroads of procedural safeguards – such as having their defense heard by a jury. In constructing this constitutional due process right, courts elevated some aspects of the common law to constitutional status. Some common law rules were so important that legislative change would rupture the Constitution itself.

In Montana, for example, the territorial Supreme Court stated (with the aid of a legal treatise) that "courts will not set aside a declaration of the legislative will, unless it is plainly in violation of a constitutional provision."[377] The court found that the statutory scheme setting the value of livestock and the inability of the railroad to submit facts to a jury violated the company's due process rights. The national Constitution and "laws of the United States" thus expanded to include constitutional common law. National lawmakers overruled territorial legislatures. They elevated the national common law to a position superior to that of territorial legislation.

Case Study #2: Water

John Wesley Powell explored the arid regions of the Southwest in the late 1860s and early 1870s and summarized his findings and proposals to Congress. Based upon his geological observations and his interactions with local farmers and ranchers, Powell noted that the "general subject of water rights is one of great importance … the lands have no value without the water … the monopoly on the water rights will be an intolerable burden upon the people."[378] Powell's astute mind went beyond his geological observations; he recognized the important public policy

[377] *Bielenberg v. Montana U. Ry Co.*, 8 Mont. 271, 315 (1889).

[378] John Wesley Powell, *Report on Lands of the Arid Regions of the United States* (Washington, D.C.: Government Printing Office, 1879), 40.

implications of the unique geographic region. To exploit the economic potential of the area, water law would need to differ from the traditional common law of the East.[379]

Traditional common law governing water operated under a system of riparian rights. Those owning land adjacent to rivers, streams and other bodies of non-navigable waterways have the right to use the water reasonably. Their rights are alienable and subject to an equitable balancing with other riparian right-holders. In water-abundant locations, riparian rights work. In arid regions, it is not suitable to sustain communities. Water sources in the West were few and thus, riparian sections of property were few. To sustain themselves, communities needed more land than the amount located next to water.

Even before Powell published his report, the Colorado Supreme Court began modifying the common law to meet local needs. In one of the earliest decisions calling for a modification of the riparian rule, a judge of the Colorado Supreme Court stated:

> I am fully aware that courts should be slow to justify their decisions on the ground of necessity; but I am equally conscious of the fact that they will betray their trust if, in the administration of law or in the expounding of constitutional principles, they shut their eyes and refuse to recognize those conditions of society which call into force and operation principles whose existence and recognition cannot be disregarded without bringing ruin on all … [T]he law is not a system marked by folly, based on bald sentences, without reason; it is a grand code, founded on the necessities of men, erected by mature judgment, gradually expanding in beneficence and wisdom as time progresses, and regulating with care the interests of society and civilization.

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[379] For information about water resources in the western United States, *see* Marc Reisner, *Cadillac Desert: The American West and its Disappearing Water* (New York: Penguin Books, 1993). For a discussion of water resource policy concerns in the western United States, *see* Sarah F. Bates, et al., *Searching Out the Headwaters: Change and Rediscovery in Western Water Policy* (Washington D.C.: Island Press, 1993), and Barton H. Thompson, Jr., "Institutional Perspectives on Water Policy and Markets," 81 *Cal. L. Rev*. 671 (1993). For a discussion of why two water law systems have developed in the United States, *see* Joseph Sax, "Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine," 24 *U. Haw. L. Rev*. (2001). For a discussion of the connection between western prior appropriation water law and mining law, *see* Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, D.C.: Island Press, 1992). For a discussion of the interaction between federal interests and state interests in the area of water law, *see* David H. Getches, "The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role," 20 *Stan. Envtl. L.J*. 3 (2001).

Another justice in the same case wrote, "I conceive that … the right of every proprietor to have a way over the lands … for the passage of water … is well sustained by force of the necessity arising from local peculiarities of climate."[380]

Through both a reinterpretation of the common law and the passage of statutes, other western territories followed Colorado's lead and created a western water law. The doctrine of prior appropriation replaced that of riparian rights. Those who first made use of a water resource enjoyed the preemptive rights – first in time, first in rights.[381] Like riparian rights, judges balanced these prior appropriators' water interests against other community interests but, when disputes arose, courts upheld the rights of prior appropriators. By the early 1890s, the prior appropriation rule had become settled law. In one colorful opinion, the Idaho Supreme Court overruled a lower court judge who had ignored the prior appropriation rule. In doing so, the Court stated:

> [T]he learned district judge found no difficulty whatever in reaching a conclusion as unique as it is unprecedented. We say unprecedented, because this question, under statutes identical with that of Idaho, has been decided so often in favor of the prior appropriator that it has been generally considered … as a settled question; … In fact, the decision of the learned district judge in this case stands alone. ... Heroically setting aside the statute, the decisions, and the evidence in the case, he assumes the role of Jupiter Pluvius, and distributes the waters of Gooseberry creek with a beneficent recklessness, which make the most successful efforts of all the rain wizards shrink into insignificance, and which would make the hearts of the ranchers on Gooseberry dance with joy, if only the judicial decree could be supplemented with a little more moisture. The individual who causes two blades of grass to grow where but one grew before is held in highest emulation as a benefactor of his race. How then shall we rank him who, by judicial fiat alone, can cause 400 inches of water to run where nature only put 100 inches? (We veil our faces, we bow our heads, before this assumption of judicial power and authority.)[382]

[380] *Yunker v. Nichols*, 1 Colo. 551 (1872).

[381] For an examination of the way the Supreme Court and federal policy makers have addressed Native American claims to water rights, *see* Norris Hundley, "The Winters Decision and Indian Water Rights: A Mystery Reexamined," 13 *W. Hist. Q*. 20 (1982).

[382] *Hillman v. Hardwick*, 3 Idaho 255 (Idaho Supreme Court, 1891). By the time of this opinion, Idaho was a state, but the opinion traces the development of water law to its territorial period as well as that of other territories.

Why was there national receptivity to western innovation in water rights while there was hostility to western railroad law? Powell's reports to Congress on the need for innovation in water law certainly helped. Further, prior appropriation rules did not hinder the nationalizing project in water law as strict liability did in railroad law. Indeed, consistent with Hurst's theory that judges and policy makers manipulated law to release creative energy, the efficient use of a scarce resource in the West promoted not just local, but national interests by allowing for the growth of profitable pursuits it an inhospitable climate.[383]

Case Study #3: Marriage

From the Founding through the first half of the nineteenth century, the federal government did not involve itself in the regulation of marriage – an area of common law and culture traditionally left to local institutions, including churches. In the early nineteenth century, American states began to regulate marriage, delineating boundaries based on age and consanguinity. Additionally, marriage was a determining factor for the property rights of women in many jurisdictions. Until the Civil War, marriage regulation in the United States remained a matter of local jurisdiction, subject to both statutory and common-law rules. With the passage of the Morrill Anti-Bigamy Act in 1862, Congress regulated marriage in the territories. Congress did not, however, attempt to regulate it in existing states.[384]

The adoption of common law in Utah proved particularly difficult because Mormons, knowing that the common law disfavored polygamy, fiercely fought against it. Edward Tullidge writes that the Mormons' "judicial economy was after the patterns of the New Testament rather

[383] *See* James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1956).

[384] For a history of marriage law and policy in the United States, including an argument that the national government sought to formulate marital policy from the Founding, *see* Nancy Cott, *Public Vows: a History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000). *See also* Hendrik Hartog, *Man and Wife in America* (Cambridge: Harvard University Press, 2002).

than after the pattern of Blackstone."[385] Not only did the Mormons introduce new conceptions of marital law, but they also reformulated property and riparian rights that differed from common law. "Utahns made water and timber community property."[386] Mormons also argued for a "mountain" common law to replace traditional common law in the criminal realm.[387]

Even though the Organic Act for the Utah Territory granted the judiciary common law jurisdiction, territorial citizens formally rejected it. The original territorial Supreme Court, whose job it would have been to implement common law, consisted of two non-Mormons and one Mormon, Zerubbabel Snow. Following a dispute with Brigham Young, the non-Mormons left the territory, leaving Snow as the only judge on the Court for a short period. From his perch on the bench, Judge Snow held that Utahns had "a right to make such laws as suited [their] own Convenience, Notions, and Circumstances" and that such laws could be enacted "without any regard to the Common Law of England or the laws which any of the states had adopted."[388]

Once the President again populated the territorial Supreme Court with non-Mormons, Brigham Young, as the first territorial governor, went to the legislature and asked it to prohibit the judiciary from employing common law and to adopt a code-based system. The territorial legislature responded by passing a statute in 1854 doing just that:

> [A]ll questions of law, the meaning of writings other than laws, and the admissibility of testimony, shall be decided by the Court; and no laws or parts of laws shall be read, argued, cited, or adopted in any Court, during any trial, except those enacted by the Governor and Legislative Assembly of this Territory, and those passed by the Congress of the United States when applicable; and no report, decision, or doings of any Court shall be read, argued, cited, or adopted as precedent in any other trial.

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[385] Orma Linford, "The Mormons, the Law, and the Territory of Utah," 23 *Am. J. Legal His.*. 213, 220 (July 1979).

[386] *Ibid*.

[387] Michael W. Homer, "The Judiciary and the Common Law in Utah, 1850-61," 21 *Dialogue: Journal of Mormon Thought* 97, 100 (1988).

[388] *See* Jarom R. Jones, "Mormonism, Originalism, and Utah's Open Courts Clause," 2015 *B.Y.U. L. Rev*. 811 (2015).

President Pierce appointed a new Chief Justice of Utah's Court, John F. Kinney, who came from Iowa to assume his duties. In one of his first rulings, he held the territorial statute violated Utah's Organic Act. The Mormon reaction was swift and critical. Church leaders responded by claiming Congress had given the legislature the "privilege of excluding the common law at pleasure." [389]

Nevertheless, Kinney continued to apply the common law in Utah. The legislature adopted a new tack. It had previously created three territorial jurisdictions, one for each justice, as prescribed by the Organic Act. Now the legislature assigned Kinney to remote Carson Valley in what was soon to become Nevada; the Organic Act required him to live there. His complaints, along with those of fellow Supreme Court Judge William W. Drummond, helped convince President Buchanan to replace Brigham Young as governor, which he did with the help of the federal army in 1858. Mormons prepared for a battle with the federal government but avoided a shooting war through the negotiation of sympathetic non-Mormons.[390]

Despite having lost control of the governorship, Mormons continued to evade the common law by instructing the territorial legislature to grant jurisdiction over marital and criminal law to probate courts. The legislature then filled the probate bench with local Mormons. The Civil War provided some respite for Mormons from federal oversight, but even in the midst of war, Congress passed, and President Lincoln signed, the Morrill Anti-Bigamy Act in 1862, which prohibited not only bigamy but also the private property holdings of religious and charitable organizations in the territories. Through this Act, Congress again asserted its plenary power over territories; notably, the Act made no mention of bigamy in the *states*. Passing the legislation and enforcing it were

[389] Michael W. Homer, "The Judiciary and the Common Law in Utah, 1850-61," 21 *Dialogue: J. Mormon Thought* 97, 100 (Spring 1988).

[390] *See, e.g.*, Hubert Hugh Bancroft, *History of Utah* (San Francisco: The History Company, 1890), Chapter 19.

two different political questions, however. President Lincoln, with other pressing matters, decided to leave the Mormons alone so long as they did not interfere with Union war efforts.[391]

For the duration of the War and during the first years of Reconstruction, Congress gave little attention to its most troublesome territory, other than to deny a half-hearted request for statehood – Utah's fourth such request, in 1867. However, in fulfillment of the Republican Party's earlier promise to eradicate both slavery and polygamy, many activists came to view Reconstruction as an opportunity not only to restructure the social order of the South, but also to fashion the western territories more in the image of the victorious Union. As both Sarah Barringer Gordon and Heather Cox Richardson have argued, fighting polygamous culture became almost as important as fighting slave culture, and was an important part of reconstructing the nation after the War.[392]

Efforts to prosecute polygamists, though, were difficult. Other than the Governorship and the Territorial Supreme Court, local officials populated the territorial justice system: a local territorial Marshall who might or might not arrest suspects; a local territorial prosecutor who might or might not prosecute violators, and a local territorial jury populated with Mormons. Thus, the territorial legal apparatus was inadequate to eradicate the repugnant practice. Congress sought to strengthen the federal government's power to prosecute polygamists by passing the Poland Act of 1874.[393] This Act replaced the territorial Marshall and prosecutor with federally appointed ones, and restructured the selection process for both grand and petit juries in order to avoid all-Mormon juries.

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[391] *See* Edwin Firmage and Richard Collin, *Zion in the Courts* (Champagne: Univ. of Illinois Press, 2001), 139.

[392] Gordon, *The Mormon Question*, *supra* note 254, at 14; Richardson, *West from Appomattox*, *supra* note154 .

[393] 18 Statute at Large 253 (1874).

Prosecutions under the Morrill and Poland Acts remained difficult, due partly to the fact that wives, even polygamous ones, could not be forced to testify against their husbands. Given the federal government's insistence on prosecuting polygamists, and given the Mormon Church's intransigence, the U.S. Attorney and Mormon Church officials agreed to send a test case to the Supreme Court to determine the constitutionality of anti-polygamy laws. Mormon Church leaders, in exchange for a federal promise not to prosecute until after the test case, furnished a lay member, George Reynolds, for federal prosecution and ensured enough evidence to convict him under the law. The territorial federal court upheld the conviction and Reynolds appealed to the United States Supreme Court, arguing that the First Amendment's Free Exercise Clause protected his practice of polygamy. Ironically, claims made under the Bill of Rights were available to territorial citizens in the 1870s, but not state citizens seeking protection against state action. Despite having the requisite standing under the First Amendment, Reynolds (and the Mormon Church) lost the case when the Court ruled the First Amendment did not provide unqualified protection to religious activity, even if it might to religious belief.[394]

Fortified by the Court's ruling, federal officials resumed their prosecutions of church leaders, still hampered, though, by evidentiary rules and juries comprised of at least some Mormons. The same year that territorial citizens submitted their sixth petition for statehood, 1882, Congress passed the Edmunds Act. In addition to eliminating the voting, jury, and office holding rights of polygamists, the Act punished "unlawful cohabitation," removing the prosecutorial burden to prove that an actual wedding ceremony had taken place. Rather, evidence of "cohabitating" with a member of the opposite sex was sufficient for conviction. The law also vacated all territorial

[394] *Reynolds v. United States*, 98 U.S. 145 (1878).

offices and called for new elections. Those who professed a religious belief in polygamy could not vote, whether they practiced polygamy or not.

With this new law in place, federally appointed territorial judges finally had an effective mechanism to convict Mormon polygamists. The federal penitentiary in Salt Lake City began to fill with Mormon polygamists. Church leaders went into hiding in the intermountain west, and some polygamists wives fled to Europe, referring to themselves as part of "the Underground."[395] However, Mormon polygamy remained entrenched. Congress's final anti-polygamy legislation was the Edmunds-Tucker Act of 1887. By this Act, Congress disincorporated the Church of Jesus Christ of Latter Day Saints, seized its assets, required prospective voters, jurors and officials to take an anti-polygamy oath, disenfranchised women who had been voting since 1870, removed the spousal privilege for polygamists in criminal trials, and disallowed the children of polygamists to inherit property. Further, Sarah Gordon has shown how not only a change in the substantive law, but also a change in tactics began to yield results. After passage of the Edmunds-Tucker Act, federal officials began prosecuting women, as well as men. The perception of Mormon women rapidly changed from victims of patriarchal oppression, albeit with suffrage, to criminals aiding and abetting their outlaw husbands.[396]

The conclusion of the Utah territory story, including the Church's capitulation, will be told in the sections herein that discuss voting rights, other political and civil rights, and conditions on statehood. The story to this point, though, illustrates that popular sovereignty in the territories existed only at the pleasure of Congress. Congressional plenary authority in the territories was absolute. Even Stephen Douglas had conceded that Congress had power to regulate marriage in

[395] *See. e.g.*, Martha Hughes Cannon, *Letters from Exile: The Correspondence of Martha Hughes Cannon and Angus M. Cannon, 1886-1888*, eds. Constance L. Lieber and John Sillito (Salt Lake City: Signature Books, 1989), 171, 221.

[396] Gordon, *The Mormon Question*, *supra* note 254.

the territories, but he had struggled to explain why. His "dividing line between federal and local authority" became blurry when it came to marital law.[397] Future Speaker of the House Thomas Reed of Maine articulated a more cogent theory, when he argued in favor of the Edmunds-Tucker Act as it was debated in the House of Representatives. After proclaiming his love of local self-government, Reed stated that there could be "no greater fallacy" than to believe that a territory of the United States occupied the same relationship to the federal government as a state of the United States. For Reed, the right of self-government exists only in the states, not the territories. Reed derived his theory from a theory of ownership of the underlying land. So long as the territory is not a state, Congress has the right to "make rules and regulations" regarding the territory.[398]

Reed had to contend with the long-standing historical practice of territorial citizens, in Utah and elsewhere, to exercise the powers of self-government. To this, he responded that the power of local self-government is a *right* of the citizens of a state, but only a *privilege* of the citizens of a territory. Self-government had been "accorded to the temporary residents [in the territories] not as rights but as privileges extended by the hand of Congress."[399] Reed suggested that Congress, if it chose, could completely dissolve all civilian government in any territory and institute martial law. He then added, "I am not sure that the wiser course today would not be to take complete control of this particular Territory."[400]

Reed's argument was sufficient to convince fence sitters to support the Edmunds-Tucker Act and begin the final process of rooting out the repugnant marital practice. Further, Reed's forceful defense of Congressional plenary authority in territories and his call for homogeneity in culture and law throughout the nation created a new kind of framework for moving forward with territorial

[397] *See* Alford, *Civil War Saints*, *supra* note 253, at 161–183.
[398] 18 Congressional Record 560, 591-593 (1887).
[399] *Ibid*.
[400] *Ibid*.

government, one that would inform future decisions regarding the desirability of statehood for even further flung territories acquired in the Spanish-American War.

Civil Codes in the West

A natural outgrowth of the treatise undertaking was a movement to codify the law in common law jurisdictions, driven largely by Jeremy Bentham in England and David Dudley Field in the United States. Field was a member of a prominent New England family. Both his grandfathers fought in the Revolutionary War as part of the Continental Army. His father was a Congregationalist minister and historian. Field was one of nine children. His brother Stephen was an associate Justice of the United States Supreme Court. Field studied and practiced law in New York where he became convinced that the common law, especially its procedure, needed changing.[401]

In 1836, Field traveled through Europe, including the Code jurisdiction of France, to gain firsthand knowledge of their legal systems. He returned to New York and began a virtual one-man campaign to change New York's substantive and procedural law.[402] Common law pleading, in particular, confused clients and lawyers alike. Without using language that even then was archaic to signify whether the case was filed "in law" (for monetary damages) or "in equity" (for equitable relief), a litigant might have his case thrown out. Further, if a litigant wanted both legal and equitable relief, he needed to file two lawsuits. Field, as head of a legislatively appointed commission, drafted a code of procedure that simplified the process of a lawsuit. In 1850, New York adopted Field's procedural code and many jurisdictions followed. Field's code was the progenitor of the successful movement to simplify and codify procedural rules.[403]

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[401] *See* Henry M. Field, *The Life of David Dudley Field* (New York: C Scribner's Sons, 1898).
[402] *Ibid*.
[403] William B. Fisch, "Civil Code: Notes for an Uncelebrated Centennial," 43 *North Dakota Law R.* 481, 486 (1966).

Field also wanted to codify the substantive civil law. As successful as his efforts were with procedural rules, his substantive civil code crusade must be deemed a failure. After a decades-long effort to pass such a code in his home state, New York finally decided to retain the common law. Five jurisdictions eventually adopted an amended version of Field's substantive law, but only one of them has completely retained it. Interestingly, all five jurisdictions were in the West – California, Idaho, Montana, and North and South Dakota.[404] When California adopted Field's substantive civil code in 1872, David's brother Stephen was a member of the United States Supreme Court and still rode the circuit in California, where he had once practiced and served as justice of the California Supreme Court. Stephen's close ties to California helped in the adoption of the code there.[405]

William Fisch, in two articles, traces the adoption of Field's substantive code in the Dakotas and California, as well as their interaction with the common law. He finds that courts in those jurisdictions treated the code with ambivalence, looking first to the common law for resolution of the case and then to the Code for clarification.[406] Further, Fisch says, courts have treated the code as the law for the period in which it was enacted, but subject to being overridden by subsequent common law decisions.

Despite the failure of Field's substantive Civil Code even in jurisdictions where the legislature accepted it, it nevertheless found some traction in western jurisdictions that were yearning to be governed by formal law. The State of New York, with a legal culture and tradition stretching back

[404] *Ibid*.

[405] *See* Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence: University of Kansas Press, 1997).

[406] William B. Fisch, "Dakota Civil Code: More Notes for an Uncelebrated Centennial," 45 *North Dakota Law*. R. 9, 54 (1968).

two centuries, rejected the codification movement. New states in the West with no such history and tradition, however, were more willing to accept a formal, codified system.

Voting Rights

The Constitution of 1787 was silent on the right to vote. State, not federal, law determined eligibility to vote in both state and national elections. Even the voting requirements for ratification of the Constitution were set locally.[407] Not until the passage of the Fifteenth Amendment, followed by the Nineteenth and Twenty-Sixth, did the Constitution set voting standards on the bases of race, gender and age. Congress exercised its constitutional power to remedy state restrictions on voting in federal legislation in the late 1950s and 1960s. The Civil Rights Acts of 1957, 1960 and 1964 all included provisions meant to remove race-based discrimination in state voting qualifications and procedures.[408] Congress followed these Civil Rights Acts with an explicit Voting Rights Act in 1965 that expanded federal power to address racial discrimination in voting.[409] Apart from these restrictions, states to this day maintain discretion to determine voter eligibility. At the Founding, when voting was a local matter, the organization of territories presented an administrative question that went to the heart of the American experience with sovereignty and federalism – who would determine voting eligibility in the territories – Territorial legislatures or Congress?

Under the Northwest Ordinance, during the "First Stage" of territorial governance prior to the formation of a territorial legislature, there was no voting because the President appointed the

[407] Notably, voting requirements for ratification were generally more liberal than for other elections. *See* Pauline Maier, *Ratification: the People Debate the Constitution* (New York: Simon and Schuster, 2010).

[408] *See* Public Law 85-315, 71 Stat 634 (Civil Rights Act of 1957); Pub. L. 86–449, 74 Stat. 89 (Civil Rights Act of 1960); Pub. L. 88–352, 78 Stat. 241 (Civil Rights Act of 1964).

[409] United States Pub. L. 89-110, 79 Stat. 437

governor, secretary and judges.[410] Once the governor called for the formation of a legislature, the Northwest Ordinance restricted voting to free males of full age who owned fifty acres of land and who either had been citizens of another state or had resided in the territory for two years. Congress adopted this same suffrage provision when it organized other territories under the same model as the Northwest Ordinance – the Southwest, Indiana, Michigan and Orleans Territories.[411] In 1808, Congress altered voting requirements in the Mississippi and Indiana territory to allow voting by those who either met the 50-acre ownership requirement or who owned a town lot worth at least 100 dollars. Additionally, Congress altered the language to indicate that only free *white* males could vote, instead of any free male. The Organic Act for the Missouri territory in 1812 dropped the property requirements altogether. Between 1812 and 1836 when the Wisconsin territory was organized, Congress generally loosened requirements for white men, and restricted it for black men. Women had no voting rights anywhere.

In 1836, Congress embarked on a new path. With the creation of the Wisconsin territory and every territory since then, Congress set the initial rules for voter eligibility in the first territorial legislative election, restricting it to United States citizens who were residing in the territory at the passage of the Organic Act. For all subsequent elections, however, the territorial legislature would determine voter eligibility – the only federal restriction being that the voters had to be citizens of the United States. Thus, Congress expanded the powers of local self-government to include the power to determine who could participate in the voting process.[412]

Territorial legislatures organized under this Wisconsin model, then, could implement voting requirements that allowed or disallowed the franchise to African-Americans, Native Americans,

[410] For a history of voting in the United States, *see* Alexander Keyssar, *The Right to Vote: the Contested History of Democracy in the United States* (New York: Basic Books, 2000).
[411] J.W. Smurr, *Territorial Jurisprudence* (Ann Arbor: University of Michigan, 1971).
[412] *Ibid*.

women, and others – so long as they were citizens. When the Supreme Court held in *Dred Scott* that those of African descent were not and could never be citizens, Congress responded by passing an Organic Act for Colorado that allowed the franchise to be extended even to non-citizens. Congress designed this provision specifically to allow black men to vote.[413]

Following statehood and prior to the Fifteenth Amendment, new states could restrict voting in any way they saw fit. In 1866, with *Dred Scott* repudiated by the Civil War, Congress passed legislation that forbade states from denying the franchise for reasons based on race, color, or previous condition of servitude. The constitutionality of this early Civil Rights Act and its applicability in the states was in question as the nation struggled to re-orient itself after the Civil War. Did the Union victory in the Civil War give Congress the power to regulate voting in the states – something it had never done before? Fearful that the answer was no, Congress passed and the states ratified the Fourteenth and Fifteenth Amendments in 1868 and 1870. However, the western territories did not need to wait for those constitutional amendments. The Civil Rights Act of 1866 and Territorial Suffrage Act of 1867 obligated territorial legislatures to expand the franchise to all males.[414]

Another group of disenfranchised citizens began voting for the first time in 1870s – women in western territories. Wyoming was the first to grant women the right to vote in 1869, followed by Utah in 1870. Four more territories and states continued the western trend in Washington (1883), Colorado (1893), Idaho (1896) and California (1911). By the time of the Nineteenth Amendment, women in the West had been voting for 50 years. No Congressional action required or forbade this extension of the franchise. Historians continue to grapple with an interesting

[413] *See* Organic Act of Colorado, February 28, 1861.

[414] *See* The Civil Rights Act of 1866, 14 Statute at Large 27-30, and The Territorial Suffrage Act of 1867, *Congressional Globe*, 39th Congress, 2nd Session, pp. 381-82.

question: Why did the West lead out in extending the franchise to women? Multiple theories abound. A Turnerian interpretation suggests the rugged nature of existence in the West created an equality of the sexes – pioneer women worked just as hard as men in the same fields of labor and were therefore rewarded with the vote. Some combination, though, of other theories is more likely. Sparsely populated territories thought enfranchisement would encourage more settlement. Territories with high ratios of men to women thought enfranchisement would encourage women to move there. White men thought female suffrage would protect their political power from erosion by newly enfranchised black and Chinese men. They assumed white women would generally vote the same as white men on substantive issues. Similarly, political parties (mistakenly) believed that women, once enfranchised, would reward the party that gave them the vote. No matter the cause, western territories expanded the franchise and their citizens believed the American constitutional structure authorized them to do so.[415]

[415] For a discussion on the western territories' leading role in women's suffrage, *see* Rebecca J. Mead, *How the Vote was Won: Woman Suffrage in the Western United States, 1868-1914* (New York: New York University Press, 2004) and Beverly Beeton, *Women Vote in the West: The Woman Suffrage Movement* (New York: Garland, 1986). For examinations of the suffrage movement more generally, *see* Nancy Cott, *The Grounding of Modern Feminism* (New Haven: Yale University Press, 1987) and Ellen Carol DuBois, *Feminism and Suffrage: the Emergence of an Independent Women's Movement in America, 1848*-1869 (Ithaca: Cornell University Press, 1978).

Figure 7 – "Wives Wanted"

Therefore, at least one principle of territorial popular sovereignty appeared to have survived the Civil War – the right of territorial legislatures to determine who would participate in the foundation of democracy through voting. In the first twenty years after the Civil War, Congress acted to change voting rules only in the service of expanding the franchise, with one notable exception.

Suffrage leaders in the East generally celebrated western territories that expanded the vote to women. The extension of the franchise in Utah, however, was a source of embarrassment rather than a victory for national suffrage leaders. They had sought to allay concerns that extending the franchise to women would undermine the family, and they initially supported the franchise for women in Utah. Elizabeth Cady Stanton and Susan B. Anthony visited Utah in 1870. But even after Mormon women in Utah obtained the franchise, they continued to support polygamy and the

Church, seeming to confirm the fears of the anti-suffrage forces that extending the franchise would change traditional family structures.[416]

The Edmunds-Tucker Act of 1887 disenfranchised women in Utah, reversing the Congressional trend of expanding it. Of all the provisions of the law designed to punish polygamists, the disenfranchisement provision garnered the most opposition in Congress, even from those otherwise inclined to support the legislation. During House debate, Representative Risdon T. Bennett of North Carolina described the removal of the franchise from women as "simply atrocious."[417] Even the strongest of supporters of the bill, Ezra Taylor, expressed his alarm at the removal of the franchise, wondering where it might lead.[418] Future Speaker of the House Thomas Reed, though supporting the bill, also wished to retain the female franchise.[419] After intense debate in both the House and Senate, the bill passed. Grover Cleveland did not sign it but allowed it to become law by not vetoing it within ten days. As with areas of substantive common law, Congressional plenary power in the territories over voting was absolute.

Other Rights

On September 18, 1885, John Sharp walked into the federal territorial courthouse in Salt Lake City, Utah accompanied by his attorney. They approached the bench of Judge Charles Zane together. Zane, who had once replaced Abraham Lincoln in the law firm of William Herndon when Lincoln won the presidency, had been appointed Chief Justice of the Utah Supreme Court in 1884 and presided over criminal trials as part of his judicial responsibilities. He had already developed

[416] *See* Sarah Barringer Gordon, "'The Liberty of Self-Degradation:' Polygamy, Woman Suffrage and Consent in Nineteenth-Century America," *Journal of American History* 83 (December 1996): 815-47; *see also* Faye E. Dudden, *Fighting Chance: The Struggle over Women Suffrage and Black Suffrage in Reconstruction America* (New York: Oxford University Press, 2011), 189.

[417] 50 Cong. Rec. 584 (1887).

[418] 50 Cong. Rec. 585 (1887).

[419] 50 Cong. Rec. 591 (1887).

a reputation among Mormons as a zealous anti-polygamy judge through extensive use of the recent Edmunds Act of 1882. He had previously accepted Sharp's plea of "not guilty" to charges of polygamy and unlawful cohabitation. On that day, however, Sharp wished to change his plea to "guilty." Sharp had prepared a statement, which his attorney read to the court. Sharp noted that he had entered into multiple marriages at a time when there was, according to him, no law against it and the dictates of his religion demanded he so marry.[420] He stated, "By this new law [my wives and I] are made transgressors and deprived of many of the privileges of our citizenship." He then noted that he had arranged his family affairs so that he would continue to provide financial support for all of his wives, but that he was no longer in violation of the new prohibitions on polygamy or unlawful cohabitation. He intended to continue to abide by such laws until an "overruling Providence shall declare greater religious toleration in the land." Judge Zane, moved by Sharp's statement and taking note of Sharp's status as a Mormon Bishop, imposed no prison sentence on Sharp; Zane hoped Sharp's actions would serve as an example to other polygamists.[421]

What were the privileges of citizenship Sharp hoped to regain, if not for him, then for his posterity? He did not itemize them in his brief statement to the Court, but only referred to "political disabilities."[422] However, the new law under which he had been prosecuted, the Edmunds Act, removed three activities commonly associated with political rights – the right to participate in a jury, the right to vote, and the right to hold elected office.[423] Whereas the fines and imprisonment imposed upon polygamists in the Edmunds Act and earlier legislation could be worn as a badge of personal martyrdom, the revocation of the right to participate in the political process posed a threat

[420] Sharp either was not aware of or deliberately ignored the Morrill Anti-Bigamy Act of 1862, discussed in further detail, *supra*, which prohibited polygamous marriages.

[421] *New York Times* Editorial, September 25, 1885.

[422] *New York Times*, September 25, 1885.

[423] *See* Edmunds Act, 22 Stat. 30 (1882).

to Sharp's familial and religious community. Their loss of civic participation diminished their ability to participate in the affairs of government, local or national. Sharp's repeated reference to the "political disabilities" imposed by the law suggests that his motivation for compliance was due more to the loss of governmental and societal participation, rather than fear of fines and prison. Such an interpretation of his statement is consistent with his active civic life.

Born and raised in Scotland, Sharp had converted to Mormonism and immigrated to Utah in 1847 where he established himself as a business and local church leader and amassed considerable wealth. Unlike Brigham Young, John Taylor and Wilford Woodruff, Sharp had not experienced religious persecution in Missouri and Illinois, giving him less reason, perhaps, to distrust government prosecution. His family's social status was placed in jeopardy through continued violation of the Edmunds Act and it probably seemed to Sharp a logical and honorable course to submit to the might of the federal government. Mormon Church leaders, however, appear to have disapproved of Sharp's decision to plead guilty in 1885. They soon removed him from his position as Bishop.

As severe as the Edmunds Act was in its punishment of those convicted of federal law and the removal of their civil rights, Congress went much further with the Edmunds-Tucker Act of 1887. There, Congress required all those wishing to vote, serve on a jury, or hold elected office take an anti-polygamy oath. This new law, then, not only outlawed a religious *practice* of polygamy, but also a religious *belief* in one. Even the non-polygamist Mormon was required to undertake the oath in order to participate in the full panoply of civic rights. These prospective voters, jurors and office-holders also were required to swear not to "aid or abet," or "counsel" anyone to practice polygamy.

Further, the Edmunds-Tucker Act overruled territorial legislation specifically allowing polygamists children to inherit property. Under the Edmunds-Tucker Act, no children born to non-lawfully wedded parents could inherit property. Laws of inheritance, like other areas of common law, had traditionally been left to state regulation. However, that changed with the Edmunds-Tucker Act. By that law, Congress granted the President power to appoint judges of the probate courts as well as the territorial superintendent of schools. With federal control of local schools, Congress hoped to be able to instruct children of the evils of polygamy.

Territorial citizens, though able to avail themselves of the Bill of Rights against territorial legislation and executive action, nevertheless found that their civil liberties were subject to Congressional curtailment with no intermediary government. Congress could insert itself most vigorously into territorial affairs to remake the territories in the image of an "American" state.

Chapter 6:

Conditions of Statehood in the West

The pressure and anxiety to fix the problems of the territories prior to statehood was driven by a theory of territorial *and* state sovereignty articulated by Representative Reed during the debates over the Edmund-Tucker Act. "The right of self-government is a right which exists in a State, which belongs to the inhabitants of a state, and which the Constitution declares Congress shall guarantee to a state."[424] The implication of Reed's argument – one understood by Democrats and even the most ardent of Republicans (of which Reed was one) – was that once a territory achieved statehood, Congressional power to regulate its affairs would disappear, except to the extent the Constitution specifically authorized Congress to interfere. Tort, marital and every other areas of common law would fall under state jurisdiction. States could set voting requirements once again. Both Congress and territorial citizens understood that statehood meant a lighter touch from Washington and greater autonomy for the citizens. The Congressional ability to root out repugnancies in law would diminish. For this reason, Congress sought not only to exercise its plenary power during the territorial period, but also to fix its determinations in stone upon statehood. One tool at Congressional disposal was the use of statehood conditions.

In deciding whether, when, and on what conditions to permit statehood, Congress and the Executive branch were in a unique position to leave for posterity their understanding of what powers should properly lay with the federal government and what powers should properly lay with the states. The statehood debates serve as a mirror image of the ratification debates. Pauline Maier stated that James Madison "had more confidence in the state legislatures as protectors of rights than he had in the courts" and that during the ratification debates other leading Federalists argued

[424] 50 Cong. Rec. 591 (1887).

that the "states would protect the people against any federal infringements on their rights." In the ratification debates, state citizens discussed what powers they would cede to the new federal government and discussed what important rights they might lose. In statehood debates for new territories, however, Congress deliberated what powers it would cede to newly formed states, and territorial citizens articulated the substantive rights they hoped to protect through statehood.[425]

Further, the granting of statehood concerned not only the relinquishment of legislative and executive power over substantive areas of the law, but also judicial power over legal process. Under Article IV of the Constitution, Congress had power to exert direct control over judicial aspects of territorial administration. With the creation of a state, a new Article III federal court would also be created, which necessitated Congress relinquish control over the judiciary, beyond its authority to give advice and consent to the executive on the nomination of judges. Thus, the decision to grant statehood would implicate not only the horizontal separation of powers between the federal government and states, but also the vertical separation of powers among the three branches of the federal government.

Sarah Barringer Gordon has argued that Congress redefined federalism in its dealings in the West, by appropriating to itself powers that had traditionally been reserved for local governments.[426] Although true, Congress expounded a theory of government power in the territories that sought to do the least amount of harm to existing concepts of federalism. More importantly, Congress reinforced more traditional, pre-Civil War, notions of federalism regarding the power of states as political entities. Congress understood that by granting statehood, it would

[425] *See* Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon & Schuster, 2010), 463.

[426] Gordon, *The Mormon Question*, *supra* note 254, at 9.

divest itself of plenary power in the territories, losing some powers to the new state government and losing others to a new Article III court.

Eric Biber has thoroughly described the conditions of statehood, and the way that Congress has used such conditions to reconstruct the political, economic and even marital landscape.[427] Placing general conditions on statehood did not begin with the western territories. Congress has placed conditions upon all new states created from federal territory. The West is unique, however, for two reasons. First, only in western territories did Congress affix certain land use restrictions that changed the relations among citizens, states and federal government. These conditions will be discussed in detail in Part III. Second, Congress used statehood conditions in the West in a much more aggressive way to impose a national view of law in areas traditionally reserved to states. Congress did this as part of a process to "Americanize" the western territories. The three instances discussed herein are (1) Non-sectarian education, using New Mexico as an example; (2) Marriage, using Utah (again) as an example; and (3) the structure of the judiciary, using Arizona as an example.

Non-sectarian Education

New Mexico's territorial period was the longest of the continental United States. Created as part of the 1850 compromise, Congress delayed New Mexican statehood until 1912. Initially, statehood attempts were lost to the complicated national debate of slavery in the territories as well as to the relatively sparse Anglo-American settlements in a large area. Over time, however, cultural differences between New Mexicans and Easterners came to be the primary obstacle to statehood. Anti-Mexican as well as anti-Catholic sentiment contributed to the distrust. Further, a cadre of wealthy landowners opposed statehood for fear of higher taxes. An 1890 statehood effort

[427] Eric Biber, "The Price of Admission: Causes, Effects and Patterns of Conditions Imposed Upon States Entering the Union," 46 *Am. J. Legal History* 119 (April 2004).

was thwarted not by Congress, but by New Mexicans themselves, who voted down a proposed Constitution. New Mexico developed a reputation in the East for general lawlessness. Tales of Billy the Kid and Black Jack Ketchum entertained eastern readers, helping to create a sense that New Mexico was ungovernable. William T. Sherman suggested that the United States declare war on Mexico a second time, and "make it take back New Mexico."[428]

Biber notes that differences in language and religion were the primary sources of eastern suspicion.[429] The language of statehood for New Mexico (and other western territories) was the language of assimilation. Republican Senator William Dillingham expressed eastern sentiment in 1902:

> When they shall have become educated, when through that education they come to mingle more commonly with the American people, when they cease to isolate themselves in their own villages and employ their own language and think their own old inherited thoughts, then it is, in my opinion, they will make a good class of citizens.[430]

A sense of the Anglo-elite perception of New Mexico can also be found in the United States Supreme Court decision of *United States v. Sandoval*. In *Sandoval*, the Court held that the Puebla of New Mexico were "Indian" and therefore subject to the extension of the Non-Intercourse Act found within the New Mexico Statehood Enabling Act.[431] In discussing the Puebla, the Court said, "always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people."[432]

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[428] Lloyd Lewis, *Sherman, The Fighting Prophet* (New York, 1932), p. 130.
[429] Biber, "The Price of Admission, *supra* note 427, at 165-166.
[430] 36 Cong. Rec. 361 (1902).
[431] *United States v. Sandoval*, 231 U.S. 28, 39 (1913). In so holding, the Court overruled *United States v. Joseph*, 94 U.S. 614 (1876).
[432] *Sandoval*, 231 U.S. at 39.

One of the tools available to the federal government in territories was control over education. By the time of western territorial organization, the use of public schools as Americanizing agents of democracy was not a new concept.[433] However, in the West, and particularly in New Mexico, the traditionally predominant role of public schools was challenged by sectarian schools operated by Catholics. By 1870, only five of New Mexico's 44 primary schools were public. Additionally, only a small percentage of New Mexican children attended any school at all. In 1872, the New Mexico legislature began to allocate greater resources to non-Sectarian schools and permitted all of New Mexico's counties to organize county boards of education. Catholics complained because public funds were not made available to sectarian schools, which offered education to students of all religious backgrounds.[434]

Despite the protests, efforts to create a greater role for non-sectarian public education continued. One territorial secretary, William Ritch, blamed the Catholic Church for what he described as the ignorance and illiteracy prevailing in the schools. Ritch called for the Congressional establishment of public schools as the only sure way to "Americanize" New Mexico. As part of this effort, Ritch and other advocates of public education sought to establish English as the language of instruction and sought to use only non-sectarian textbooks. Catholic school administrators taught in Spanish and taught Catholic doctrine in their schools. Anti-parochial school sentiment became so strong in the 1870s that both Presidents Grant and Hayes supported a constitutional amendment to prohibit states and territories from using public funds on sectarian schools. The Blaine Amendment passed the House put fell short of the 2/3 majority

[433] *See, e.g.*, Robert Carlson, *The Quest for Conformity: Americanization through Education* (New York: Wiley, 1975).

[434] *See* Steven K. Green, "The Blaine Amendment Reconsidered," *The American Journal of Legal History*, Vol. 36, No. 1 (1992), pp. 38-69, and Diana Everett, "The Public School Debate in New Mexico, 1850-1891," *Arizona and the West*, Vol. 26, No. 2 (1984), pp. 107-134.

needed in the Senate. When the amendment failed to make it out of Congress, a similar bill was proposed in the New Mexico legislature. It also failed, by four votes. Nevertheless, anti-Catholic sentiment continued to rise.[435]

In the 1880s, the New Mexico territorial legislature continued to pass laws designed to strengthen public schools and weaken Catholic ones, culminating in 1891 with a statewide non-sectarian public school system, in which teachers were required to teach in English. The drive toward this educational system was motivated by statehood desires. Statehood advocates thought the system was necessary to show Easterners that Spanish speaking "foreigners" did not dominate New Mexico.

Other issues continued to thwart New Mexican statehood until 1912. Fearful that the new sovereign state might return to support of parochial schools, Congress included in the Enabling Act a clause that "provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said state and free from sectarian control, and that said schools shall always be conducted in English." This provision was drafted into the New Mexico Constitution as Article XII, Section 3, and Article XXI, Section 4. New Mexico and 10 other western states are the only states to have this non-sectarian provision included in their state constitutions by demand of Congress.[436] Congress used its power in western territories as well as Indian territories to "Americanize" the children of those federally controlled areas by setting up schools designed to instruct them in English and in "American" ideals of democracy.

[435] *Ibid*. Anti-Catholic sentiment was not limited to New Mexico and the United States in the late 1800s. *See* Michael B. Gross, *War Against Catholicism: Liberalism and the Anti-Catholic Imagination in Nineteenth-Century Germany* (Ann Arbor: University of Michigan Press, 2004).

[436] *See* New Mexico Constitution, Article XII, Sec. 3; Article XXI, Sec. 4. The other ten states are Washington, North Dakota, South Dakota, Montana, Idaho, Wyoming, Utah, Oklahoma, Arizona, Alaska.

Marriage

The territorial citizens of Utah applied for statehood eight times between 1849 and 1896. The first petition was an ambitious proposal to form a state entitled "Deseret," encompassing almost the entirety of the Great Basin region. Territorial citizens also filed petitions in 1856, 1862, 1867, 1872, 1882, 1887 and the final, successful one in 1892. As we have already seen, Congress would not grant these statehood petitions until after it was satisfied that the Mormon Church had discontinued polygamy.

The record from this forty-year statehood debate reveals that a version of federalism in which states had ultimate sovereignty over certain aspects of law persisted in the language and ideas of both Congress and territorial citizens, despite the Civil War and the Fourteenth Amendment. Territorial citizens, whose representatives in territorial government were gradually but persistently replaced with federally appointed officials, came to believe that their rights would best be protected through statehood – the mechanism for reestablishing local control of government. This political discourse was especially prevalent in the 1880s, after the Supreme Court held the Mormon practice of polygamy was not protected by the First Amendment's free exercise clause.[437] When it became clear that the Bill of Rights provided no refuge from federal prosecution, Mormons turned more fully to the structure of the Constitution to protect their liberties.

Moreover, during the 1880s, lay Mormons became less concerned with protecting their religious liberty to practice polygamy, and more concerned with protecting core political rights that were rapidly disappearing, such as the right to vote and otherwise participate in representative government. Congress, for its part, exhibited significant anxiety in relinquishing power to a new

[437] *Reynolds v. United States*, 98 U.S. 145 (1878). The best explanation of the mechanics of territorial government is still Earl Pomeroy's *The Territories and the United States, 1861-1890: Studies in Colonial Administration* (Seattle: University of Washington Press, 1969).

state over matters such as marital and property law, as well as relinquishing judicial powers. To grant statehood to Utah without eradicating its own peculiar institution would serve to entrench polygamy behind state protection. However, to grant statehood while continuing to exercise federal control over matters traditionally falling within the purview of state power would be to destroy the cherished dispersion of powers, which was still important to Senators and Representatives of both major parties who were accountable to local political constituencies.

Thus, the landscape of the Utah Territory in the 1880s included widespread prosecution of Mormon polygamists, a federal penitentiary filling with both men and women, the administration of anti-polygamy oaths prior to voting or holding office, and the loss of core civil liberties for both polygamous and monogamous Mormons.

The Edmunds-Tucker Act was signed into law in April 1887. In June, leadership of the People's Party of Utah, including the newly monogamist John Sharp, called for a territory-wide constitutional convention to be held the first week of July to discuss statehood. The People's Party was comprised almost entirely of Mormons. The party asked all citizens, regardless of political party or religious domination, to meet in county seats the following weekend to nominate delegates to the convention. Non-Mormons, who formed the Liberal Party, were generally opposed to statehood and boycotted the nominating meetings.[438]

After delegates were selected, the convention began its work on June 30, 1887. Non-Mormons boycotted the convention, as they had the delegate nominating meetings. They did not support a statehood bid at that time and were distrustful of the motives and sincerity of the Mormons. The first order of business of the convention was to administer the oath required by the Edmunds-Tucker Act that obligated public officials to denounce polygamy. Without the oath, delegates

[438] *See* Report of the Utah Territorial Commission, 1887, p. 3.

feared Congress would refuse to recognize them as official representatives of the people. Some delegates objected to the oath as an insult and beneath their dignity. They felt the oath violated their religious freedom and moved to ignore the oath or modify it to remove the objectionable provision. Their motion, however, was defeated, and the delegates took the oath in order to legitimize their proceedings in the eyes of the national government.[439] The convention then set to work on drafting a state constitution. The convention proposed a constitution to the people on July 7, 1887, which voters ratified in the general election on August 1, 1887 with more than 96% of the 13,697 votes cast. Only those taking the oath required under Edmunds-Tucker (i.e., monogamous) were allowed to vote in the general election. Again, non-Mormons boycotted the general election as they had the nominating meetings and the convention.

The most notable part of the proposed constitution was its criminalization of polygamy. For the first time, Mormon citizens voted in a democratic process to criminalize a practice their community had not only openly engaged in since 1852, but had claimed as divine right. The constitution also provided that the ban on polygamy could not be repealed without Congressional approval. Further, polygamists could not receive a state-level pardon unless approved by the President. To be certain, the penalties for polygamy under the proposed constitution were considerably lighter than what was then in operation under the Edmunds and Edmunds-Tucker Acts. And, as will be discussed more fully herein, questions immediately arose regarding the sincerity of this sudden abandonment of polygamy. Yet, the proposed constitution of 1887 was the turning point in Mormon-federal relations – a large number of lay Mormons had now gone on

[439] The Utah Territorial Commission, who had drafted the oath and subsequently recounted the proceedings of the convention in its report to the Secretary of the Interior, found that the People's Party leaders had sought to allay the concerns of the Mormons by interpreting the oath in a manner in that required them to disavow only a *present intention* to commit the crimes prohibited thereof or aid others in doing so. The Commission denied the Liberal Party's request to modify the oath. *See* Utah Territorial Report of 1887, 1330-1332.

record through a democratic process as supporting the criminalization of polygamy, which rendered their Church leaders outlaws. Having taken that step, it would be difficult, if not impossible, to turn back. The proposed constitution of 1887 represented a Rubicon with respect to polygamy.

Following acceptance in the general election, the convention submitted its proposed constitution to Congress and the President along with a memorial. In the words of the delegates, the proposed constitution was a reasonable "political settlement," designed to overcome the sole objection which had impinged the territorial citizens' "rights and privileges of statehood and prevented them from having a "republican" form of government."[440] The delegates noted that the provisions making the ban on polygamy non-repealable were inserted not at the insistence of Congress, but by the citizens themselves to "secure political harmony with the existing states." They also stated that the entire population of Utah was "desirous of becoming fully identified as a state with the institutions of this great republic."[441] In the closing two paragraphs of the memorial, the delegates referred to a "republican" form of government no less than three times. In the minds of the delegates, territorial government was antithetical to a republican form of government.[442] The memorial reveals that many territorial citizens felt that during the 1880s they considered themselves subjects of a distant sovereign, and not participants in representative government. The solution for them was not to declare independence from the sovereign, as the Founding Fathers had done, but to declare statehood.

The level of Mormon Church involvement with the entire statehood effort of 1887 is unclear. While there is no evidence of collaboration, there is also no strong record of opposition. The *Salt*

[440] Memorial of the Constitutional Convention of Utah, 1887, p. 23.
[441] *Ibid*., 24.
[442] *Ibid*., 27.

Lake Tribune, however, which was not affiliated with the church and was hostile to the practice of polygamy, called the convention and its resulting constitution a "farce." Comparing the Mormons to Goethe's Reynard the Fox, the *Tribune* asserted that the Mormons has professed half-hearted repentance and expressed an insincere promise to renounce polygamy. The *Tribune* warned against statehood; once achieved, "nature and habit" would assert their dominion and "woe to the victims within their power!" [443] The *Tribune* articulated the fears of many non-Mormons who were concerned that premature statehood would not only lead to the return of polygamy but also entrench the Mormon Church in control or politics.

Congress in 1882 had created a Utah Territorial Commission within the Department of the Interior. The Commission prepared annual reports to the Secretary of the Interior that the Executive shared with Congress. The Commission felt that its 1887 report would "prove to [contain] interesting information, especially so in view of recent events which have transpired in the territory."[444] The report took stock of the recent request for statehood, including the proposed state Constitution, and included a recommended response to the petition. By a vote of 3-2, the Commission recommended against statehood, and laid out its reasoning in the report. The two dissenters filed a minority report. The report thus reads as a judicial opinion, providing the executive branch, by submitting the report, and Congress, by reviewing and adopting it, the opportunity to expound upon principles of federalism in a statehood process.

The report contained, as some of the Commission's previous reports had, information regarding Utah's geography, population, demographics, commercial interests, and history. Additionally, the majority opinion characterized Mormon Church leaders as in charge of local politics, harboring illusions of empire, and counseling church members to avoid participation in

[443] *Salt Lake Tribune* editorial, July 6, 1887.
[444] Utah Territorial Commission Report of 1887, p. 1317.

territorial courts.[445] As for the lay members of the Mormon Church, the majority wrote they "are very tenacious of what they claim to be their rights, and have never yielded a point."[446] The majority recounted the long history of Congressional attempts to eradicate polygamy, finding the Mormon population to have successfully thwarted federal efforts. The majority also repeatedly characterized the legislative enactments against polygamy as "invitations" to the Mormons to abandon the repugnant practice that was preventing them from joining the nation. By referring to laws, which carried the penalties of fine and imprisonment for disobedience, as invitations, the report reflected a nationalist interpretation of the law as a tool of correction and guidance, and not a means of oppression, as the Mormons had come to view it. The majority also equated the Constitution with legislation, suggesting they both comprised the "supreme law" of the land.[447] The majority laid blame for the "contest" which had been waged between the government and the Mormons squarely at the Mormons' door, especially church leaders. "All that has been asked of them is to acknowledge the supremacy of the law."[448] Despite this negative outlook, the majority nevertheless stated, "[the Mormons] possess many of the elements which under wise leadership would make them useful and prosperous people." The majority also characterized the non-Mormon element of Utah – the "Gentiles" – as oppressed "outsiders" who had, despite Mormon opposition, succeeded in building many successful business enterprises as well as establishing more traditional religious institutions in the territory.

The majority then spent the bulk of its opinion recounting the circumstances of the registration of voters in 1887 (including the dispute about the anti-polygamy oath), the general election of August 1, and the statehood petition. In addition to recounting the arguments in favor of statehood

[445] *Ibid*., 1320-1321.
[446] *Ibid*.
[447] *Ibid*., 1330.
[448] *Ibid*., 1332.

propagated by the Mormons as set forth in the memorial accompanying the petition, the majority opinion also recounted the arguments against statehood set forth by the non-Mormon population. The arguments against statehood, as summarized by the Commission, were that: (1) the Mormons were acting in bad faith in professing an abandonment of polygamy; rather, they sought to entrench polygamy "behind statehood;" (2) Mormons, from their press and pulpit, if not from their political soap box, had not professed an abandonment of polygamy; (3) that Mormons had not obeyed present laws against polygamy; (4) that under statehood, the judicial system would fall completely into the hands of Mormons; (5) that because marriage was a "proper subject of State legislation," Mormons in control of state government would likely experience a "reconversion" to polygamy; (6) that the proposed ban on polygamy in the Constitution would not prevent unlawful cohabitation, which had become illegal under the Edmunds-Tucker Act of 1887.

After recounting the arguments for and against statehood, the majority announced its position by stating that the "action of the Mormon people in adopting a constitution which forbids polygamy … is an anomaly."[449] The majority then took to analyze not only the statements of monogamous Mormons in the petition for statehood, but also the statements of the Church in the press and at the pulpit. The majority asserted that the move for statehood was insincere – the change in heart regarding polygamy was too sudden, the constitutional convention too hastily established, not exercised with the "care and deliberation" one would expect of citizens acting to "advance the interests of all and not of a particular class."[450] Further, the punishment for polygamy under the new constitution would be more lenient than that currently existing under federal law. Not only would the fines and imprisonment be of lesser degree, but convicted polygamists also would not lose their political rights of voting and holding office, of which they were then already

[449] *Ibid*., 1337.
[450] *Ibid*.

deprived. This restoration of civil rights appears to be the final nail in the coffin of the 1887 petition. Finally, Congress turned the provision rendering the ban on polygamy amendable only with its approval against the Mormons. The majority found the proposal "incongruous and futile … if a community cannot be trusted to amend a constitution it can hardly be said to be fit to be trusted with the powers of a State under any form of Constitution."[451] Interestingly, the same provision was included and approved when Utah finally achieved statehood, and remains part of Utah's constitution to the present.

The closing statements of the majority's opinion, which particulars were not contested by the minority opinion, articulated an interpretation of federalism in the territories – namely, that sovereignty in the territories lay with Congress, who delegates powers to local citizens, but also has power to withdraw them "until the perpetuated evils should be corrected."[452] Local governments, contrary to the beliefs and wishes of Utah's territorial citizens, held no independent power, but were entirely subject to the national legislature. The structural protections of individual liberties and local institutions that existed in the states did not exist in the territories. Congress thus sought to administer the territorial empire by emulating the British model as described by Mary Sarah Bilder – eradicating repugnant local practices while permitting practices that merely "diverged" from national standards.[453]

However, by contracting the power of local governments in the territories, Congress simultaneously reinforced the power of states to legislate in affairs for which Congress had no delegated authority, such as marriage. The majority opinion, understanding the states' continuing power to regulate marriage and even allow non-traditional forms of marriage, proposed that Utah

[451] *Ibid*., 1338.
[452] *Ibid*., 1340.
[453] *See* Bilder, *The Transatlantic Constitution*, *supra* note 28.

not be admitted as a state until an amendment to the United States Constitution had been ratified banning polygamy altogether.[454] There would be no need for such an amendment if the national government could assert power to dictate marriage laws to the states. In addition to recommending against statehood, the Commission also recommended that all county officials, such as clerks, assessors, recorders and school superintendents in Utah be replaced with federally appointed officials, who would be "in sympathy with the efforts of the Government to extirpate polygamy."[455]

The minority report took issue with the majority's characterizations of monogamous Mormons as insincere in their stated desire to abandon and criminalize polygamy. The minority cited to the Commission's previous reports in which it remarked that it had begun to see some reform efforts in Utah, which it credited to the Commission's deliberate attempt to drive a wedge between polygamous and monogamous Mormons. The minority also recounted how the Commission itself granted legitimacy to the general election during which the people ratified the proposed Constitution. The Commission had written to judges throughout the territory that "when the great body of the legal voters of the Territory manifest a disposition to place themselves on record against polygamy, in howsoever an informal manner, they ought to be encouraged therein, the object of the Government being not to destroy but to reform the Mormon people." Unlike many of the "gentiles" in Utah and the majority of the Commission, the minority did not think the anti-polygamy movement was "a sham."[456]

The major point of disagreement between the majority report and the minority was the necessity of eradicating the religious *belief* in polygamy in addition to the actual *practice*. Whereas

[454] Utah Territorial Report, 1887, 1340.
[455] *Ibid*, 1342.
[456] *Ibid*. 1348-1349.

the majority would not be satisfied until the Mormons had abandoned polygamy in deed and belief, which would require a formal abandonment by Church leaders, the minority sought only to stamp out the practice. The minority argued that after having assured Mormons that Congress sought only to stop the practice of polygamy, the national government had then added an additional requirement by demanding the abandonment of religious opinion, which was contrary to the arc of religious toleration in United State history. "Then," the minority opinion wrote, "in the close of the most enlightened century in the tide of time, shall we invoke legal coercion over the consciences of men and resort to the pains and penalties inflicted in former times for recusancy, non-conformity, and heresy?" The minority expressed a version of territorial federalism that the majority had rejected. "[W]hatever the Federal authorities can rightfully accomplish in the way of reform can be done without resorting to the total overthrow of local self-government." In the minority's opinion, removing local self-government in the territories was an extreme and "un-American" solution to the problem of repugnant local practices. The minority had greater faith in the sincerity of monogamous Mormons' criminalization of polygamy and believed polygamy was on the decline in Utah. Although the minority stopped short of issuing a full-throated call for statehood, it sought to allay Congressional concerns about the sincerity of the Mormons professions for monogamy and the waning nature of polygamy. Like the majority, however, the minority recommended the adoption of a United States Constitutional Amendment banning polygamy. Thus, the Commission was united in its belief that states retained power over marital laws and the proper, constitutional way to place it under national control was through a formal constitutional amendment.

Mormon concerns about whether the convention of 1887 and the resulting ratification election would be granted legitimacy by Congress were assuaged when Congress took up the matter of

Utah's petition in late 1887 and 1888. Congress, like the Territorial Commission, found no procedural defects in the election process, and proceeded to address the merits of the petition. The decision to accept the convention as procedurally sound should not be ignored; by so doing, Congress engaged in a meaningful dialogue with moderate Mormons who sought statehood.

Congress heard testimony from both those in favor and those opposed to statehood. During the course of testifying before the Congressional Committee on Territories, church advocate Franklin Richards was surprised to find that Congress had begun to express worries over the provision of the proposed constitution that required Congressional approval to amend the ban on polygamy. Congress expressed concern that such a provision was unprecedented and put at jeopardy notions of local sovereignty. "For years," Richards stated, "our opponents have urged us to do the very thing contained in these sections because they thought we would never comply with such a request. And it would seem that some members of this committee think we ought never to have complied."[457] Richards then proceeded to quote a mutually acknowledged "eminent" constitution lawyer, George Curtis, on the question of Congressional approval of state constitutional amendments. Curtis stated that the equality desired among the states need not prevent a state, such as Utah, from entering the Union upon special conditions that did not apply to other states. "The people of Utah propose to covenant with the United States in their State constitution … they shall make this compact in diminution of what would otherwise be their unlimited sovereign right to change their constitution." According to Curtis, such a "covenant" had "nothing to do with the constitutional validity of this compact that other states have not made."[458]

[457] Report of the Hearing of the Congressional Committee on Territories, February 1888, p. 7.
[458] *Ibid*. 8.

Curtis's argument was interesting, because it essentially allowed an individual state to make a "treaty" in the words of one Congressman, with the United States. The argument did not prevail. Although the record is not clear, members of Congress, when considering Richards and Curtis' argument, must have thought not only about Congressional power over Utah, as a state, but also whether Congress might subsequently assert greater power over their own state affairs. The Congressional Committee on Territories reported the petition out of committee, and Congress rejected the petition. In a curious twist, Congress's primary stated reason for rejecting Utah's 1887 statehood was what Richards saw coming out of the committee – that the proposed State constitution upset the balance of power between states and the national government by giving Congress veto power over state action. "Congress ought not to exercise any supervision over the provisions of the constitution of any such new State further than is necessary to 'guarantee to every State in this Union a republican form of government.'" Utah's constitution, in the words of a Senate Resolution, contained provisions that would "deprive such proposed State, if admitted into the Union, of that equality which should exist among the different States."[459] Congress thus denied Utah's petition for statehood on the basis that it was not in Utah (or any other state's) best interest to allow Congressional interference in state matters. This is not to say Congress skirted the issue of polygamy. The Senate also resolved that Utah ought not to be admitted as a State until "it is certain, beyond doubt," polygamy had been abandoned.

Following the denial of Utah's 1887 petition for statehood, polygamy prosecutions continued, but the church demonstrated a willingness to comply with the law. Prominent polygamists, like George Q. Cannon, surrendered to authorities and the Church announced that no new polygamous marriages were being performed.[460] Finally, in 1890, Church president Wilford Woodruff issued

[459] United States Senate Resolution, No. 89, March 26, 1888.
[460] *See* Gordon, *The Mormon Question*, *supra* note 254, at 211-212.

a "Manifesto." The Manifesto stated that the Church would abide by the law, and authorize no new polygamous marriages in the United States. When Woodruff learned of polygamous marriages performed by church leaders in the Church's "Endowment House," he ordered the building destroyed.[461] Prosecutions began to wane, leaving existing polygamous marriages largely intact. Territorial citizens began preparing another petition for Statehood, which would finally prove successful.

Unlike previous petitions, the statehood petition of 1891-92 was an exercise in comity and good feelings. Virtually all opposition to statehood was dropped. Much of the newfound good feeling and faith in the sincerity of the Mormon Church was the result not only of the Manifesto, but also a sympathetic plea for clemency submitted by the leaders of the Church. In a letter dated December 19, 1891, members of the governing councils of the Church begged United States President Benjamin Harrison for pardons. The leaders recounted church members' faithfulness, stating, "Our people almost without exception remained firm, for they, while having no desire to oppose the Government in anything, still felt that their lives and their honor as men were pledged to a vindication of their faith." To counter the image of Mormons as immoral lawbreakers, church leaders recast them as firm in their convictions, and willing to suffer fines and imprisonment for their belief. Now that the Church had issued its Manifesto, Church leaders assured the government they would be faithful and good citizens, "nowhere in the Union [was] there a more loyal people."

[461] Between 1890 and 1904, some high-ranking church officials continued to enter into and solemnize polygamous marriages. The United States Senate began hearings in 1904 to decide whether to seat Reed Smoot, a Mormon, as a senator from Utah in light of these marriages. The Mormon Church President in 1904, Joseph F. Smith, issued a second manifesto announcing that those entering into new polygamous marriages would be excommunicated from the Church. Senator Reed was ultimately seated when the Senate failed to reach the necessary 2/3rds threshold vote to expel him. See D. Michael Quinn, "LDS Church Authority and New Plural Marriages, 1890-1904," *Dialogue: A Journal of Mormon Thought* (Spring, 1985), 9-105. *See also* Kathleen Flake, *The Politics of American Religious Identity: The Seating of Seating of Senator Reed Smoot, Mormon Apostle* (Durham: University of North Carolina Press, 2004).

Church leaders reminded the President of the clemency shown the South after the Civil War. President Harrison issued a proclamation of amnesty and pardon for all polygamists who promised to obey the law.[462]

Judge Zane, the zealous anti-polygamy judge who accepted John Sharp's guilty plea, supported the new statehood bid without reservation. Like Church leaders, he pointed to the Mormons previous faithfulness as a reason in favor of granting statehood, instead of an obstacle to it. "The signers [of the petition for amnesty] include some who were most determined in adhering to their religious faith … and they are men who would not lightly pledge their faith and honor to the Government …without having fully resolved to make their words good in letter and spirit."[463] All federal officials in the territory likewise supported the statehood petition. Other non-Mormon elements of Utah, most notably Presbyterian and Methodist churches, likewise dropped their objections.

This unanimity and good feeling with regard to statehood did not mean that Mormons had forgotten the offenses they had suffered or were not willing to voice their objections to past and current treatment. In January 1892, the legislative assembly of Utah presented a petition to Congress in which it referred to itself as the representative of the people, but "helpless." The legislature argued that Utah was "imbued with the hope and determination to be free – free in the full sense of American Constitutional freedom."[464] According to the legislature, "constitutional freedom" entailed the right to vote, to hold office, to be equal. Additionally, these rights were, according to the legislature, natural rights, "not held at the mercy of one man, or popular majority or distant body unadvised as to local needs or interests." The legislature paid further homage to

[462] *See* House Report No. 162, from the Committee on the Territories, regarding the Admission of Utah, 1893, pp. 4-5.
[463] *Ibid*. 5.
[464] *Ibid*. 6.

notions of localism by arguing that the federally appointed officials were not only unfamiliar with local affairs, but also acted arbitrarily and sometimes corruptly.[465]

Along with Mormons' renunciation of polygamy, the Church also disbanded the People's Party, and instructed its members to join one of the two major political parties, sometimes assigning members to one or the other to assure parity.[466] The Church thus took a less prominent role in directing politics in Utah, if it did not withdraw altogether. Both the Democratic and Republican party conventions of 1892 adopted planks in their respective platforms encouraging statehood for Utah.[467] Congress finally passed the Enabling Act of Utah, and granted Utah statehood in 1896. Mormons and non-Mormons celebrated together in the Church's tabernacle.

Utah's new constitution restored suffrage for women. One member of the freshman class of Utah state senators was Martha Hughes Cannon, the first woman state senator in the country, who defeated her own polygamist husband in the election. She ran as a Democrat, he as a Republican. In her words, there was no marital discord; Democrat party leaders simply asked her to run, and as the only Democrat she beat a field crowded with Republicans. Cannon, as Senator, took the lead in proposing and passing legislation that was in line with other progressive legislation of the era, such as protective labor rules for women, and community health laws. Thomas Alexander has argued that following the renunciation of polygamy, Utah in general and the Mormon Church in particular sought to compensate for their past outlaw status by seeking to envelope themselves in then extant concepts of "America-ness." Thus, the Mormon Church and Utah became enthusiastic supporters of progressive movements such as temperance and political reform.

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[465] *Ibid*.

[466] Howard Lamar has noted the existence of a Mormon-controlled political party was the second major obstacle to statehood and that "the coming of a two-party system to Utah after 1890 was in many ways as significant as the abolition of polygamy." Howard Lamar, *The Far Southwest 1846-1912: A Territorial History* (Albuquerque: University of New Mexico Press, 1966), 285.

[467] *Ibid*.

The happy marriage of Utah to the rest of the country in the 1890s either would have been delayed or would not have been so happy had it not been for the groundwork laid by John Sharp at the 1887 constitutional convention. Utah's territorial citizens took part in the American tradition of state constitution making.[468] In so doing, they and federal officials in the executive branch and Congress who responded to them, revealed that a notion of federalism in which states had ultimate sovereignty over some areas of law, remained prevalent and important in the late nineteenth century.

Direct Democracy in the Wild, Progressive West: Judicial Structure and Arizona

The fear that an unruly territory might adopt an unsavory forsaken practice following Statehood became reality in Arizona. There, the "unsavory" practice was judicial recall elections. Arizona's drive for statehood followed the same general chronology as that of New Mexico, from whence it sprang in 1863. The issues in Arizona, however, differed from those of New Mexico due to polarization between labor and conservatives. Large-scale mining operations in Arizona had attracted larger numbers of laborers to Arizona. They succeeded in electing delegates to the constitutional convention in 1911 who drafted a document containing progressive structural elements that other western states had recently adopted – the initiative, referendum, and recall.

The perception of a Wild West was aided by the adoption of constitutional structures designed to root out or at least reign in corruption in statehood government. Western states adopted direct democracy measures – the initiative, referendum, and recall –in the late nineteenth and early twentieth centuries, after statehood. South Dakota, admitted as a state in 1889, was the first to adopt voter initiative and referenda less than a decade later. Utah followed suit in 1900. By the

[468] For a thorough examination of state constitution making, *see* Roman Hoyos, "The Rise and Fall of Popular Sovereignty: Constitutional Conventions, Law, and Democracy in Nineteenth-Century America (Ph.D. Diss., Univ. of Chicago, 2010).

time California adopted direct democracy measures in 1911, six other western states had already done so, with more to follow.[469]

Political and financial elites, mostly based in the East, but also with a presence in the West, opposed direct democracy measures. The Pacific States Telephone Company, for example, argued before the United States Supreme Court that Oregon's direct democracy provisions violated the Guarantee Clause of the United States Constitution, by which the national government is to guarantee to every states a "republican form" of government. The Court found the case to be non-justiciable, avoiding such a fundamental constitutional question.[470] Elites fought the direct democracy measures in other forums. Thomas Goebels writes, "no other element of direct democracy aroused as much strident opposition as the judicial recall." According to opponents of the recall, the "judiciary formed the last line of defense against radical groups catering to the whims of the people, bent on overturning the constitutional system in the United States and launching a social revolution."[471]

Arizona's constitutional confrontation was not with Congress, but with President Taft. Taft's lengthy public service was emblematic of a nationalist Republican. His father had been the Secretary of War and Attorney General under Ulysses S. Grant. Taft had been appointed a judge at age 29 and faced his first judicial election the next year, which he won. After a stint as Solicitor General of the United States, Taft was appointed to the Sixth Circuit Federal Court of Appeals, where he did not have to face judicial elections. Taft's governorship of the Philippines (and short

[469] *See* Nathaniel Persily, "The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West," 2 *Mich. L. & Pol'y Rev*. 11 (1997).

[470] *Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U.S. 118 (1912).

[471] Thomas Goebel, *A Government by the People: Direct Democracy in America, 1890-1940* (Chapel Hill: University of North Carolina Press, 2002), 62.

governorship of Cuba) introduced him firsthand to territorial governance and issues hindering autonomy and sovereignty.[472]

Taft made his conservative views on the progressive Arizona constitution known in a series of speeches delivered in Arizona in 1909. Taft called the judicial recall a form of "legalized terrorism." Further, he called judicial recall "pernicious in its effect, destructive of independence in the judiciary, and injurious to the cause of free government."[473] When Arizonans sent a draft Constitution to Washington for approval in 1911, Taft made good on this threat to veto it. Arizonans then re-drafted their constitution without the judicial recall. Despite the previous uses of statehood conditions, Taft did not insist upon a state constitutional provision guaranteeing judicial immunity from recall. Taft had apparently won the debate, and he approved the Constitution, accepting Arizonans at their word. Two months after statehood, the legislature of Arizona drafted a bill to allow for judicial recall and voters approved it later that year in a referendum. Taft also lost re-election later that year, taking a distant third behind Woodrow Wilson and Theodore Roosevelt, and taking fourth in Arizona behind the labor leader and Socialist Eugene Debs. Political elites realized that there was nothing left for the national government to do to change the decision of a sovereign state, other than to encourage its citizens to "ponder in

[472] For a biography of Taft, *see* David H. Burton, *William Howard Taft: Confident Peacemaker* (New York: Fordham University Press, 2004). For an examination of Taft's political philosophy, *see* Jonathan Lurie, *William Howard Taft: the Travails of a Progressive Conservative* (New York: Cambridge University Press, 2012). For a look at Taft's presidency, *see* Lewis L. Gould, *The William Howard Taft Presidency* (Lawrence: University of Kansas Press, 2009). For a look at Taft's time as Chief Justice, *see* Alpheus T. Mason, *William Howard Taft, Chief Justice* (New York: Simon and Schuster, 1965). For a look at the reshaping of the presidency in the Progressive Era, *see* Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism* (New York: Simon and Schuster, 2013).

[473] "President Vetoes the Statehood Bill," *New York Times*, August 11, 1916.

their quiet moments" their act of bad faith.[474] Arizona thus joined the other western states in the participation of wild-west democracy.

Statehood for the last continental territories occurred at the same time that the United States began to articulate new theories of territory in response to the acquisition of islands in the Caribbean and the Pacific. Puerto Rico, Guam and the Philippines ended up on a different path than New Mexico, Arizona and Oklahoma. These new theories represented the close of the period of solidifying American Federalism and will be examined more closely in the Conclusion.

[474] As reported in Richard Ruelas, "Judicial 'Fib' got Arizona its Statehood," *Arizona Republic*, February 20, 2010.

PART III:

LANDLORD OF THE WEST

Introduction

"The western territory ought to be regarded as a national stock of wealth. It may be compared to bullion, or coin deposited in the vaults of a bank, which although it produces no present profit, secures the credit of the institution, and is ready to answer any emergency."

St. George Tucker

When St. George Tucker published these words in 1803 as part of his project to expand Blackstone's commentary on the law, he did so to argue in favor of *retaining* federal lands, not *disposing* them, as would be federal policy for the first half of the nineteenth century. Tucker's concern was that the proceeds from disposition of valuable land in the west would cause federal coffers to overflow. This was a bad thing because it might "lay the foundation of so large a revenue, independent of the people, as to be formidable in the hands of any government." [475] Tucker continued:

> To amass immense riches to defray the expences of ambition when occasion may prompt, without seeming to oppress the people, has uniformly been the policy of tyrants. Should such a policy creep into our government, and the sales of land, instead of being appropriated to the discharge of former debts, be converted to a treasure in a bank, those

[475] 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*, Appendix 1, 283-86. (Philadelphia: 1803; Reprint. South Hackensack, N.J.: Rothman Reprints, 1969). St. George Tucker, professor of law at William and Mary, believed that legal education needed to be formalized. A Revolutionary War veteran, he also recognized that after the separation from Britain, Blackstone's commentaries did not speak to the American experience the same way they had prior to the war. Tucker began expounding Blackstone in the 1780s and 1790s in his lectures and writings, and later published his notes, lectures, and marginalia as an "American" edition of Blackstone in 1803. *See* Philip Hamilton, *The Making and Unmaking of a Revolutionary Family: The Tuckers of Virginia* (Charlottesville: University of Virginia Press, 2003).

who can at any time command it, may be tempted to apply it to the most nefarious purposes.[476]

The accumulation of wealth in the national treasury drawn from sources other than those that would arouse the concern of the citizenry, such as tariffs or taxes, would inevitably lead, according to Tucker, to the loss of liberty, whether the government was self-representative or not. "Whenever any government becomes independent of the nation all ideas of responsibility are immediately lost: and when responsibility ceases, slavery begins. It is the due restraint, and not the moderation of rulers that constitutes a state of liberty."[477]

Tucker was not opposed to the disposition of *any* land. He argued that the United States should sell federal lands to pay off the national debt, but should not sell it for other purposes. Tucker suggested that the United States retain "one half, or some other considerable proportion of the lands remaining unsold" for purposes of limiting federal income and, thus, power.[478] For Tucker, a land retention policy was essential to *limiting* the power of the new federal government.

For the first half of the nineteenth century, however, Tucker's land retention proposal went unheeded. United States policy beginning in 1785 was to dispose of most federal lands, primarily though sale to the public, but also by small land transfers to states. Although disposition remained the official policy of the United States until 1976, when Congress passed the Federal Land Policy and Management Act (FLPMA), the most important policy changes took place between 1864 (the creation of Yosemite State Park) and 1906 (The Antiquities Act). These two legislative acts are important bookends for federal land retention policy and its relationship to American federalism. When Congress first showed interest in reserving lands, its initial instinct was to transfer such land to state control, with conditions placed upon use. For this reason, Congress initially organized

[476] *Ibid*.
[477] *Ibid*.
[478] *Ibid*.

Yosemite as a California State Park, under state control. After becoming convinced of the incompetence and corruption of California's management of public lands, and also after witnessing the apparent success of federal management of national parks in the federal territories of Wyoming and Washington, Congress reversed course and insisted that public lands be managed federally, and also gave discretionary power to the federal executive to reserve public lands with the Antiquities Act of 1906. Thus, not only was the relationship between the national government and the states altered by the assertion of landlord responsibilities for western public lands, but the relationship between Congress and the Executive changed with Congress granting virtual plenary power to the President. The questions of (1) what caused the change in federal land policy to go from disposition to retention; and (2) how did this change affect the balance of power in the federal system are the subjects of inquiry in the Part.[479]

[479] Scholarly interest in the history of the United States public lands grew in the early twentieth century as President Theodore Roosevelt exercised extensive executive power to reserve public lands for conservation efforts. Payson Jackson Treat, a historian at Stanford University, published *The National Land System, 1785-1820* in 1910, which was the first comprehensive examination of the origins of federal land policy. Payson Jackson Treat, *The National Land System, 1785-1820* (New York: E.B. Treat, 1910). Benjamin Hibbard took up the cause in 1926 and extended the timeframe with the publication of his *A History of Public Land Policies*. There, Hibbard described three periods of land policy: (1) one based on using public lands for revenue (1780s – 1840); (2) the public domain as a basis for national development (1841-1900); and (3) a period of conservation (1900-1920). Benjamin Hibbard, *A History of Public Land Policies* (New York: Macmillan, 1924). Vernon Parrington, although not a western historian per se, spent the bulk of his career at the University of Washington and memorably referred to the public lands disposition policy as "The Great Barbecue." *Main Current in American Thought* (New York: Harcourt Brace, 1927). In 1942, Roy Robbins published what he considered to be a "synthesis on the history of public lands in the United States" encompassing questions of politics, economics, law, and social history. Roy Robbins, *Our Land Heritage: The Public Domain, 1776-1936* (Princeton: Princeton University Press, 1942). Felix Cohen made sure to note that federal title to public lands was obtained not only from European powers, but also from native tribes. *See* Felix Cohen, "Original Indian Title," 32 *Minn. Law Rev*. 25 (1947). In 1963, Vernon Carstensen edited a collection of historical essay on the public lands, commissioned by the BLM to mark the sesquicentennial of the creation of the General Land Office and the centennial of the Homestead Act (both anniversaries occurring the previous year. *See* Vernon Carstensen, ed., *Public Lands: Studies in the History of the Public Domain* (Madison: University of Wisconsin Press, 1963). The "dean" of Public Lands history, Paul W. Gates, published his seminal work in 1968 – *History of Public Land Law Development* – a government-financed project. This work, incorporating the work of assistants and other historians, provides a long-range legal history of public lands from the Founding to the 1960s. Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: United States Government Printing Office, 1968). Karen Merrill makes a fascinating contribution to the history of public lands in *Public Lands*

Public land retention policy in the American West may be divided into two distinct periods. First, during the *Ad Hoc Conservation* period beginning in 1864, Congress sought to protect individually identified parcels of land on a case-by-case basis. This approach to land retention created islands of conservation in a "sea" of public land otherwise destined for disposal. Second, Congress entered into a period of *Systematic Conservation / Preservation* beginning with the creation of the United States Geological Survey in 1879. The creation of the survey was an important marker on the road to a full retention policy because it placed power in the hands of a federal agency to systematically and scientifically survey all western public lands and make determinations about their public value prior to offering them for sale to the public. No longer would the United States dispose of land or grant preemption rights site-unseen. Effectively, land would be retained in the public domain unless the Department of the Interior affirmed its fitness for disposal. The land retention policy adopted in the latter half of the nineteenth century is clearly reflected in maps, such as the following, showing federal land in the states.

and Political Meaning: Ranchers, the Government, and the Property Between Them. There, Merrill demonstrates that ranchers in the West adopted a language of persuasion based in rights and the Constitution to assert an entitlement to graze on public lands. They won a temporary victory with the Taylor Grazing Act but ultimately lost the battle when Congress created the BLM. Karen Merrill, *Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them* (Berkeley: University of California Press, 2002). For a series of essays on conflict involving public lands, *see* "Constitutional Conflicts on Public Lands," 75 University of Colorado Law Rev. No. 4 (2004).

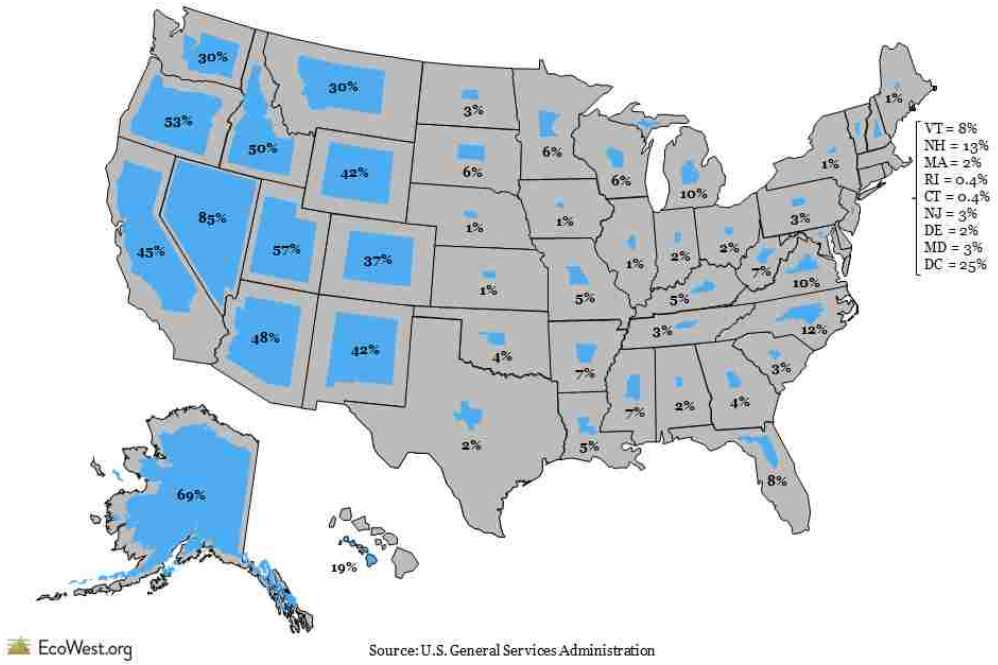

Figure 8 – Percentage of Federal Land in Each State

This change in policy occurred as the last areas of federal territory in the continental United States were transformed into sovereign states. States entering the Union in the late 1800s and early 1900s faced a new federal policy – public land retention – that brought them into a new kind of relationship with the national government. For those states, the national government became the landlord and manager for the majority of the real property within their borders.

Chapter 7:

Federal Real Estate Agent

Colonial Experience and Founding Theories

Early colonial proprietors in North America confronted labor scarcity. Whereas the Spanish colonial system enslaved large numbers of indigenous people, English, Dutch and French colonials in North America enslaved fewer for a variety of reasons.[480] Deprived of the option of enslaving a large native population, the settlers looked elsewhere for labor. A large-scale slave labor force imported from Africa was viable in what became the United States' Southeast, although the number of slaves imported to the North American mainland was not nearly as large as that imported to the Caribbean and South America. North American colonies also sought to import labor in other ways. The promise of land was one inducement, and was a central aspect of indentured servitude.[481] Scarce labor and abundant land often created conditions where colonial governments adopted formal policies of land disposition – sometimes giving the land away free.

Maryland created the first office of surveyor-general in 1641 and other colonies followed suit. Colonial land offices began as established institutions in the 1680s. Whereas Maryland and Virginia disposed of public land through sale at the colonial land office, Mid-Atlantic and New England colonies held public auctions.[482]

The only exception to this general trend of disposition was when governments sought to respect Native American claims to the land by preventing migration and settlement thereon. For

[480] *See* Andres Resendez, *The Other Slavery: The Uncovered Story of Indian Enslavement in North America* (Boston: Houghton, Mifflin & Harcourt, 2016).

[481] Stanley L. Engerman and Kenneth L. Sokoloff, "Once Upon a Time in the Americas: Land and Immigration Policies in the New World," *Understanding Long Run Economic Growth,* Dora L. Costa and Naomi Lamoreaux, eds. (Chicago: University of Chicago Press, 2011).

[482] Milton Conover, *The General Land Office: Its History, Activities and Organization* (Baltimore: Johns Hopkins University Press, 1923), 3.

example, colonial Americans supported the British war effort against the French and their Indian Allies on the North American continent during the Seven Years' War. Following the war, though, the British attempted to do exactly what the French had hoped to accomplish at the outset of the war – prevent Anglo-American westward migration. Through the Proclamation of 1763, the Crown sought to prevent colonial settlement west of the Appalachians in order to maintain peace with Native American tribes living in the region. The Act angered both trans-Appalachian settlers and coastal elites who financed their expeditions and were financially invested in their success. The road to the American Revolution began in 1763 with the Proclamation.[483]

Parliament passed the Quebec Act in 1774, which (1) restored French Civil law in Quebec; (2) allowed Catholics to hold office in Quebec; and (3) extended the border of Quebec south into the Northwest Territory. The first two provisions angered New Englanders who feared "popish" authority in the region. The third provision angered Virginia who claimed title to the vast region to its west. In 1775, Parliament also passed legislation to create a Crown-administered land office to dispose of public lands in all the colonies, at higher prices than the colonial governments charged. This legislation further angered colonial Americans. The central land office never came into being due to the Revolutionary War.[484]

The effects of some Parliamentary legislation in the 1760s and 1770s, such as levies placed on the export of lumber, were felt only in New England. Southerners did not see the need to fight Boston's battles. However, legislation restricting the acquisition and development of land affected virtually all colonies, who stood to benefit from a westward push. Thus, British land policies in

[483] For an old, but good, recounting of the origins of the Proclamation of 1763, see R.A. Humphreys, "Lord Shelburne and the Proclamation of 1763," *The English Historical Review*, Vol. 49, No. 194 (1934), 241-264. *See also* Colin Calloway, *The Scratch of a Pen*, *supra* note 280.

[484] Conover, *The General Land Office*, 5

North America in the 1760s and 1770s served to unite otherwise disparate colonies in their anger at the mother country. Their anger led to revolt.

At the outset of the war, the Confederation Congress used public lands as incentives for soldiers on both sides of the conflict. In order to encourage enlistment and re-enlistment, Congress promised bounty lands to soldiers who fought for the duration of the war. Congress also passed a resolution promising 50 acres to any British soldier or Hessian mercenary who would desert. Further, Congress sought to establish sovereignty over the Northwest Territory, so that it could dispose of those lands to fund the war effort. [485]

At the end of the war, the British decided their resources defending the North American interior would be better used elsewhere. The British Cession of the Northwest and Southwest territories in the Treaty of Paris created an immediate administrative issue for the Confederation Congress. (Part II discussed administrative policies as embodied in the Act of 1784 and the Northwest Ordinance, as well as the cession of land claims to the federal government. This Part discusses public lands policy). Following the war, the states continued to dispose of their public lands through state land offices, with differing methods of distribution.

The Congressional Land Ordinance of 1785 created a policy of disposition, by adopting the New England style of surveying, dividing and selling the public lands by auction. Through this Act, Congress created a geographer-general, with several subordinates, whose job it was to survey the public lands and return the plats to the Treasury Office. The Treasury Office would then direct commissioners of regional land offices to sell the land at public auction. The army was authorized to remove squatters on public lands. As Milton Conover notes, the regional land offices "did much

[485] *Ibid.*

to bring the people of the West into close relationship with the national government and to develop their faith in the justice of lawful methods of disposing of the public domain."[486]

To be certain, the federal government did not dispose of all lands. For each township surveyed, one square mile was reserved for public use and eventually transferred to the new state – primarily to create schools. The federal government also reserved land for its own purposes, such as military installations.

Creation of the General Land Office and Early Administration

When the First Congress under the new Constitution met in 1789, the disposition of federal lands continued unabated. The newly organized Treasury Department continued in the role of the Continental Treasury Office as administrator of the disposal of public lands. Early attempts to create a general land office died in Congress in 1789 and 1791.

The creation of a federal general land office was driven by two interrelated goals: (1) the desire to have a single agency in charge of resolving competing land claims and (2) the desire to create an efficient institution that that could dispose of land quickly without the need to have the Treasury Department approve each sale, although the Treasury Department would continue to receive the proceeds from the sales. This plan took a step forward in 1796 with the creation of the office of surveyor-general to take over the duties of the geographer-general. [487] To his powers was added the ability to bypass Congress in approving plats, which he could send directly to the agents in charge of auctions.[488]

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[486] *Ibid*., at 8.

[487] *See* 1 Stat. 464 – Text of Act of May 18, 1796.

[488] Though dated, Milton Conover's history of the early land office remains an excellent resource. Milton Conover, *The General Land Office: Its History, Activities and Organization* (Baltimore: Johns Hopkins University Press, 1923). Whereas Conover's work traced political developments in Washington, especially legislation and administrative structure, Malcolm Rohrbough provided a look into the day-to-day operations of the early land offices by examining their correspondence, arguing that policy was made

In 1800, Congress created four district land offices, each with a recorder and a receiver of funds. Congress also by this time allowed land to be purchased on credit, giving the buyer four years to pay off the land. This credit provision was designed to give poorer settlers the chance to purchase property. The year 1800 also saw the introduction of preemption rights, by which the owners of gristmills and sawmills on public domain lands earned the right of first refusal at the public sale.[489]

The Louisiana Purchase doubled the size of the nation and by 1812, much of the public domain in the Southeast remained unsurveyed and unsold. Congress finally created the General Land Office in 1812 to handle the large amount of work to be done. The General Land Office was organized as a bureau within the Department of Treasury, led by a commissioner. Conover writes that the position of Commissioner of the General Land Office was never a "sinecure," but one of real power – the role generally being filled by experienced politicians.[490]

Two developments between 1812 and 1836 necessitated modifications to the office. First, the credit system undermined the goal of the disposition policy – to pay off domestic and foreign debt – because so many of the purchasers ultimately could not fulfil their obligation to pay. The federal government found itself holding many valueless promissory notes. Second, the surveyors and sales agents could not keep pace with westward migration. Settlers continued to move onto unsurveyed public land, even before title had been secured from Indian tribes, let alone platted and sold. Significant, sizable communities, such as in Burlington, Iowa, popped up prior to any survey, sale or recording of a patent. In the absence of a constitutional sovereign to govern and adjudicate land sales and ownership in these areas, settlers developed "claim clubs" – a non-constitutional

"on the ground" more often than in Washington. *See* Malcolm Rohrbough, *Land Office Business: The Settlement and Administration of American Public Lands* (New York: Oxford University Press, 1968).

[489] Conover, *The General Land Office*, 14.

[490] *Ibid*., at 17.

form of quasi-government complete with its own frontier system of law.[491] These claim clubs often protected the rights of those who wished to settle and develop the land by dispensing vigilante justice to speculators. Sometimes, though, the claim clubs served to protect the interests of absentee-owners. The Omaha Claim Club was particularly violent toward homesteaders. One such instance is documented in *Baker v. Morton*, a case that made it to the United States Supreme Court.[492]

Baker v. Morton's main holding is a defense of the common law principle that contracts made under duress are invalid. However, a brief review of *Baker v. Morton* is warranted here because the case also stood for the proposition that the federal government exercises plenary power over public lands and that local assertions of sovereignty could be disregarded. The Omaha Nebraska Claim Club was an organization of 100-200 men, including the mayor of the city, the sheriff of the county, the secretary of the territory and, interestingly, the register of the land office. The avowed purpose of the Claim Club was to protect the ownership rights of the members against other claimants, including homesteaders. Their tools of enforcements included knives, guns, bayonets and ropes. If a particular adversary was obstinate, according to the Court, the Claim Club dragged him to the Missouri River, attached a rope to his neck and threw him in, then dragged him out for negotiation, repeating the process as often as necessary to procure a favorable contract.

[491] Frederick Jackson Turner characterized the land claim clubs as the frontiersmen's way of creating *ad hoc* democratic norms. See *The Frontier in American History* (New York: Henry Hold & Company, 1921) 137, 212. Other historians who have given the land claim clubs favorable treatment include George M. Stephenson, *The Political History of the Public Lands from 1840 to 1862: From Preemption to Homestead* (Boston: Richard G. Badger, 1917), 20-23; Benjamin Hibbard, *A History of the Public Land Policies* (New York: Macmillan, 1924), 198-208; and Roy Robbins, *Our Land Heritage: The Public Domain, 1776-1936* (Princeton: Princeton University Press, 1942), 67-68. For a more recent, interdisciplinary look at land claims clubs, *see* Ilia Murtazashvili, *The Political Economy of the American Frontier* (Cambridge: Cambridge University Press, 2013).

[492] *Baker v. Morton*, 79 U.S. 150 (1871).

In this climate, Alexander Baker asserted a claim to property located just outside of Omaha, based on his homesteading. Through the above-mentioned negotiating tactics, the Claim Club convinced him to relinquish his claim to the Club. Baker subsequently sued, finding no relief in the territorial courts. The United States Supreme Court, however, found in his favor. In so holding, the Court ruled that Congress, through the passing of public land laws, may exercise plenary power in their disposition. Local assertions of sovereignty must bow to Congress.

In response to the kinds of difficulties raised by Claim Clubs, Congress enlarged the General Land Office in 1836 and streamlined some processes. For example, it no longer required the President or Secretary of State to sign each land patent.[493] Congress also passed preemption laws in 1841 to extend the benefits of preemption not only to mill owners, but also to anyone who worked to improve the public domain land upon which they squatted. Under these laws, settlers held the statutory right to purchase federal land on which they squatted.

The General Land Office grew with the United States. By the late 1840s, it had ten fully formed divisions and performed a larger number of tasks than many United States Departments.[494] The acquisition of territory from Mexico necessitated an administrative restructuring. Just as the Bureau of Indian Affairs moved to the new Department of the Interior, so did the General Land Office, leading contemporary observers to call the new cabinet-level agency the "Great Miscellany" and the "Department of Everything Else."[495] The strongest proponent of transferring the General Land Office from the Department of Treasury to Interior was none other than the Secretary of the Treasury – Robert Walker. He wrote, "The business of the land office occupies a

[493] *Baker v. Morton* post-dated the creation of the General Land Office, but is nevertheless a useful illustration of the kinds of problems that arise when settlement occurs prior to surveying, platting, patenting, and recording title.

[494] Conover, *The General Land Office*, 25.

[495] As recounted in Robert Utley and Barry Mackintosh, *The Department of Everything Else: Highlights of Interior History* (Washington, D.C.: Government Printing Office, 1988).

very large portion of the time of the Secretary of the Treasury every day, and his duties connected therewith must be greatly increased by the accession of our immense domain in Oregon, New Mexico and California." The duties placed upon the Secretary of the Treasury in connection with the land office seemed, to Walker, to be far removed from Treasury-related items. He added, "I have pronounced judgment in upwards of five thousand cases involving land titles …These are generally judicial questions … requiring often great labor and research."[496] Congress created the Department of the Interior in March 1849 and transferred the General Land Office to its executive jurisdiction.

Walker's view that the business of the land office was distinct from that of the Treasury portended greater change. Early Republic Congressional and Executive leaders, like St. George Tucker, viewed the public lands as a source of wealth for the nation. It was natural, in their view, to place that wealth in the treasury. Responsibility for the management of that wealth fell to treasury officials initially. Walker's desire to rid the Treasury Department of that responsibility reflected a developing perspective that the public lands should not be used to finance the national government. However, they might still serve some kind of national interest.

The Homestead Act and Western Lands as Nationalizing Space

The transfer of the General Land Office from the Treasury to the Department of Interior was shortly followed by a significant change in federal land disposition policy. Whereas the disposal of public lands prior to the Civil War served to pay off the national debt, at least where the debt could be collected, Congress began giving the land away during the Civil War.

[496] *Executive Documents*, 30 Cong., 2nd Sess. (1848-1849), II., Doc. 7, pp 35-36.; *see also* Henry Barrett Learned, "The Establishment of the Secretaryship of the Interior," *The American Historical Review*, Vol. 16, No. 4, (1911), pp. 751-773, 766.

The idea for a federal Homestead Act, by which land would be granted free of charge to individuals who settled and improved it, first appeared in the 1840s and was introduced as legislation during the Mexican-American War. The two individuals most responsible for bringing about the Homestead Act were labor activist George Henry Evans and newspaper editor Horace Greeley.

Evans was born in England and immigrated to the United States at the age of fifteen. In the 1820s and 30s, he founded several newspapers, such as *The Workingman's Advocate*, and helped to found the Working Men's Party. In his early activities, Evans sought to improve working conditions in eastern cities through labor legislation. In the late 1830s and early 1840s, Evans began to focus his efforts on the West. He believed that free land in the West would attract surplus labor from the East, giving the poor a chance for success in the West while simultaneously improving working conditions and wages in the East.[497] Evans articulated his views in a book published in 1840 – *History of the Origin and Progress of the Working Men's Party*.

Horace Greeley, editor of the New York Tribune, became attracted to the ideas of Evans in the 1840s. Greeley began to publish the reports of workingmen's associations and their calls for reform in the Tribune. Greeley supported Evans' free soil ideas and reprinted columns from Evans' paper in his own.[498] Greeley reported on the activities of Evans' political action organization – the National Reformers – and even attended their meetings. Greeley popularized the phrase "Go West, Young Man," which did not appear in print until 1865. However, Greeley

[497] *See* Mark Lause, *Young America: Land, Labor and the Republican Party* (Champaign: University of Illinois Press, 2005).

[498] *See* Roy Marvin Robbins, "Horace Greeley: Land Reform and Unemployment, 1837-1862," *Agricultural History*, Vol. 7, No. 1 (1933), 18-41.

had certainly adopted the ideas behind the phrase by the mid-1840s. He supported the National Reformers and encouraged aid organizations to assist poor young men in relocating to the West.[499]

In early 1846, Greeley published his own manifesto, advocating free land for poor settlers:

> This system, with such modifications and safeguards as wisdom and experience may suggest would rapidly cover the yet unappropriated Public Domain with an independent, substantial yeomanry, enjoying a degree of Equality in Opportunities and advantages such as the world has not seen. . . . Secure all, so far as possible, a chance to earn a living … shame on the laws which send an able, willing man to the Alms-House or to any form of beggary when the Soil on which he would gladly work and produce is barred.[500]

This editorial was the opening salvo in a lengthy battle of newspapermen fought on the opinion pages. The *New York Courier and Express*, the *Buffalo Commercial Advertiser* and the *Boston Daily Mail* all attacked Greeley (and Evans') free land ideas. Greeley vigorously responded to all attacks.

Greeley cheered the introduction of two Homestead Acts in 1846, one backed by the National Reformers, which the House refused to print, and a second introduced by Andrew Johnson. Although Greeley feared Johnson's bill did not go far enough to prevent speculators from taking advantage, he thought it was a step in the right direction. Neither bill passed.

Greeley's contributions to the political discourse in the mid-nineteenth century were made primarily through his newspaper columns. His lengthy and prolific career as a newspaperman overshadows his brief stint as a politician. Greeley served as a Congressman from New York for three months at the end of 1848 and the beginning of 1849. Greeley's predecessor in office, David Jackson, had been elected in 1846 under a cloud of election fraud. In early 1848, the House

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[499] *See* Robert Chadwell Williams, *Horace Greeley: Champion of American Freedom* (New York: New York University Press, 2006). Scholarly interest in Greeley has waned some since the late 1940s and 1950s when it was at its peak. *See, e.g.*, Henry Luther Stoddard, *Horace Greeley: Printer, Editor, Crusader* (New York: G.P. Putnam's Sons, 1946); William Harlan Hale, *Horace Greeley: Voice of the People* (New York: Harper, 1950); and Doris Faber, *Horace Greeley: the People's Editor* (Englewood Cliffs, N.J.: Prentice-Hall, 1964).

[500] *New York Tribune*, January 23, 1846.

declared the seat vacant. Under the laws of New York, a Whig committee for the Congressional district could choose Jackson's replacement for the remainder of the term and it chose the energetic and bombastic Greeley. Greeley was seated in time for Congress's December 1848 session. There, he introduced a torrent of bills, all of which failed. Greeley proposed to rename the United States "Columbia." He sought to end slavery in the District of Columbia and to increase tariffs. He exposed Congressional abuse of expense accounts and published the names of Congressman who did not show up for votes. These latter actions earned him the enmity of his fellow Congressmen. He did make one friend in Congress though – Abraham Lincoln, who was finishing his one and only term in the House and who would later, as President, sign into law the first Homestead Act.

Greeley introduced in 1848 a Homestead Act that would allow settlers to purchase federal land at extremely low rates. When asked why a New Yorker should be concerned with the disposition of public lands in the West, Greeley replied that he represented more landless men than any other member of Congress."[501] With conservatives controlling both parties, Greeley's Homestead Bill was tabled and never taken up before his short term expired.

During the 1840s and 1850s, Greeley openly flirted with any political party that supported free land, though he ultimately came home to the Whigs in both 1848 and 1852. The most attractive alternative for Greeley was the Free Soil Party. The Free Soil party was formed in 1848, just in time to serve as a spoiler in the 1848 presidential election. The Free Soil Party was founded to oppose the expansion of slavery in new territories. In 1848, Greeley came close to supporting the Free Soilers when it appeared they might also adopt a plank of Free Land. When they did not, Greeley supported Zachary Taylor and the Whigs. By 1852, however, the Free Soilers came around. The party's 1852 platform stated that "public lands … should be granted in limited

[501] *See* Roy Marvin Robbins, "Horace Greeley: Land Reform and Unemployment, 1837-1862," *Agricultural History*, Vol. 7, No. 1 (1933), 18-41.

quantities, free of cost, to landless settlers."[502] The Whigs, too, began to warm to the idea. Daniel Webster and William Seward both introduced bills in Congress (that did not pass) that would have granted free or cheap land to settlers. Moderate Democrats also supported the idea, including Stephen Douglas, Thomas Hart Benton and Sam Houston. Conservative Democrats, however, realized that Free Land meant Free Soil – slavery would be blocked in the West – and so they came to oppose it. Greeley in 1852 again supported the Whigs over the Free Soilers, partly because the Whigs had adopted Free Land. Both parties, however, soon died. The Free-Soilers strong anti-slavery position had been neutralized by the Compromise of 1850. The Whigs succumbed to divisions over slavery. The Republican Party would pick up the pieces of both parties following the events of Bleeding Kansas.

In 1854, the House passed a Homestead Act that died in the Senate. The new Republican Party chose to avoid the Free Labor issue in 1856, focusing only on its anti-slavery position in order to maintain a unified party. In early 1860, Congress passed a Homestead Act, which was vetoed by President Buchanan. Greeley criticized Buchanan while promoting the Republican nominee for President:

> Such a veto as this of Buchanan's is one of the natural consequences of elevating to the Presidency a man who from past associations has no sympathy with the poor, and who regards only the interests of speculators. Does anybody suppose that Abraham Lincoln would ever veto such a bill?[503]

Greeley, a member of the Republican Party platform committee, wrote the Homesteading plank in 1860. After Lincoln's election, the Homestead bill was tabled as Congress and the President addressed other pressing issues. At the urging of Greeley, Congress took up and passed the Homestead Act in 1862 and President Lincoln signed it into law on May 20, 1862. The Act

[502] *See* David Hinshaw, *Political Party Platforms* (New York: Institute of Public Relations, 1944).
[503] *New York Weekly Tribune*, June 30, 1860.

provided that settlers were entitled to a patent of 160 acres of unreserved federal land if they lived on the land for five years and built improvements. The Act also contained provisions designed to prevent companies and speculators from accessing the land for free. According to the law, only a "head of household" would be allowed entry and that person needed to swear an affidavit affirming that entry was made for his exclusive use and benefit and "not for the use or benefit of any other person or persons whomsoever."[504]

The Act was celebrated from the outset and received generally favorable treatment from historians for the first half-century of its existence. Republicans held up the Act to blunt criticism that the party only served the interests of northeastern manufacturing elites. However, Paul W. Gates threw cold water on the Act by demonstrating (1) the ways in which the purposes of the Act were thwarted by Congress, large companies, and speculators, and (2) that not all land was open for entry under the Act, but that the vast majority of land continued to be disposed of through sale.[505] Congress continued to grant large sections of land to railroads, as it had done before the Act, not only for the building of the railroad itself, but also for the improvement of the areas adjacent to railroads. The railroads would then sell these valuable parcels to speculators and developers. Most lands available under the Homestead Act for settlement were located further away from the railroad. For such parcels that had value, speculators and companies used dummy-men as fronts for the application for patents. After acquiring the patents, the dummy-men would simply transfer title to the investor. Land Office officials were often complicit in these transactions or turned a blind eye. Legitimate government to private party cash sales also continued, relatively unabated.[506]

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[504] United States Statutes at Large, 12 Stat. 392.

[505] *See* Paul Wallace Gates, "The Homestead Law in an Incongruous Land System," *The American Historical Review*, Vol. 41, No. 4 (1936), 652-681.

[506] *Ibid*.

For these reasons, Gates argued that the land policy of the United States did not fully change from disposition to free grants with the Homestead Act. Rather, he says, the two policies existed simultaneously. William Deverell agrees with Gates that the promise of the Homestead Act went unfulfilled. "The Homestead Act was an enlightened piece of legislation that benefitted thousands of homesteading families. But the Act's beneficence stopped short of reaching the industrial laborer of the East in any meaningful way."[507] A true and more abrupt change in federal land policy was yet to come, but the seeds were planted while Lincoln was still President.

Western Miners Codes and the General Mining Act of 1872

Homesteading was not the only activity Congress wished to encourage in the American West. And it was not the only activity it found difficult to regulate due to rapid westward expansion in the 1840s through the 1860s. The discovery of valuable minerals in the West, particularly gold in California in 1849 and silver in Nevada in 1858, led to many mining communities existing outside the practical jurisdiction of the United States; because they were on federal public land, they operated in many ways in a legal vacuum.

Just as land claim clubs developed in the Midwest as an *ad hoc* legal system to address competing claims to land, mining camps further west created their own internal rules to recognize mining claims and adjudicate disputes. These "Miners Codes" regulated the right to and size of claims, how many claims an individual could work, what work must be done to maintain a claim, and even the amount of water that could be used on the claim. To enforce the Miners Codes, the miners created regulatory districts, encompassing several camps. Mining camps took on some of the features of autonomous states. The town of Rough and Ready, California, even voted to secede

[507] *See* William Deverell, "To Loosen the Safety Valve: Eastern Workers and Western Lands," *Western Historical Quarterly*, Vol. 19, No. 3 (1988), 269-285.

from the Union in 1850. Because miners tended to travel from camp to camp and took the Miners Code with them, these "laws" became remarkably uniform in the American West.[508]

Congress recognized both its own futility in regulating mining in the West as well as the functionality of the Miners Codes. In the general mining law of 1866, Congress authorized the mining of public lands "subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts so far as the same may not be in conflict with the laws of the United States." Congress initially instructed courts to adopt the "law" of mining camps rather than promulgating its own code.

The validity of the adoption of the Miners Code as the law of the United States, as well as the constitutionality of Congress's delegation of its power under the Property Clause to local legislatures, came before the United States Supreme Court in the 1905 case of *Butte City Water Co. v. Baker*.[509] There, two parties had a dispute over a mining claim that was located in the federal public domain. The lower courts in Montana resolved the dispute by referencing Montana law. The aggrieved party appealed to the United States Supreme Court, arguing that local legislatures lacked constitutional authority to regulate mining because Article IV, Section 3 specifically vested the power to make "needful rules and regulations" of federal property in Congress. The Court rejected the argument, stating that Congress had in 1866 (and again in 1893) specifically adopted local law, whether it be the Miners Code or state law, as the law of the public domain. Miners' law was valid insofar as it did not conflict with state or federal law, and state law

[508] The story of the Miners Codes began to be told as early as 1885 with the publication of Charles Howard Shinn's *The Mining Camps: A Study in Frontier Government* (New York: Charles Scribner & Sons, 1885). *See also* Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth Century America," *Law and Society Review*, Vol. 10, No. 2 (Winter 1976), pp. 234-266.

[509] *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905).

was valid insofar as it did not conflict with federal law. The law of 1866, then, was a recognition that local institutions had a role to play in constructing governing rules.

Chapter 8:

The *Ad Hoc* Conservation Period

The American preservation movement did not spring forth fully formed from the head of John Muir. This chapter describes a budding conservation movement of the mid-nineteenth century, its connection to the American West, and its early reliance on state government.[510] I refer to this period between the late 1840s and 1879 and the "*ad hoc*" conservation period because the desire to conserve public lands was translated into governmental action, but not in a systematic way. Congress passed conservation legislation in a piecemeal fashion, offering protection status to various parcels of real estate due to the lobbying efforts of politically connected elites. Congress likewise created *ad hoc* exploratory parties and geological surveys, headed by men such as John Wesley Powell and Clarence King. Congressional legislation in this period simultaneously encouraged free settlement of public lands, disposition of public lands, and conservation. The overlapping goals and policies created confusion regarding property rights in public lands. This chapter describes that uneven process, and sets the stage for the following chapter, in which the national government sought to bring coherence to federal land policy.

Twenty-first century hindsight and experience might cause one to believe that public lands conservation always fell under the direct control and management of the federal government. However, it was never written in stone that the federal government must do so. Congress's first instinct when reserving public lands for public use and enjoyment was to delegate management to the states. From a logistical point of view, this made sense. The states already had local law enforcement and other resources in place to manage public lands. Had not John Muir and other

[510] For a scholarly treatment of the distinction between conservation and preservation, *see* Jean Frederic Morin and Amandine Orsini, "Conservation and Preservation," in *Essential Concepts of Global Environmental Governance*, Jean Frederic Morin and Amandine Orsini, eds., (London: Routlege, 2015).

environmentalists convinced Congress and the Executive that state management was inept, corrupt, or both, then conservationists might have left us a system of state parks, rather than national parks.

Travel Literature and Nature Essays

Shortly after the Mexican-American war, two related forms of literature began to capture the imagination of the nation's eastern elites – romantic travelogues of the American West and nature essays. Travel literature as a genre was not new, of course. Multiple "ages of exploration" are denoted as such precisely because the explorers and their associates "wrote home." Tales of the travels of Marco Polo first appeared in the thirteenth century.[511] De Tocqueville's description of the United States in the early nineteenth century provided a fascinating read for his original French audience and also for modern American historians.[512] Spanish and Euro-American descriptions of the American West also pre-date the 1850s.[513] What made the American West travelogues of the mid to late nineteenth century unique was their connection to romanticism and transcendentalism as well as their convergence with two other related phenomena – the budding conservation movement and the development of early photography.[514]

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[511] Marco Polo, *The Description of the World*, A.C. Moule and Paul Pelliot, eds., (London: George Rutledge & Sons, 1938).

[512] Alexis de Tocqueville, *Democracy in America*, Harvey Mansfield and Deborah Winthrop, transl., (Chicago: University of Chicago Press, 2000).

[513] *See, e.g.*, Pedro de Castañeda of Najera, *The Journey of Coronado, 1540–1542*, George Parker Winship, transl., (Golden, Colorado: Fulcrum Publishing, 1990); Washington Irving, *A Tour on the Prairies* (New York: Skyhorse Publishing, 2013).

[514] Regarding Romanticism and Transcendentalism, James Rasband, James Salzman, and Mark Squillace write, "The first hints of changes in social attitudes [toward wilderness] were evidenced in the literature of Romantics such as Byron, Wordsworth, and Tennyson, who began to associate God with wild nature. This view had particular appeal in American where the country's vast wilderness was embraced as a distinctive source of American identity and superiority. This new appreciation of wilderness was evident in the [works] of William Cullen Bryant, … James Fenimore Cooper, … Thomas Cole, Asher Durand, … Albert Bierstadt, and …Henry David Thoreau." *Natural Resource Law and Policy*, 2nd ed., 579 (New York: Foundation Press, 2009).

Approximately 2000 travel books were published in the United States between 1830 and 1900, with even more published in Europe.[515] David Wrobel writes that travel writings were "voluminous, ubiquitous, and vital to the public understandings or misunderstanding of place."[516] Historians have only recently begun to mine this rich resource for understanding the American West.[517] Most historians examining travel writings do so in the service of understanding and defining American Expansionism and Imperialism in the nineteenth century.[518] Far less attention has been paid to the way in which travel writings and nature essays helped to bring about conservation efforts in the West, ultimately shaping the leading role the national government would play in conservation.

Popular travel literature in the mid-nineteenth century included Washington Irving's A *Tour of the Prairies*, Mark Twain's *Roughing It*, and Isabella Bird's *A Lady's Life in the Rocky Mountains*.[519] Due in large part to the travel writings and nature essays of the mid-nineteenth century, the deserts, wilderness and forests of the West became inviting, rather than forbidding.

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[515] *See* David Wrobel, "Exceptionalism and Globalism: Travel Writers and the Nineteenth-Century American West," *The Historian*, Vol. 68, No. 3 (2006), 431-460, 441.

[516] *Ibid*.

[517] Wrobel writes that travel writing "to some degree slipped through the cracks of our historiographical consciousness in much the same way that the genre naturally slips through the cracks between literature and history." *Ibid.*, at 442.

[518] David Wrobel suggests that both lines of historiography – those who have written of American Expansionism in "positive tones" as well as the New West historians who describe the expansion following the Mexican-American War as imperialistic both characterize the American experience as exceptional. This, Wrobel says, misses much of the literature that complicates the narrative – contemporary travel writers who criticize United States policy in the West as well as others who viewed the American West in global, unexceptional ways. *Ibid*.

[519] Washington Irving, *A Tour of the Prairies* (London: John Murray, 1835); Mark Twain, *Roughing It* (Hartford, Conn.: American Publishing Co., 1872); Isabella Bird, *A Lady's Life in the Rocky Mountains* (New York: G.P. Putnam's Sons, 1879).

George Perkins Marsh and Early Calls for Conservation

The American conservation movement began to receive political attention in 1847 when Vermont Congressman George Perkins Marsh raised alarm about the destruction of forests and called for a new management policy – one that would preserve forests for future generations.[520] In an address to the Agricultural Society of Rutland County, Vermont, published the following year, Marsh noted that the forests were once seen as an "incumbrance," standing in the way of potential crop fields. Marsh described, though, the negative ripple effects of deforestation. With the clearing of forests, smaller vegetation also died due to the loss of protection from the elements. Rain and snowmelt could then wash away barren soil. Marsh called for "the introduction of a better economy in the management of our forest lands." He proposed the preservation of some existing forests as well as the replanting of others, for the benefit of "succeeding generations."[521]

In 1864, Marsh published what historians now consider his magnum opus on conservation, *Man and Nature*. There, Marsh argued that ancient civilizations collapsed because of soil degradation. Marsh indicated that he had four purposes in writing the book: (1) to demonstrate the changes men had made in nature; (2) point out the possible dangers of these changes; (3) suggest remedies for the abuses of nature; and (4) demonstrate that Man was the "molder" of Nature, and not the reverse.[522]

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[520] *See* George Perkins Marsh, "Address Delivered before the Agricultural Society of Rutland County, Sept. 30, 1847," *Sabin Americana, 1500-1926* (Farmington Hills, MI: Gale Publishing, 2012). The contributions of George Perkins Marsh to the American conservation movement began to receive focused attention in the 1960s during the development of modern conservation efforts. For a review of the literature from the 1960s and 1970s, *see* Daniel W. Gade, "The Growing Recognition of George Perkins Marsh," *Geographical Review*, Vol. 73, No. 3 (1983), 341-344. For a biography of Marsh, *see* David Lowenthal, *George Perkins Marsh: Prophet of Conservation* (Seattle: University of Washington Press, 2000). Marsh was a polymath, with interests in business, agriculture and the study of languages. For a collection of Marsh's writings focused on conservation, *see* Stephen C. Trombulak, ed., *So Great a Vision: the Conservation Writings of George Perkins Marsh* (Hanover, N.H.: University Press of New England, 2002).

[521] *Ibid*. at 17.

[522] *See* George Perkins Marsh, *Man and Nature: or, Physical Geography as modified by Human Action* (New York: C. Shribner, 1864).

Abraham Lincoln appointed Marsh as a diplomat in Italy in 1861, where he lived for the next 21 years. Thus, Marsh was not a member of Congress in 1864, the year that *Man and Nature* was published. It was also the year that Congress created Yosemite State Park.

Trust in the States: Yosemite State Park

Figure 9 – Bridal Veil Falls, Yosemite, Carleton Watkins, 1861

Carleton Watkins grew up in New York but the California Gold Rush enticed him, like so many others, to San Francisco in 1851, at the age of 21. Watkins found no luck in mining, but he found an apprenticeship of sorts in San Francisco with daguerreotypist Robert Vance. Watkins learned the art of photography and opened his own photography business in 1858. Watkins first visited the Yosemite Valley in 1861. From that visit, he produced dozens of prints, copies of which were sent to the East. Oliver Wendell Holmes and Ralph Waldo Emerson possessed copies of Watkins' photographs. So did Senator John Conness of California.[523]

[523] *See* Kevin Michael DeLuca and Anne Teresa Demo, "Imaging Nature: Watkins, Yosemite, and the Birth of Environmentalism," *Critical Studies in Media Communication*, Vol 17, No. 3 (2000), pp. 241-260.

Conness shared the photographs with his fellow Congressmen and with President Lincoln to advocate for the preservation of the Yosemite Valley and Mariposa Big Tree Grove. When Congress created the state of California in 1850, it reserved much of the geographic area, including the Yosemite Valley, as federal land. Between 1850 and the Civil War, the federal government occasionally granted federal land within the state to private parties, such as railroads and individual farmers, and for public projects. In 1864, Senator Conness introduced a bill to grant the Yosemite Valley and the neighboring Mariposa Big Tree Grove to the state of California with an unprecedented condition – "that the premises are to be held for public use, resort, and recreation, and are to be inalienable for all time." Importantly, the legislation specifically allowed the State to lease the rights to various activities on the land with the stipulation that "all income to be derived from leases of privileges are to be expended in the preservation and improvement of the property." The legislation not only restricted the use of the land, but also spelled out state management. "The premises are to be managed by the governor of the State, with eight other commissioners, to be appointed by the Executive, and who are to receive no compensation for their services."[524] Senator Conness, when introducing the bill, stated that the redwoods in the Mariposa Grove, as well as other flora and fauna in the Yosemite Valley were subject to "damage and injury." Senator Conness asserted that the trees "had no parallel in the world" and were deserving of governmental protection from logging and vandalism.

An initial concern about the bill, raised by Senator Foster of Connecticut, was that it would be "officious" of the national government to foist upon a sovereign state federal land attached with conditions for its use. Foster suggested such a land grant could not be accomplished without the consent of the grantee. Conness acknowledged the unprecedented nature of the grant, assured the

[524] "An Act Authorizing a Grant to the Sate of California of the Yosemite Valley and the Land Embracing the Mariposa Big Grove," U.S. Statutes at Large, Vol. 13, Chap. 184, p. 325.

Senate that California accepted the conditions, and argued that the unparalleled natural wonders of the area justified unparalleled legislation.[525] Senator Conness also asserted the right to speak for his state on the issue, and Congress did not seek at that time an input from the Governor or state legislature, although it did require an official acceptance from them after passage of the bill.

There was no discussion during the Congressional debate of the competence of California to manage public lands. Congress appears to have assumed the competence of local government, perhaps based on Conness' assurance that the project was being undertaken by men of "refinement."[526] Furthermore, no one put forth the idea that the national government might manage the public park itself. Congress did not formulate, much less consider, such a notion.

In order to sell the bill to his fellow Senators, Conness assured them that the Yosemite Valley had no commercially exploitable resources. The valley was, according to Conness, "worthless" for all public purposes and "of no value to the government," but did contain "some of the greatest wonders of the world."[527] Such an argument would be repeated in the debate over Yellowstone National Park. In the age of continued industrialization, the idea that commercially profitable public land should be reserved for public recreation and enjoyment was not politically viable. Satisfied that there was no money to be made from Yosemite, the Senate passed the bill with little more discussion. The House passed the bill with no discussion. John Conness enjoyed a close association with Abraham Lincoln, even serving as a pallbearer at Lincoln's funeral. Lincoln signed the bill into law in July 1864.[528]

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[525] 38 Congressional Globe 2301.
[526] *Ibid*.
[527] 38 Congressional Globe 2300-01.
[528] Robert Denning and J. Henry Rogers, "A Fragile Machine: California Senator John Conness," *California History*, Vol. 85, No. 4 (2008), 26-49.

The identities of those who encouraged Senator Conness to introduce the bill were obscure and they remain somewhat obscure to this day. When asked on the Senate floor if the state of California desired such a grant, Senator Conness responded that the agitators for protection of Yosemite were "various Gentlemen … of fortune, of taste, and of refinement" but he did not name them.[529] Conness then noted that the plan had been presented to the Commissioner of the General Land Office and that the Commissioner was supportive. Some of the proponents are now known based on the reconstruction of events preceding and post-dating the creation of Yosemite State Park. Israel Ward Raymond, a representative of the Central American Steamship Transit Company visited Yosemite in 1862, was awed by the grandeur, and became alarmed at logging and mining therein. He wrote to Conness and encouraged him to "let the wonders of Yosemite be inalienable forever."[530] Some of the language in the bill is identical to the language of Raymond's letter. Raymond included in his dispatch one of Watkins photographs and he assured Conness that the land had no commercial use – the argument Conness repeated in Congress. One of the first appointed commissioners of the new park was Frederick Law Olmsted, who penned a report in 1865 outlining his vision for park management. This has led some scholars to suggest that Olmstead was one of the original proponents. Other suggested candidates are Jessie Benton Fremont, Galen Clark, Thomas Starr King, Josiah Dwight Whitney, Stephen Field, and John F. Morse.[531]

[529] 38 Congressional Globe 2301.

[530] Raymond to Conness, February 20, 1864, Yosemite-Legislation, File 979.447, Y-7, Yosemite National Park Research Library. This is a copy of the original in the National Archives, Records of the General Land Office, Miscellaneous Letters Received, G3 3572.

[531] *See* Laura Wood Roper, *FLO: A Biography of Frederick Law Olmstead* (Baltimore: Johns Hopkins University Press, 1973), 268; Hans Huth, "Yosemite: The Story of an Idea," *Sierra Club Bulletin* 33 (1948), 63-76; Holway R. Jones, *John Muir and the Sierra Club: The Battle for Yosemite* (San Francisco: Sierra Club, 1965), 28-29; and Joseph L. Sax, "America's National Parks: Their Principles, Purpose, and Prospects," *Natural History Magazine* (October 1976). The speculation that Stephen Field advocated for a Yosemite State Park is particularly interesting due to the conflict of interest it would have presented when

Regardless of the identities of the proponents, the transfer of Yosemite to the state of California might have served as a model for future conservation efforts – one in which the federal government continued to grant public lands to states conditioned upon reserved use as public parks and recreation areas. Under that model, states would exercise management over some of the public domain, as California did over Yosemite. Had the Yosemite project been deemed successful, this might have been the model and legacy for conservation in the United States. However, federal policy changed in the late nineteenth century from a system of state-administered parks to one of nationally administered parks due in large part to the alleged mismanagement of Yosemite. The story of how the federal government reacquired Yosemite from the state of California is told in Chapter 9.

The Legal Challenge to Congressional Conservation Efforts

The first efforts to undo what Congress had done with Yosemite were conducted judicially, not legislatively, and the basis of the lawsuit was not directed to the question of which level of government was best situated to conserve public lands; rather, the question presented was whether Congress could preserve public lands at all in the face of private citizens' property claims.

The creation of Yosemite State Park was the first time Congress removed federal public lands from settlement or other use and reserved them expressly for public use, enjoyment and recreation. The Act, then, raised a legal question – whether Congress could exercise such a power against the general backdrop of disposal policies and the particular context of preemption rights. During the 1840s and 1850s, Congress had passed a series of laws designed to aid the disposal and settlement of public lands by reducing conflict among those claiming property rights. These laws created rights of preemption: those who occupied and developed federal public land prior to its survey,

he sat on the Supreme Court and issued the opinion upholding Congressional power to grant the land to California with public use restrictions, discussed herein.

platting and auction (and could prove it) enjoyed a statutory right of first refusal to purchase the land once it became available for sale. They could preempt other potential purchasers. This policy served to encourage settlement and development of land, which was occurring faster than the General Land Office could sell it. With preemption laws in place, those settling and improving public lands could do so with peace of mind, knowing that their work would not be lost at an open auction.

One such person hoping to benefit from the preemption laws was James Mason Hutchings. A few weeks prior to the passage of the Act establishing Yosemite State Park, Hutchings procured land in the Yosemite Valley and occupied it, living with his family, and homesteading. To say that he "purchased" the land, though (as he most likely thought he was doing), is an oversimplification and a bit misleading. The land had not yet been surveyed, platted and recorded. Rather, he purchased a right of preemption and expected it to be honored. When Congress reserved the land from public use, his property rights became clouded. The new Yosemite Commission believed he had no right to title and no right of occupancy. The Commission offered him a ten-year lease at a nominal rate. Hutchings refused. The Commission then sought to evict him.[532]

Hutchings lacked neither sympathy nor legal argument in defending against the eviction. Many in the late nineteenth century still considered private property to be a natural right.[533] The Constitution states citizens cannot be deprived of three things without due process of law – life, liberty and property. The same provision also provides that private property cannot be taken for public use without just compensation to the property owner. These constitutional guarantees were

[532] For a biography of Hutchings, *see* Dennis Kruska, *James Mason Hutchings of the Yo Semite: a Biography and a Bibliography* (San Francisco: Book Club of San Francisco, 2009).

[533] For an essay arguing that the conception of property as a natural right changed in the Progressive Era, *see* Thomas W. Merrill and Henry E. Smith, "What happened to Property in Law and Economics?," 111 *Yale Law Journal* 357 (2001).

produced by, and helped contribute to, a culture in which vested private property was inviolable. Did Hutchings have a property interest?

The district court in California held that he did. According to that court, the preemption laws divested Congress of the right to alienate a property interest. The Court said that to eject Hutchings from the land would "operate [a] great an irreparable injury."[534] The Yosemite commission appealed to the California Supreme Court, which reversed the District Court and ordered Hutchings to be ejected. Hutchings appealed to the United States Supreme Court. There, the Supreme Court held that the preemption laws did not divest Congress of the power to reserve public lands. The Court drew a distinction between a right of preemption and a vested property right. The Court stated that when Hutchings acquired his preemptive right, he did not acquire a vested title, which could only happen upon payment of the purchase price. Congress, though it could not grant a patent in the land to another person without giving Hutchings a right of refusal, could nevertheless completely withdraw the land from settlement.

The import of the *Hutchings* case is based not so much on the interaction of conservation laws with preemption rights, but rather because it held that Congress could assert plenary power over public lands, and was not bound by any obligation of disposal. Should Congress choose to reorient public land policies, it faced no constitutional obstacle.

Government-funded Exploration and Scientific Literature

The travel literature, with its romanticizing of the West, has been relatively well-studied. Less attention has been paid to the less romantic writings of the US governmental surveys. Government commissioned land surveys, like travel literature, did not begin in the 1850s. Lewis and Clark explored the U.S. West from 1804-1806 under commission from President Thomas Jefferson. The

[534] *Low v. Hutchings*, 41 Cal. 634, 635 (1871)

exploratory activities of Zebulon Pike, John Gunnison and four out of five of John C. Fremont's expeditions were likewise United States government endeavors. These early expeditions primarily were military and political endeavors, seeking to establish boundaries with foreign powers – Great Britain, Spain, and Mexico. The scientific studies that accompanied these expeditions were secondary.

There was a change in emphasis in the purpose of government expeditions after the national borders had been settled and Indian reservations had been established. Scientific inquiry and economic exploitation received more attention. Beginning in the mid-1850s, the U.S. War Department began conducting extensive surveys of the American West for purposes of locating a railroad route from the Mississippi River to the Pacific Ocean. Spencer Fullerton Baird, who was at the time Assistant Secretary of the Smithsonian Institute, arranged for naturalists to accompany the expeditions in a way similar to Charles Darwin's travels aboard the HMS Beagle.[535] These naturalists documented the plant and animal life and their findings were published with the other results of the survey in a multi-volume report.[536]

Prior to the Civil War, the Executive Branch took the lead in western expeditions by organizing them and appointing their leaders, drawn from the ranks of military officers, though funding was authorized by Congress. Following the Civil War, as the purposes of the expeditions changed from military and political to economic and scientific, Congress asserted dominance in organizing the surveys. We have already seen in Part I the creation of a Congressional Commission in 1867 to negotiate new treaties with western plains Indians, with Congress naming

[535] *See* John A. Moore, "Zoology of the Pacific Railroad Surveys," *American Zoologist*, Vol. 26, No. 2 (1986), 331-341.

[536] *See Reports of Explorations and Surveys to Ascertain the Most Practical and Economical Route for a Railroad from the Mississippi River to the Pacific Ocean* (Washington, D.C.: Government Printing Office, 1855-1861).

the Commissioners in the legislation. To be certain, Congress continued to draw from the military for leadership of post-bellum western expeditions, as it did with William Sherman and the Indian Peace Commission, but the military gradually receded in the organization of the West and the Department of Interior ascended. Further, Congress sought leaders who had scientific backgrounds. Whereas John C. Fremont, who led expeditions prior the Civil War, had experience in military leadership, post-war explorers John Wesley Powell and Ferdinand Hayden had academic backgrounds in geology in addition to their military service. Other leaders, like Clarence King, had no military service at all.

The Great Surveys

Between 1867 and 1878, Congress commissioned four grand-scale surveys of the American West, each to be led by a different scientific explorer, Ferdinand Hayden (Nebraska and Wyoming), Clarence King (40th parallel), John Wesley Powell (Colorado River and the modern Southwest) and George Wheeler (who was charged with mapping everything west of the 100th meridian on a scale of 8 miles per inch).[537] Their commission was to survey the American West in its geology, botany and economic potential. They led exploratory expeditions in the late spring, summer and early fall, and would return to the East each winter, to publish their findings and fulfill any academic responsibilities they may have had. Their writings helped to allay fears about settling in the West. Richard Bartlett suggests that by the 1870s Americans stopped asking "What is out there?" but rather, "When shall we go there?"[538]

Despite the fact that theirs was a scientific endeavor, their writings about the American West nevertheless drifted into the romantic overtures of literary and transcendentalist works. Clarence

[537] The best scholarly treatment of the four great surveys remains Richard Bartlett's *Great Surveys of the American West* (Norman: University of Oklahoma Press, 1962).

[538] *Ibid.*

King, for instance, published *Mountaineering in the Sierra Nevada* in which he described the mountain range like "waves of stone upon whose seaward base beat the mild, small breakers of the Pacific … its crest a line of sharp, snowy peaks springing into the sky and catching the *alpenglow* long after the sun has set on the rest of America."[539] Waxing poetic about the American West may have served financial interests. Unlike Henry David Thoreau and John Muir, King did not view undeveloped nature as a place of spiritual refuge. Rather, he saw economic potential. Rapturous descriptions of the West would encourage migration and, presumably, profits. King spent a considerable amount of time devising plans to profit from the development of the West, although he never became rich.

Less inclined to seek a profit from his expeditions, George Wheeler, like King, nevertheless was enraptured by the West. He described his ascension to the Continental Divide as follows:

> [From the peak, we saw] minor tributaries, clothed with grass, presenting most beautiful oscillations of color to the eye, while farther in the horizon lay long mesa lines heavily clothed with pine and deciduous foliage, all lending a calm repose to the landscape seldom witnessed. [There], one stands upon the backbone of the continent, at a mountain summit rising majestically from the half-plateau … standing a proud and conspicuous monument … dividing the waters of the Pacific from those of the Atlantic.[540]

Wheeler, King, and Powell's expeditions all made enormous contributions to the federal government's knowledge of the American West, which would later serve the interests of settlers, miners, conservationists and preservationists. But Ferdinand Hayden's survey had a more immediate impact on public lands management – especially on the question of which governmental entity would assume management for public lands in the West.

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[539] Clarence King, *Mountaineering in the Sierra Nevada* (Boston: J.R. Osgood and Company, 1872), 1.

[540] George Wheeler, "Address to the American Geographical Society, December 23, 1874," *Report of the American Geographical Society* (1874).

Figure 10 – Great Falls of the Yellowstone River, 1871

In 1871, the Supreme Court decided two important public lands cases. It held that individuals could not exercise preemption rights on land reserved for public use (*Low v. Hutchings*) and that Congress could exercise plenary power over the disposition of public lands (*Baker v. Morton*). Not only was the Supreme Court active in theorizing the nature of public lands in 1871, Congress sought to exercise the vast power that the Supreme Court said it had. In March of that year, Congress appropriated $40,000 to Ferdinand Vendeveer Hayden to explore and survey, under the

direction of the Secretary of the Interior, the Yellowstone area of the Wyoming and Montana territories.[541]

Hayden had been one of the naturalists embedded by Spencer Baird on the railroad expeditions of the 1850s. He had academic training in medicine and geology. He was also an energetic and adventurous self-promoter.[542] Hayden made sure to include on his team an illustrator and photographer. Despite Congressional funds not being available until July 1871, Hayden commenced the survey on June 8, having convinced the U.S. Army to supply him with necessities. From early June until early October 1871, Hayden and his team of 32 explored and mapped Yellowstone and other parts of Montana, Idaho and Wyoming.[543]

When he returned to Washington in late 1871, Hayden began preparing a 530-page report of his expedition. Hayden organized his report by reference to (1) the Agricultural Resources of the area, (2) Paleontology, (3) Zoology and Botany, and (4) Meteorology. The report described the unique features of the Yellowstone area, including the interesting warm water geysers.[544] As portions of his report began to circulate, but before it was completed and published, Congress debated legislation to create Yellowstone National Park.

Senator Samuel Pomeroy of Kansas introduced a bill in December 1871 to reserve 3,578 square miles to create the first National Park. When the bill was debated, Senator Simon Cameron of Pennsylvania wished to know the size of the proposed park. When he learned of the square

[541] 42 Congressional Globe 503 (1871).

[542] *See* Mike Foster, "Ferdinand Vandeveer Hayden as Naturalist," *American Zoologist*, Vol. 26, No. 2 (1986), 343-349. *See also* Mike Foster, *Strange Genius: The Life of Ferdinand Vandeveer Hayden* (Niwot, CO: Roberts Rinehart, 1994).

[543] Richard Bartlett, *Great Surveys of the American West* (Norman: University of Oklahoma Press, 1962).

[544] Ferdinand Vandeveer Hayden, *Preliminary Report of the United States Geological Survey of Montana and Portions of Adjacent Territories* (Washington, D.C.: Government Printing Office, 1872).

mileage, he asked to know what is the "necessity of the park belonging to the United States."[545] Senator Pomeroy sought to assure Congress, as Senator Conness had done with Yosemite, that there were no agricultural or other economic prospects for the area to be put under reserve. He also responded to Senator Cameron's question about the necessity of land belonging to the United States by asserting that Congress would be able to exert a cleaner title over squatters than the states or territories could.[546]

The ability of the federal government to protect the redwoods of California had been impeded by the manner in which Yosemite had been created – as a state park. Taking note of the litigation involving Yosemite in front of the Supreme Court that very year, Senator Lyman Trumbull of Illinois, co-author of the Thirteenth Amendment, noted that by creating a national park, Congress might avoid such legal questions. "We did set apart the region of country on which the mammoth trees grow in California …but there is a dispute about it. Now, before there is any dispute about this wonderful country, I hope we shall except from the general disposition of public lands, and reserve it to the government."[547] Congress passed the bill creating Yellowstone National Park in 1872.

Federal Legislation in the Ad-Hoc Conservation Period

Three pieces of Congressional legislation in the 1870s demonstrate that, although Congress had begun to conserve land for public use and recreation as well as for resource preservation, it still sought to unlock the economic potential of land use. Congress recognized that certain lands in the West might be productive, but actual settlement thereon was unfeasible. These

[545] 42 Congressional Globe 520.
[546] *Ibid*.
[547] *Ibid*.

included heavily timbered and stony lands as well as arid lands. Congress gradually relaxed the requirements of the Homestead Act that cultivators live directly on the parcels.

Timber Culture Act (1873)

George Perkins Marsh's efforts to conserve forests first bore legislative fruit in 1873 with the passage of the Timber Culture Act. This Act was not designed, however, as strictly conservationist. Rather, its goal was to create small groves of trees on empty plains, first in areas of 40 acres, later reduced to 10 acres. The timber from these groves would be used in building projects. It was also thought that periodic groves of trees might serve as a windbreak for neighboring farms and would serve to modify the climate, even bringing extra rainfall.[548] Some of the leading natural scientists of the day, including Ferdinand Hayden, advocated those ideas.[549]

Congress sought to accomplish these goals by amending the Homestead Act of 1862 to grant homesteaders an additional 160 acres of land if they agreed to cultivate trees. Five years after the initial grant, if the homesteader could show that at least 675 trees were living and in good condition, then the United States would patent to the settler the 160 acres.

The Act was not as successful as Congress had hoped. Settlers found some climates simply too inhospitable for planting new trees. In a study of public lands management in the Owens Valley, Robert Sauder found that only 2.5 percent of the lands alienated there occurred through the Timber Culture Act, mainly due to the difficulty in getting trees to grow in the southern end of the valley.[550] And the promised rainfall did not materialize on the Great Plains. Nevertheless,

[548] *See* C. Barron McInotsh, "Use and Abuse of the Timber Culture Act," *Annals of the Association of American Geographers*, Vol. 65, No. 3 (1975), 347-362.

[549] See David M. Emmons, "Theories of Increased Rainfall and the Timber Culture Act of 1873," *Forest History Newsletter*, Vol. 15, No. 3 (1971), 6-14.

[550] Robert A. Sauder, "Patenting an Arid Frontier: Use and Abuse of the Public Land Laws in Owens Valley, California," *Annals of the Association of American Geographers*, Vol. 79, No. 4 (1989), 544-569.

Congress began a new policy of land management in 1873, one that included an element of encouraging private landholders to renew a renewable resource.

Desert Land Act (1877)

The next major amendment to the Homestead Act took place in 1877, when Congress passed the Desert Land Act.[551] The Act was designed to encourage the economic development of arid lands in the West. There were two important differences between the Desert Land Act and the original Homestead Act. First, the Desert Land Act allowed claimants to obtain a full section (640 acres) of arid or semiarid land through reclamation, irrigation and cultivation, instead of the quarter section (160 acres) available under the Homestead Act and its previous amendments. Second, the Desert Land Act removed the residency requirement for arid or semiarid lands. Claimants of these desert lands would not be required to live there to obtain their patents.

The Act was opposed by officials in the executive department, such as the Secretary of the Interior, as well as the Commissioner of Public Lands. They anticipated fraud, and raised concern about the settlement and distribution of public lands prior to going through an appropriate review and classification process to determine aridity. Their concerns about fraud were well founded. The lack of a residency requirement made the Act subject to even greater instances of abuse than occurred under the original Homestead Act. The two most common forms of abuse were typically used by cattle ranchers wishing to maximize their holdings of the most desirable arid lands. First, some would claim 640 acres of land continuous to a stream. National administrators felt this undermined the purpose of the Act, which was to encourage development of all arid lands, including those further removed from water sources. They felt that parcels should only be

[551] *See* Desert Land Act, March 3, 1877, Ch. 107, §1, 19 Stat. 377.

distributed in rectangular sections. Further, cattle ranchers found it easy to create dummy buyers by using employees to claim continuous parcels, thereby amassing large tracts for grazing.[552]

Timber and Stone Act (1878)

The Timber and Stone Act of 1878 was a Congressional effort to unlock the economic potential of land that was unfit for agriculture. The law allowed individuals to purchase 160 acres of such areas in the public domain at $2.50 / acre. The Act reflected the nineteenth century belief, soon to be questioned, that the supply of timber in the United States was virtually inexhaustible and ought to be harvested to meet the needs of the expanding country.[553] Getting the land, specifically the natural resources on the land, into private hands remained a top priority.

As with the Homestead Act and the Desert Land Act, large corporations used dummy purchasers to acquire adjacent tracts and then combined them to create large tracts suitable for large-scale timber removal.[554] The clear cutting of forests, particularly in the Northwest, quickened.

The forest depletion resulting from the Timber and Stone Act created a visible scar on the surface of the land noticeable to not only the viewing public but also to those viewing photographs. Further, it soon became apparent that the timber supply was indeed limited, and that clear-cutting created a host of environmental problems, most prominent among them being the lost protection of the watershed.[555] The Timber and Stone Act, and the depletion of the forests, perhaps more than any other developments, gave rise to more systematic and bureaucratic conservation and preservation policies, led by the federal government. This turn in the 1880s and 1890s marked the

[552] *See* Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Government Printing Office, 1968), 387.

[553] *See* Janel M. Curry-Roper, "The Impact of the Timber and Stone Act on Public Land Ownership in Northern Minnesota," *Journal of Forest History*, Vol. 33, No. 2 (1989), 70-79.

[554] *Ibid*.

[555] *Ibid*.

shift in roles for the national government. No longer would Congress serve as a real estate agent, selling off land and natural resources to the public. Rather, it would become a landlord, and manage the land with the aid of a property manager – the Executive branch.

Figure 11 – Effects of Deforestation, 1915

Chapter 9:

Systematic Conservation and Preservation

Public Lands Commission of 1879

Congress has created Public Lands Commissions five times in the nation's history. These commissions have been charged with investigating facts on the ground and making recommendations to Congress for new legislation. Congress established the first commission in 1850 to sort out the validity of Spanish and Mexican land grants in California. From the 1850s until the late 1870s, federal public land policy was a web of contradictory legislation. Disposal policies continued. Congress granted land to railroads and homesteaders. Congress also began to reserve for conservation purposes land that would become national parks. Congress simultaneously, though, privatized timber and desert lands, selling it at low prices to those wishing to log or mine lands that were not suitable for agriculture. Further, journalists exposed land office incompetence and corruption. These facts combined with the public's dislike of railroad land grants to create a public distrust in Congress.

Faced with these developments, Congress created its second Public Lands Commission in 1879. This was Congress's first effort to create a uniform federal public land policy. Congress empaneled a four-man commission comprised of John Wesley Powell, Thomas Donaldson, Clarence King and A.T. Britton. Powell and King had each led surveys of the West in the late 1860s and early 1870s. The Commission was charged with understanding all of the then extant laws concerning public lands, investigating conditions on the ground, and making recommendations for improvements.

The Commission's first order of business was to undertake an extensive tour of the public lands in the West. From August until December 1879, they visited every state and territory west

of Kansas and Nebraska, except for Washington.[556] The Commission met with political leaders, business interests, and individuals, and solicited feedback from virtually anyone willing to offer. The Commission concluded that the federal land laws had been successful in accomplishing the purposes of disposition put in place at the Founding.[557] The Commission also noted the change in policy from raising revenue to placing citizens on the land. "[A]t an early period … the sale of public land has been looked upon as a source of revenue." They continued, "but this policy … gave place to one which regarded the public lands as a field in which the great and rich harvest to be reached consisted of thousands and perhaps millions of good citizens."[558]

Completing its work in 1880, the Commission recommended to Congress a new general law for the public lands of the American West. The law would reinforce the existing policy of disposition, but do so in a way designed to be efficient and organized. The Commission recommended reorganizing the General Land Office to account for a "restless" citizenry. More importantly, the Commission recommended a land classification system for the public lands, by which the land office would know which lands were best suited for agriculture, lumber, and mining.

Congress did not act on the Public Lands Commission report of 1880.[559] However, it did act in the following 30 years in other important ways to create a more uniform public lands policy and management system.

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[556] Report of the Public Lands Commission, 1879, VII.
[557] *Ibid*. ("It is believed to have accomplished, thus far, the objects for which it was devised.")
[558] *Ibid*., at VIII.
[559] *See* Harold H. Dunham, "Some Crucial Years of the General Land Office, 1875-1890," *Agricultural History*, Vol. 11, No.. 2 (1937), pp. 117-141.

Creation of the U.S. Geological Survey

Given the failure of Congress to act on the recommendations of the Public Lands Commission of 1879, the more important Congressional act that year was the creation of a permanent scientific office within the Department of the Interior – the U.S. Geological Survey. The office was born of a desire to rid Congress of two sets of rivalries, one institutional and one personal.

For much of the nineteenth century, government funded surveys were of an exploratory nature first, and a scientific nature second, and were thus funded through the United States Army. However, with the creation of the *ad hoc* surveys starting in 1867, Congress began to place more emphasis on the scientific aspects of those endeavors, a move applauded by Clarence King, who led one of the surveys. "Eighteen Sixty-Seven, therefore, marks … a turning point, when the science ceased to be dragged in the dust of rapid exploration and took a commanding position in the professional work of the country."[560] A dispute developed over whether the surveys should be run through the military or through a civilian branch. President Ulysses S. Grant, perhaps not surprisingly, favored the army whereas the veteran John Wesley Powell and Hayden favored the Department of the Interior. When Rutherford B. Hayes came into office in 1877, Congress was able to settle the matter by creating the permanent survey in the Department of the Interior. Simultaneously, it ended the growing personal rivalries among the leaders of the surveys who competed for not only appropriations from Congress, but prestige among the public.[561]

The newly created office was tasked with the "classification of the public lands and examination of the Geological Structure, mineral resources and product of the national domain."[562]

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[560] Clarence King, First Annual Report of the U.S. Geological Survey (1880); *see also* John C. Rabbitt and Mary C. Rabbitt, "The U.S. Geological Survey: 75 Years of Service to the Nation, *Science*, Vol. 119, No. 3100 (1954), pp. 741-758.

[561] *See* John C. Rabbitt and Mary C. Rabbitt, "The U.S. Geological Survey: 75 Years of Service to the Nation, *Science*, Vol. 119, No. 3100 (1954), pp. 741-758.

[562] *See* Organic Act of March 3, 1879, 20 Stat. 394, 43 U.S.C. 31.

Whereas previous efforts to understand the nature of the American West consisted of *ad hoc* surveys by adventurous explorers, Congress now sought a more scientifically grounded, less politically ambitious, and more permanent institution for understanding and classifying the West.[563] Through the legislation, Congress ended the still-extant surveys of the West led by Clarence King, John Wesley Powell, and Ferdinand Hayden. Hayden and King vied for the job of director of the new permanent survey, with many expecting it to go to the politically astute and ambitious Hayden.[564] However, Powell's support of King proved critical. When King was chosen, John Wesley Powell became the deputy director and King asked Hayden to become the chief geologist. King, whose personal interests were in mining, focused his brief administration on understanding the full mining potential of the West. When he left after two years to pursue his personal fortune in the mines, Powell sought a comprehensive understanding of the West in its topography and agricultural possibilities. Powell led the Survey for thirteen years.

By placing responsibility for the survey of the West within the Executive Branch of government, instead of under the direct supervision of Congress as previously arranged, Congress created one more layer of accountability between the scientists and the people of the West, who would most be affected by the activities of the Survey. This extra layer served to shield the U.S. Geological Survey from direct political pressure. As we shall see, Congressional enlistment of the Executive Branch in public lands management served the same purpose.

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[563] For an introduction to the creation of the United States Geological Survey, see Thomas G. Manning, *Government in Science: The U.S. Geological Survey, 1867-1894* (Lexington: University of Kentucky Press, 1967); *see also* William H. Goetzmann, *Exploration and Empire: The Explorer and the Scientist in the Winning of the American West* (New York: Alfred A. Knopf, 1966).

[564] *See* Clifford M. Nelson, Mary C. Rabbitt, and Fritiof M. Fryxell, "Ferdinand Vandeveer Hayden: The U.S. Geological Survey Years, 1879-1886," *Proceedings of the American Philosophical Society*, Vol. 125, No. 3 (1981), pp. 238-243.

Wresting Yosemite Back from the State

John Muir moved to California in 1868, just four years after the creation of the Yosemite State Park. He first visited Yosemite in April, a few week after disembarking in San Francisco. He spent the next two decades exploring and writing about the wilderness areas of the American West, particularly in the Sierra Nevadas. He also developed a business and personal relationship with Robert Underwood Johnson, writer and editor of the *Century Magazine*, headquartered in New York City. Together, Muir and Johnson collaborated on articles describing the scenic beauty of the Sierra Nevadas as well as other parts of the rugged West.

Although based in northern California, Muir travelled extensively. In the summer of 1885, Muir traveled through Yellowstone National Park where he saw firsthand a "people's park" controlled, if not actively managed, by the federal government. Muir noted in his journal the "fine dashing clear water" to be found within the park, as well as the "many miles of hot springs."[565] In October of that year, Muir published in the *San Francisco Evening Bulletin* a report of his excursion to Yellowstone. Amidst the religious language of Muir's environmentalism (the stones of the Park were "Divine masonry" and the buffalo were "God's cattle"), Muir praised Congress's removal of the Park from the public domain, complementing the "most noticeable piece of legislation for which everybody give thanks." Muir, like the sponsors of the bill that created Yellowstone, argued that the land had no commercial potential. "The withdrawal of this large tract from the public domain has caused no appreciable loss to any one … and its rugged, mantle of volcanic rock prevent its ever becoming available to any great extent for agricultural or mining purposes."[566]

[565] Journals of John Muir, No. 37 (August 1885), Holt-Atherton Special Collections, University of the Pacific.

[566] John Muir, "The Yellowstone Park," *San Francisco Daily Evening Bulletin*, October 27, 1885. Despite this early newspaper article, Muir's public writings about Yellowstone are relatively thin,

Muir's praise of Yellowstone National Park came at a time when he and others began to take a critical look at the state administration of Yosemite. In the 1880s, Muir became alarmed by what he saw as the mismanagement not only of the Yosemite State Park, but also the surrounding ecosystem. Within the park, Muir noted that natural meadows had been plowed to plant hay for horses. He also described the harvesting of redwoods within the park and in surrounding areas. Muir documented the overgrazing by sheep – "wooly locusts" – in the high meadows surrounding the park. Muir knew that the loss of vegetation would cause mudslides and other damage.[567]

Muir took Robert Johnson on a tour of Yosemite in 1889. Together, they spent several days exploring the park, and then ventured beyond the boundaries of the reserve. Johnson was awed by the scenic beauty and, like Muir, expressed alarmed at the destruction surrounding the park. As they camped one evening along the Tuolumne River, they discussed the environmental problems. Convinced that further protection of the area was needed, and also convinced that California could not be trusted to protect it – "under the present management the Yosemite is every year becoming less and less attractive" – Muir suggested to Johnson that a national park, patterned after Yellowstone, be created to surround the state park, in which logging and grazing could be restricted. Johnson agreed to conduct the political campaign in the East while Muir wrote advocacy pieces.[568] Thus Muir, Johnson, and their allies in late 1889 and 1890 campaigned to create Yosemite National Park – a donut shaped national reserve surrounding the state one, in which grazing and timber activities would be severely curtailed, if not completely eliminated.[569]

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prompting Robert Johnson to chide him, "[Have] you ever written about the Yellowstone? Tell Mrs. Muir not to let you backslide from the literary life." Robert Underwood Johnson letter to John Muir, dated September 20, 1890, Holt-Atherton Special Collections, University of the Pacific.

[567] John Muir, *My First Summer in the Sierra* (New York: Houghton & Mifflin Co., 1917), 97.

[568] *See* Stephen R. Fox, *The American Conservation Movement: John Muir and his Legacy* (Madison: University of Wisconsin Press, 1981), 99.

[569] William D. Ames, Letter to *Oakland Tribune*, September 12, 1890.

Muir started publishing public screeds in San Francisco newspapers against state management of the area. In June of 1889, Muir wrote an article in the *San Francisco Daily Evening Bulletin* noting the high turnover of the membership on the Yosemite Commission and the lack of clear planning strategies. In the valley of Yosemite both inside and outside the park, "miles of fences have been built around hayfields" and "hundreds of horses have been allowed to run loose over the unfenced portion of the valley year after year until in many places it looks like a dusty, exhausted wayside pasture."[570] A week later, Muir sounded the alarm about the destruction of Yosemite's forests due to grazing by sheep and other animals. "Hordes of sheep under destructive leaders continue to sweep the woods throughout almost the whole extent every summer."[571]

The following summer, Muir penned two lengthy articles describing the scenic beauty of Yosemite and the actual and potential loss of the forests and other resources.[572] Johnson published these articles in *The Century*, and made sure they were circulated to members of Congress. In the meantime, Johnson also maintained close contacts with the Public Lands Committee, even helping to adjust the boundaries of the proposed national park.[573] The *New York Times* participated in the campaign, offering numerous editorials in favor of nationalizing the park with headlines designed to arouse indignation – "The Neglected Yosemite: Some Inexcusable Faults of Management," "Needs of the Yosemite: Natural Beauty Destroyed by Bad Management," and "Despoiling the

[570] John Muir, "Yosemite Valley," *San Francisco Daily Evening Bulletin*, June 21, 1889.

[571] John Muir, "Forests of the Sierra: The Destruction that is being wrought in the Mountains," *San Francisco Daily Evening Bulletin*, June 29, 1889.

[572] *See* John Muir, "The Treasures of Yosemite," and "Features of the Proposed Yosemite National Park," *The Century*, Vol. 40, No. 5 (1890).

[573] *See* "Letter from Robert Underwood Johnson to John Muir," September 20, 1890, Holt-Atherton Special Collections, University of the Pacific.

Yosemite: An Official Report that is full of Falsehoods – Congress Should take action."[574] Congress could not ignore these calls to action.

Muir and Johnson did not run their campaign unopposed. The effort to keep control of Yosemite with California officials was led by John P. Irish. Irish was born in Iowa in 1843 and was the editor of the Iowa City Press for twenty years. He was a leader of the Democratic Party in Iowa, making unsuccessful bids for governor in 1868 and 1877. Irish moved to California in 1880 and became the editor of the *Alta California* and then the *Oakland Times*. He lost a bid for Congress as the Democratic candidate in 1890. Irish also happened to be on the board of commissioners for Yosemite in the late 1880s and early 1890s. Stephen Fox writes that when Muir criticized management of Yosemite, Irish took it personally.[575] Muir's arguments in favor of national management of the park are well studied. Less attention has been paid to the arguments and actions of those, like Irish, who favored retention of state control.

In early 1890, as word of potential federal intervention in the Yosemite Valley began to leak, Republican Governor Robert Waterman, an ally of Irish, responded defiantly to accusations of incompetence and mismanagement. "I am informed that an attempt is being made to take from California her direct interest as a state in the Yosemite and have the valley again revert to the [national] government." Although this possibility had been discussed in the halls of Congress and by Muir and Johnson, it was not then the plan. However, it would eventually become a reality.

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[574] *See*, "The Neglected Yosemite: Some Inexcusable Faults of Management," *New York Times*, February 6, 1890; "Needs of the Yosemite: Natural Beauty Destroyed by Bad Management," *New York Times*, February 23, 1890; "Despoiling the Yosemite: An Official Report that is full of Falsehoods – Congress Should take action," *New York Times*, July 20, 1890.

[575] Stephen R. Fox, *The American Conservation Movement: John Muir and his Legacy* (Madison: University of Wisconsin Press, 1981), 104.

Waterman continued, "The charge that the affairs in the valley are badly mismanaged is false and is the off-spring of personal malice, spite and feeling."[576]

John P. Irish echoed the sentiments of Governor Waterman. "The charges made against Yosemite management were searchingly investigated by a Democratic legislature with a keen, partisan incentive of working a personal point against a Republican governor. After a prolonged effort the accusations were found to have no other ground than malice."[577] Irish also suggested the need for California to protect her "reputation" and "honor" – language echoing that used by Southern states in the Civil War.[578]

The *New York Times* pilloried the Yosemite Valley Commission's defense of its management. The "antics of California's Yosemite Commission continued to bring disgrace on that body of incompetents and prove into what unfit hands the care of Yosemite has fallen."[579] Likewise, the *Chicago Tribune* said the granting of the park to California was "a mistake. The valley should have been retained under the charge of the Interior Department for the same purposes like the Yellowstone Park." The *Tribune* added that although the state still controlled the central valley, it was "not unlikely" that at some point, it would come under national management."[580] Robert Johnson attempted to answer Irish's efforts at every turn. In a letter to Muir, Johnson wrote, "The combat thickens, John P. Irish being on the warpath … Every time he puts pen to paper, he gives

[576] "The Yosemite: Waterman sends a Dispatch to Washington," *San Francisco Chronicle*, February 18, 1890.

[577] "Advice to Noble," *Press Democrat*, December 19, 1890.

[578] *See* "Defending Grave Abuses: The Yosemite Commission makes a Report," *New York Times*, April 7, 1891; *see also* Bertram Wyatt-Brown, *Honor and Violence in the Old South* (New York: Oxford University Press, 1986).

[579] "Defending Grave Abuses: The Yosemite Commission makes a Report," *New York Times*, April 7, 1891.

[580] "The Yosemite Park Enlarged," *Chicago Daily Tribune*, November 26, 1890.

an opportunity to the friends of reform. I shall write a brief reply."[581] Johnson mocked Irish's characterization of the Yosemite Commission as the defender of California's "sacred honor and reputation." Johnson told Muir, "I hope you'll go for him."[582] Robert Johnson depicted his efforts against the Yosemite Commission and John P. Irish as, to borrow a phrase from Calvin Johnson, "righteous anger at the wicked states."[583]

In the fall of 1890, Congress accepted the recommendation of Muir and Johnson, and withdrew the tract of land around the Yosemite Valley for purposes of protecting it from timber removal and grazing. This perimeter would serve as the foundation of Yosemite National Park. However, in 1890, Congress left the central Yosemite Valley in the control of the state of California, a move the *New York Times* criticized.[584] Further, Congress itself did not name the reserve as a National Park; rather, it granted discretion to the executive branch as to how to best manage the area. Secretary of the Interior John Noble designated the area as a park. Although the Executive Branch no longer has the authority to create national parks, Congress's delegation of power to the Executive in the Yosemite bill was an important milestone in public lands management. Congress that same year would grant the President great discretion in the creation of Forest Reserves (discussed herein) and would continue to involve the Executive in creating public land policies. The exercise of that executive discretion would create conflict with the states in the twentieth and twenty-first centuries more than the passage of Congressional legislation. Included with the creation of Yosemite National Park were resources to install federal rangers to

[581] *See* "Letter from Robert Underwood Johnson to John Muir," September 20, 1890, Holt-Atherton Special Collections, University of the Pacific.

[582] *Ibid*.

[583] *See* Calvin Johnson, *Righteous Anger at the Wicket States: The Meaning of the Founders Constitution* (New York: Cambridge University Press, 2005).

[584] *See* "Needs of the Yosemite: Natural Beauty Destroyed by Bad Management," *New York Times*, February 23, 1890, criticizing the draft bill as it was introduced in Congress.

police the boundaries and prevent grazing and resource extraction. Their jurisdiction stopped at the edge of the state park, which had little, if any, police presence.

The creation of Yosemite National Park did not stop Robert Johnson from agitating for the recession of the state park to the national government. He encouraged Muir to continue to criticize state incompetence and corruption in the management of Yosemite State Park. In a letter to Muir in 1892, Johnson wrote, "I am now in communication with Secretary Noble to see what can be done in the way of a repeal of the grant of '64. … It seems to me that you men in California who know most about the subject ought now to be organizing and bestirring yourselves."[585] Muir was a little reluctant; by 1896, Muir still hoped for internal reform – better state management – but he had opened up to the possibility of cession as a last resort:

> The condition of that mountain paradise, held in trust by California for the lovers of beauty of the nation and of the world, is a scandal to the State and its people. The whole valley, whose superb vistas would raise the mind of a Pluto above his daily grasshoppers to lofty thoughts, is a nest of petty jobbery. Every law passed for the preservation of its natural beauties, and for the protection and comfort of visitors, has been broken. The contrast between the squalid maltreatment of the central valley and the superb condition of the National Park surrounding it, which is kept in order by federal troops, has led to the Eastern agitation for the retrocession of the Yosemite from California to the United States. Unless we experience a revival, not only of State pride but of State conscience, that may be the best thing we can do.[586]

John Irish continued to oppose the recession of Yosemite State Park, and Johnson and Muir continued to demonize him and the Yosemite Valley Commission. Muir said that the Governor James Budd was, in 1896, following the "slimy trail of Irish."[587] Irish was the bogeyman haunting

[585] Letter from Robert Underwood Johnson to John Muir, dated December 8, 1892, Holt-Atherton Special Collections, University of the Pacific.

[586] Letter from John Muir to Robert Johnson Underwood, April 24, 1896, University of the Pacific Library, Holt-Atherton Special Collections

[587] Letter from John Muir to Robert Johnson Underwood, April 24, 1896, University of the Pacific Library, Holt-Atherton Special Collections.

the correspondence of Muir and Johnson. Irish was mentioned in at least 55 of the extant letters between Muir and Johnson, always as the force opposing the effort to preserve Yosemite.

Muir and Johnson's private and public depictions of Irish did not accurately reflect his goals.[588] Although Irish did not share their preservationist philosophy, he did strive to accomplish a conservationist vision for Yosemite in the 1890s. In 1895, he issued a challenge to the state of California to better manage Yosemite. He called for a "strong forestry organization" in the state – one that would adopt conservationist tactics of Native Americans and reject the management techniques the federal government was then using in Yellowstone. "Recession to the Federal Government is no remedy, it offers no safeguard. Upon the Federal reservations outside the valley … causes are accumulating to bring final destruction." The destruction Irish referred to was rampant forest fires brought about by the failure to clear undergrowth. Muir noted that Native Americans had cleared undergrowth through deliberate ignition, which created healthier forests and hunting grounds. "If we need an example [of bad management]," Irish continued, "it is furnished by the Yellowstone Park. Within a few years it was taken under Federal management from the Indians. … The record of Yellowstone is a sad story of waste and destruction."[589]

Muir and Johnson's campaign for full federal control of Yosemite faced obstacles, such as the obstinacy of John Irish and the election of the Democrat Grover Cleveland in 1892, who

[588] The historiography of the American Preservation movement has tended to accept Muir and the Sierra Club's accounts of California's mismanagement as accurate. *See, e.g.*, Stephen Fox, *John Muir and his Legacy: The American Conservation Movement* (Boston: Little & Brown, 1981).

[589] John P. Irish, "Secession of the Valley," *San Francisco Call*, December 22, 1895. Irish referenced the removal of Indians from National Park lands. Only relatively recently, however, have scholars begun to seriously study the displacement of Native Americans and the poor in order to create space for National Parks. *See, e.g.*, Mark David Spence, *Dispossessing the Wilderness: Indian Removal and the Making of National Parks* (New York: Oxford University Press, 1999); William Cronon, "The Trouble with Wilderness; or, Getting Back to the Wrong Nature," in *Uncommon Ground: Rethinking the Human Place in Nature*, ed. William Cronon (New York and London: W.W. Norton and Company, 1996), 69-90.

believed in "the most lenient Southern construction of federal rights."[590] Cleveland did not create any national parks although he did exercise power under the Forest Reserve Act, discussed herein. The Republican McKinley signed legislation creating Mount Rainer National Park in Washington, but took no action with respect to Yosemite. McKinley's assassination in the first year of his second term brought into office an outdoor enthusiast.

Two months after Theodore Roosevelt ascended to the Presidency in 1901, Johnson wrote to Muir, "I wonder if we cannot now quietly get some influence from the White House brought upon the California legislature to get the Yosemite receded to the [national] government."[591] Muir again went on the offensive, including a personal charm offensive of the President. In much the same way that he had given Johnson a tour of Yosemite in 1889, Muir personally guided Roosevelt through Yosemite for three days in 1903. It worked. Roosevelt became convinced of the need for federal protection in the Yosemite Valley.

In 1904, Muir made headway with various California leaders whose buy-in was necessary to convincing the legislature to cede the park. He informed Johnson of his progress. "Your long faithful fight for right management of Yosemite seems now to be nearly won. Everybody now happens to be in favor of recession."[592] With Roosevelt's bully pulpit, Muir's constant harping in the California press, and backroom pressure, legislators in California became convinced that the best protection option for Yosemite was federal, not state control. A modest federal payment to California to complete the transaction helped seal the deal. California voted in 1905 to cede

[590] *See* Cannon, *Under the Prophet in Utah*, *supra* note 255, at 73.

[591] Letter from Robert Johnson Underwood to John Muir, November 26, 1901, University of the Pacific Library, Holt-Atherton Special Collections

[592] Letter of John Muir to Robert Underwood Johnson, October 26, 1904, University of the Pacific, Holt-Atherton Special Collections.

Yosemite to the federal government and Congress voted to accept in 1906.[593] Muir sent Johnson a short telegram, "Our long Yosemite fight won at last – bill passed today."[594]

Figure 12 – Theodore Roosevelt and John Muir, Yosemite, 1903

Muir's enthusiasm for federal management of Yosemite was soon tempered by the aftermath of the 1906 San Francisco earthquake. The earthquake made clear that the city's water supply was inadequate. City planners sought to create a new reservoir, and set their sights on a valley within Yosemite National Park – the Hetch Hetchy Valley. They appealed to Congress for permission to

[593] *See* "Act of the Legislature of the State of California, Approved March 3, 1905, regranting to the United Stats of America the Yosemite Valley and the land embracing the Mariposa Big Tree Grove," Statutes of California, 1905; "Joint Resolution accepting the recession by the State of California of the Yosemite Valley Grant and the Mariposa Big Tree Grove in the Yosemite National Park," U.S., Statutes at Large, Vol. 33, Part I, Chapter 547, pp. 702-703.

[594] Letter from John Muir to Robert Underwood Johnson, February 23, 1905, University of the Pacific, Holt-Atherton Special Collections.

build a dam in the valley. John Muir led the battle against the dam but, after a lengthy fight, lost.[595] Noted conservationist Gifford Pinchot, first chief of the United States Forest Service, supported the idea. Interestingly, John P. Irish, former member of California's Yosemite Commission and Muir's antagonist in the long debates about whether Yosemite should be federally managed, opposed the damming of the Hetch Hetchy Valley. His opposition, though, was likely due to his position as a lobbyist for existing water companies.[596] It is not clear whether the California State Commission who had previously managed Yosemite would have supported the project.

The Forest Reserve Act and its Amendments

The years 1890-1891 were momentous for public lands management and the changing relationship between the federal government and the states. In addition to the creation of Yosemite National Park and the attendant policy that the remaining federal public lands should be managed directly by the United States and not entrusted to state care, Congress also sought to enlist the aid of a land agent to whom it would give a large amount of discretion. The discretion exercised by that land agent – the President – continues to serve as the major flashpoint of controversy between states and the federal government, even in the twenty-first century. Congress first granted this discretion with the passage of the Forest Reserve Act.

By the late 1800s, much of the timber supply in the eastern United States and Great Lakes region had been depleted, while logging continued apace in the Northwest.[597] As early as 1877, government officials called for the conservation of forests. Secretary of the Interior Carl Shurz

[595] *See* Robert W. Righter, *The Battle over Hetch Hetchy: America's Most Controversial Dam and the Birth of Modern Environmentalism* (New York: Oxford University Press, 2005).

[596] *See* "Hetch Hetchy is Much Discussed," *San Francisco Chronicle*, December 4, 1913.

[597] *See* James Lemond, *Deadfall: Generations of Logging in the Northwest* (Missoula, MT: Mountain Press Club, 2000); Roy Stier, *Down the Hill: A True Story of Early Logging in the Northwest* (Wilsonville, OR: Bookpartners, Inc., 1995); and Robert H. Weidman, *Timber Growth and Logging Practice in Ponderosa Pine in the Northwest* (Washington, D.C.: U.S. Department of Agriculture, 1936).

suggested that Congress pass a law "providing for the care and custody of such timberlands as are unfit for agriculture and for the gradual sale of timber thereon and for the perpetuation of the growth of timber on such lands by such needful rules and regulations as may be required."[598] The Timber and Stone Act of 1878 contributed to the problem of forest depletion by selling off unreserved public lands for timber extraction at a low cost. Lumber companies continued what by then had become an American tradition – setting up dummy purchasers to take advantage of the nation's liberal land policies – to acquire large tracts of forestland. Congress took action in 1891. In March of that year, on the last day of the legislative session, Congress delegated to the President power under the Property Clause to withdraw from the public domain forested lands, and set them aside as reserves. Such lands would be not be sold or otherwise disposed of, and logging thereon would be regulated. The Forest Reserve Act gave the President wide discretion to choose land that is worthy of protection: "[T]he President of the United States may, from time to time, set apart and reserve … any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations."[599]

Presidents Benjamin Harrison, Grover Cleveland and William McKinley each utilized the act to collectively proclaim 45 million acres of the public domain as forest reserves.[600] These executive actions received strong support in the East and Midwest but, in what would become a pattern, were opposed by western states where the reserves were located.[601]

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[598] REPORT OF THE LAND COMMISSIONER, 1877, *as quoted in* James L Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 258 (1978).

[599] Forest Reserve Act, Section 24.

[600] Cecile Brooks-Nicolopoulos, "Forest Policy (1890-1910): The Impact of Two Pioneering Decades," *Revu Francaise d'etudes Americaines*, No. 70, *L'ecologie aux Etas-Unis* (1996), 28-40, 31.

[601] *See* Robert Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RESOURCE LAW 503 (1974).

Although the President had the authority to declare forest reserves in the early part of the 1890s, he lacked real enforcement and management mechanisms. A forest commission, first created in 1896, studied the issue of forest management and made recommendations to Congress for improvements. Entering the scene that decade was a strong advocate for a progressive-based theory of forest management. One could not have scripted a better character to assert forest management authority than Gifford Pinchot.

Gifford Pinchot was born in 1865 with a silver spoon in his mouth. Both of his grandfathers were wealthy landowners – one in Pennsylvania and one in Manhattan. His maternal grandfather, Amos Eno, was at one point the richest man in New York City. Pinchot grew up in New York, and traveled extensively through Europe during his adolescence.[602]

Despite their wealth, Gifford's parents insisted he learn to work "regularly, conscientiously and diligently."[603] Gifford's mother, in particular, valued work as a puritan ethic. Both Gifford and his mother attended religious revival meetings while in England on an almost nightly basis, imbibing of the social gospel. Attendance at these meetings helped to imbue Gifford with a spirit of progressivism.[604] Perhaps no one could be better prepared to advance progressive goals than someone like Gifford – a wealthy, well-educated, eastern elite who accepted the calling to make the world a better place through the instruments of scientifically backed government policies.

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[602] *See* Brian Balogh, "Scientific Forestry and the Roots of the Modern American State: Gifford Pinchot's Path to Progressive Reform," *Environmental History*, Vol. 7, No. 2 (2002), 198-225. For book length treatments of Pinchot and his contributions to American politics and environmentalism, *see* Char Miller, *Gifford Pinchot and the Making of Modern Environmentalism* (Washington D.C.: Island Press, 2001); Harold T. Pinkett, *Gifford Pinchot: Private and Public Forester* (Urbana: University of Illinois Press, 1970); and Martin L. Fausold, *Reformers Were People: Gifford Pinchot, Bull Moose Progressive* (Syracuse: Syracuse University Press, 1961). For an examination of Pinchot's legacy in the mid-twentieth century, *see* Char Miller, *Seeking the Greater Good: The Conservation Legacy of Gifford Pinchot* (Pittsburg: University of Pittsburgh Press, 2013).

[603] *See* Balogh, "Scientific Forestry and the Roots of the Modern American State," *supra* note 602.

[604] *Ibid*.

Traditional professions for someone like Pinchot, in medicine, law, or the ministry, did not interest him. Pinchot preferred the outdoors. "I loved the woods and everything about them," he later recalled.[605] Instead of adapting to an indoor profession, Pinchot decided to professionalize the outdoors.[606] Pinchot's father, James, had been introduced to forest management during travels in Europe and encouraged his son to consider forestry as a profession, and idea Pinchot found very appealing. Such a profession did not exist in the United States and, Brian Balogh writes, Pinchot "literally had to create" it.[607]

Following his education at Yale, including his induction into the Skull and Bones Society from which he would later hire many managers in the U.S. Forest Service, Pinchot studied forestry in Europe.[608] To do so, he turned down an offer to work in the Division of Forestry. Upon his return to the United States a few months later, Pinchot was considered a national authority on forest management. Once again, though, Pinchot turned down employment with government in order to manage a private forest in North Carolina owned by the Vanderbilt family. Pinchot's hope was to parlay successful management of a private forest based on European techniques into political capital that could be used to assert forest management on a grand, national scale. Although the Vanderbilt forest was a success on paper only, Pinchot nevertheless enhanced his status as an expert in forest management.[609] Pinchot was named as one of the Forest Service Commissioners in 1896.

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[605] *See* Gifford Pinchot, *Breaking New Ground* (New York: Harcourt, Brace & Co., 1947), 2.

[606] *See* Balogh, "Scientific Forestry and the Roots of the Modern American State," supra note 602, at 203 ("If the professions would not move out of doors, perhaps he could professionalize outdoor activities").

[607] *Ibid*.

[608] In Europe, Gifford met Dietrich Brandis, a German academic who managed the British forest system in Burma. Brandis advised Gifford to remain in Europe longer to become a master of his profession. Gifford ignored his advice and returned home accurately anticipating that he would be considered the highest authority of forestry in the United States. *Ibid*.

[609] *Ibid*.

Upon the Commission's recommendations, Congress passed the National Forest Service Organic Act in 1897, setting more explicit policy for the management of forests, but leaving the Division of Forestry within the Department of Agriculture.[610] Much of the Forest Service Organic Act of 1897 was a response to the concerns of the western states that the President had too much power to remove from the public domain commercially important lands. Western state leaders were angry over (1) the creation of 13 western reserves by President Cleveland and (2) the recommendations of the Forest Commission, who suggested the creation of many more reserves in western states. "A storm of protest arose in the West, expressed in public meetings, memorials from legislatures, by letters from western public officials, angry editorials, and vituperative denunciations of the President in both houses of Congress."[611]

In order, then, to establish the Forest Service, the Organic Act needed to be a bill of compromise. In exchange for the creation of the Forest Service, the Organic Act made three concessions to western states. First, the Organic Act limited the President's discretion to create forest reserves by stating that:

> no public forest reservation shall be established except to improve and protect the forest within the reservation … [I]t is not the purpose of intent of these provisions … to authorize the inclusion … of lands more valuable for the mineral therein or for agricultural purposes, than for forest purposes.[612]

Congress thus curtailed the President's wide-ranging discretion under the Forest Reserve Act. Second, Congress specifically revoked some forest reserve designation made by President Cleveland. Finally, Congress specifically authorized the President to revoke previous designations:

> To remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to

[610] *See* Organic Act of 1897, 16 U.S.C. §473 et seq., June 4, 1897.

[611] *See* Robert Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RESOURCE LAW 503 (1974).

[612] Act of June 4, 1897, ch. 2, 30 Stat. 34.

revoke, modify, or suspend any and all such executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interest.[613]

In order to appease western legislators, McKinley and members of Congress from the East were willing to revoke some of Cleveland's forest reserve designations, but were unsure of how to do it. Some members of Congress argued the President had inherent authority to revoke a previous Presidential proclamation, while others contended that such a revocation would "insult" the office of the Presidency.[614] Ultimately, Congress itself revoked some designation while explicitly authorizing the President to revoke. The language in the bill "to remove any doubt" suggests Congress did not want to attempt to rule upon the question of whether the President had inherent authority or not.[615]

Gifford Pinchot became the head of the Division of Forestry in 1898. His ideas and personality would dominate United States forest management policy for the next several decades. Pinchot was a conservationist, not preservationist. He believed in the scientific and efficient management of forests in order to produce a steady, long-term supply of timber to meet the nation's economic needs. His conservationism put him at odds with preservationists, like John Muir.[616]

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[613] *Ibid*.

[614] *See* Robert Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RESOURCE LAW 503 (1974).

[615] Although not conclusive, this history should be of some interest to modern legal scholars who debate whether the President has authority to revoke national monument designations. Mark Squillace, Eric Biber, Nicholas Bryner and Sean Hecht argue that the President lacks authority to reduce or eliminate a national monument, based on the text of the Antiquities Act and the legislative history of the Federal Land Policy and Management Act (FLPMA) of 1976. *See* Mark Squillace, Eric Biber, Nicholas Bryner and Sean Hecht, "Presidents Lack Authority to Abolish or Diminish National Monuments," 103 *Virginia Law Review Online* 55 (2017). On the other hand, Todd Gaziano and John Yoo argue that the President has such an authority, basing their argument also on the text of the Antiquities Act, the history of its use, similar powers the President enjoys in other areas of law, and constitutional theory. *See* Todd Gaziano and John Yoo, *Presidential Authority to Revoke or Reduce National Monument Designations,* AMERICAN ENTERPRISE INSTITUTE (March 2017). None of these scholars address the parallel history of the Forest Service Act.

[616] Muir and Pinchot disagreed sharply over the construction of a dam in the Hetch Hetchy Valley of Yosemite National Park. Muir wanted to preserve the natural beauty of the area. Pinchot wanted to create a reservoir to serve the needs of San Francisco. For a discussion of this incident and the changing historical

In his first few years as head of the Division of Forestry, Pinchot was frustrated. His was essentially an advisory role. He wanted to be a forest manager, but he had no forests to manage. Forest reserves remained under the jurisdiction of the Department of the Interior, which he considered incompetent and quasi-corrupt. He persistently agitated for removal of the National Forest Service out of the Department of the Interior and into the Department of Agriculture where he would have free reign to construct and implement management policy. The ascension to the presidency of Theodore Roosevelt, who shared Pinchot's conservationist impulses, provided him a big boost. Pinchot first elevated the Division of Forestry to Bureau status in 1901, which provided him with greater resources.[617] He then focused his attention on transferring management of the nation's 56 million acres of forest reserves to the Department of Agriculture.

Roosevelt was supportive but could not persuade Congress to pass such an act without more support from the West. Pinchot therefore undertook a public relations campaign in the West to convince westerners that they would have nothing to fear from his philosophy of productive forest management, which, he assured them, would be better than the Department of Interior's methods. In 1904, Pinchot traveled through Oregon, California, Nevada, Utah, Colorado and Wyoming. There, he successfully lobbied stockmen and sheepherders to oppose the Department of Interior policies and spoke with newspapers to explain his forest management policies.[618]

In 1905, two prominent Congressional defenders of the Department of the Interior were indicted for fraud in connection with public lands managed by the General Lands Office. The announcement of the indictment bolstered Pinchot's claims that the Department of Interior was

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treatment of Pinchot, *see* Char Miller, "The Greening of Gifford Pinchot," *Environmental History Review*, Vol. 16, No. 3 (1992), pp. 1-20.

[617] *See* Stephen Ponder, "Gifford Pinchot: Press Agent for Forestry," *Journal of Forest History*, Vol. 31, No. 1 (1987), pp. 26-35.

[618] *Ibid*.

corrupt. Soon thereafter, Congress passed the Transfer Act, finally moving the forest reserves to the Department of Agriculture.[619]

Pinchot immediately set to work transforming forest management. He renamed his office the "United States Forest Service" and he renamed the forests themselves as the "United States National Forests" to underscore their essence – to serve the needs of a growing, dynamic and economically vibrant country. Between 1905 and 1910, the number of acres of national forests increased from 56 million to 172 million. During the same period, the number of national forests increased from 60 to 150. Pinchot also expanded the number of Forest Service employees exponentially, sending them to work in the forests of the West. As will be seen in the next section, Pinchot's army of forest rangers began to police the activities of western livestock owners in ways with which they were unaccustomed.

Prodded by Pinchot, Roosevelt used the Forest Reserve Act aggressively (as he did with other conservationist tools) to nearly triple the number of National Forests. Western patience with the discretion accorded the President under the Forest Reserve Act expired. In 1907, Congress amended the Act to remove the Presidential power to proclaim national forests. Theodore Roosevelt reluctantly signed the bill, but not before Pinchot identified, and Roosevelt proclaimed, 16 million new acres worth of national forests.[620] In 1911, Congress further amended the Forest Reserve Act by authorizing Congress to purchase private forested lands in the East, for purposes of watershed protection and timber production.[621] Thus, Congress could act to conserve forests in both the East and West, albeit by purchase in the East, and reservation in the West.

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[619] *Ibid*.

[620] Cecile Brooks-Nicolopoulos, "Forest Policy (1890-1910): The Impact of Two Pioneering Decades," *Revu Francaise d'etudes Americaines*, No. 70, *L'ecologie aux Etas-Unis* (1996), 28-40, 36-37.

[621] The Weeks Act, 36 Stat. 961 (1911).

United States v. Grimaud

When Gifford Pinchot finally succeeded in transferring the Forest Service from the Department of the Interior to the Department of Agriculture, he immediately began a more aggressive implementation of his forest management policies, which included limiting grazing and mineral extraction. To engage in those activities, one needed a permit issued by the Secretary of Agriculture. Pinchot also enlarged the number of employees of the Forest Service, and established forest rangers to police the reserves by arresting those engaged in unauthorized grazing, mining, and timber removal. Such clandestine resource extraction had continued in the 1890s and early 1900s.

One such person who had once enjoyed free access to the public domain for sheep grazing, but then resorted to unauthorized grazing, was Pierre Grimaud. He grazed his sheep without a permit in the Sierra Forest Reserve. One of Pinchot's forest rangers arrested him in 1907. Grimaud challenged his arrest by arguing that the Congressional delegation of rulemaking to the Department of Agriculture was unconstitutional because it was legislation, and legislation belongs in the domain of Congress, not the Executive.[622]

Although the lower court agreed with him, the Supreme Court disagreed. As in *Butte City Water Co. v. Baker*, the Court stated that the power given to the executive in this instance was not legislative in nature. Rather, it was power like an "owner might delegate to his principal agent."[623] According to the Court, the executive, as agent for Congress, had promulgated rules governing the use of government property. Grimaud, the Court said, made "an unlawful use of the government's

[622] Mark Twain is reputed to have said, "History does not repeat itself, but it rhymes." Cliven Bundy's beef, so to speak, with the United States was nearly identical to that of Pierre Grimaud. Upset that his family's ability to graze cattle on the public domain for free had been removed, Bundy and his sons first fought its battle with the Department of the Interior in federal court, and then on federal lands.

[623] *United States v. Grimaud*, 220 U.S. 506 (1911).

property."[624] In authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances, and regulations for the government of towns and cities.[625]

Not only did the Court distinguish the Property Clause's legislative features from its proprietary ones, it also discussed the nature of the discretion committed to the executive in the Forest Reserve Act and its amendments:

> What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another … In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features.[626]

Working out the details of which forest deserves reservation status, the size of those reserves, and the nature of the regulations on the reserves were details that Congress gave to the Executive Branch to work out in its discretion.

Land Use Restrictions as Part of Statehood

Congress recognized that its ability to shape the law in newly admitted states would be curtailed following statehood. Sovereign states, admitted to the union on equal footing with the others, would exercise jurisdiction over traditional areas of common law – torts, property, contracts, family law and others. Further, state governments would exercise the traditional police powers accorded governments – regulation for the health, safety, welfare and morals of the public.

[624] *Ibid*. at 521.
[625] *Ibid* at 516.
[626] *Ibid*.

Only in very limited circumstances would the national government be able to exercise a police power within a state to address, for example, the morals of the society.

Members of Congress were concerned that states would, following statehood, simply revert to their "un-American" systems. New Mexico might reinstitute a parochial system of education. Utah might return to legalized polygamy. Arizona might once again allow a procedure for the recall of judges (which it did). Under an earlier version of American federalism, Congress might have allowed these peculiar institutions to persist in the states that wanted them, assuming Congress had the power to remove them in the first place. However, under the solidifying version of federalism developing in the late nineteenth century, Congress sought greater uniformity of law by rooting out these repugnant practices. Some of the Congress's attempts to prevent these "regressions" were discussed in Part II.

Congress placed a particular condition on statehood for western states that it did not for others. In addition to keeping most of the public domain in federal control, Congress also restricted the western states' ability to sell the public land that they did receive upon statehood. Eric Biber's otherwise thorough study on the conditions imposed upon states as the "price of admission" to the union only briefly discusses public lands. Biber, noting that "sovereignty has been unevenly protected," through differing statehood conditions, writes that "Congress has enormous power through its land grant authority and its regulation of federal lands within the states to control the admitted states."[627] Biber points to conditions placed upon lands granted to the state of New Mexico to illustrate how such conditions were used in the secularization process of the public schools there.[628] Biber, however, did not further investigate these public land restrictions.

[627] Eric Biber, "The Price of Admission: Causes, Effects and Patterns of Conditions Imposed Upon States Entering the Union," 46 *Am. J. Legal History* 119 (April 2004), p. 194.

[628] *Ibid*.

The following provision included in the Enabling Act for the State of Idaho is a good example of a land use restriction placed upon western states:

> §12. Limitations on land grants and their use. – The state of Idaho shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purpose [of funding public schools] in such manner as the legislature of the state may provide.[629]

Congress disallowed the state of Idaho from selling its state-controlled public lands for any purpose other than the funding of schools. This same condition was placed upon Montana, Washington, North Dakota, South Dakota, Wyoming, Oklahoma, New Mexico, and Arizona. The three western states without this condition were the earliest ones to be admitted – California, Oregon, and Nevada. These three non-conditioned states chose to adopt disposal policies, while the conditioned states were obligated to hold those lands in trust. This distinction can be seen in a striking image showing state trust lands in the West:[630]

[629] *See* Idaho Admission Bill, 26 Stat. L. 215, PL 105-96, §

[630] This image is produced by Peter W. Culp, Andy Laurenzi, Cynthia C. Tuell, and Alison Berry, "State Trust Lands in the West: Fiduciary Duty in a Changing Landscape," *Lincoln Institute of Land Policy and Sonoran Institute* (2006), p. 6.

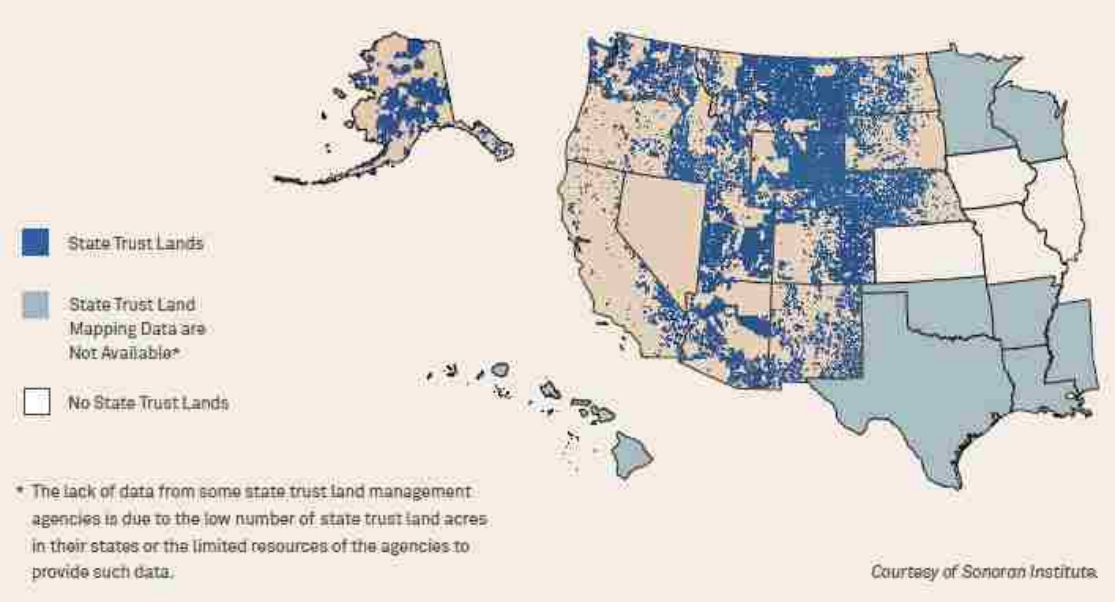

Figure 13 – State Trust Lands in the West

Nevada, where 83% of the land is federally controlled, has disposed of almost all of its granted state land, leaving less than 1% controlled by the state. California and Oregon have made similar dispositions. Those states whose granted lands have been restricted from general disposition continue to manage them to raise revenue for schools, by granting leases for timber removal and other resource extraction, as well as through occasional public sale. The forced retention of granted lands in 12 western states removed from them an option exercised by virtually every other state in the Union – the power to shape the tax base and land ownership of the state through the sale of granted lands to the public. This unique statehood condition disallowed those states the option to raise revenue for projects other than education through the sale of granted lands.

Antiquities Act (1906)

The opening scene of *Indiana Jones and the Last Crusade* depicts young Indiana's attempt to prevent a private antiquities collector from taking possession of an ancient artifact. Setting aside the exciting chase involving horses, trains, snakes, and a lion, the scene underscores a reality of the late nineteenth and early twentieth centuries. During this period, non-Indian settlers and

explorers discovered well-preserved ancient settlements on public lands in the American Southwest, particularly in Chaco Canyon and Mesa Verde. Both professional and amateur collectors raided the sites. According to Mark Squillace, "a consensus emerged among policy officials that this practice had to be stopped and that even … qualified researchers had to be carefully regulated."[631] Squillace adds, "There seems to be little doubt that the impetus for the law …was the desire of archeologists to protect aboriginal objects and artifacts."[632]

Squillace also notes that the legislative history of the Antiquities Act suggests that various factions argued over the expansiveness of the proposed executive power when drafting of the bill. Some Congressman sought a wide-ranging power that would give the President the authority to declare monuments for areas of scenic beauty. Others, primarily from the West, sought to restrict the power to the smallest area possible. Both received some concessions in the final bill, ensuring that the law would continue to be debated for more than a century. Those seeking a restrictive power inserted language that the President could declare an amount of land that was "confined to the smallest area compatible with the proper care and management of the objects to be protected." And while the language from earlier bills that would have protected lands based on their "scenic beauty, natural wonders or curiosities" was stricken, the law nevertheless protects "objects of historic and scientific interest." This latter language is broad enough to encompass areas of scenic beauty since such areas are always scientifically interesting.

The Antiquities Act has been divisive since its inception. Franklin Roosevelt created the Grand Teton National Monument in 1943 in a secretive process that generated such a backlash that when Congress later combined the Monument with Grand Teton National Park, it also

[631] Mark Squillace, "The Monumental Legacy of the Antiquities Act of 1906," 37 *Georgia Law. Rev.* 473, 477-78 (2003).

[632] *Ibid*.

amended the Antiquities Act to exempt Wyoming from any future presidential monument designations.[633] Similarly, after Jimmy Carter created national monuments in Alaska totaling 65 million acres, Congress passed the Alaska National Interest Lands Conservation Act, which requires Congressional ratification of any new land-based National Monument in Alaska greater than 5000 acres.[634] When President Clinton made a surprise announcement in 1996, two months prior to the presidential election, creating the 1.9 million acre Grand Staircase-Escalante National Monument, he and his Interior Secretary Bruce Babbitt were hanged in effigy in southern Utah.[635] President Obama's designations and President Trump's threatened rescissions are the most recent flashpoints in the lengthy war over the use of the Antiquities Act. Because the only areas where large-scale monuments are feasible are in the West, the Antiquities Act and the presidential discretion exercised thereunder create contention in the West.

The heart of the Antiquities Act controversy is not substantive but procedural. Virtually no political leader disputes that some lands are worth withdrawing from the public domain based on their scenic beauty. Many have contested, though, that the process is the problem. The operable language of the Antiquities Act states that:

> [T]he President [may] declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which … shall be confined to the smallest area compatible with proper care and management of the objects to be protected.[636]

[633] *See* 54 U.S.C. § 320301 (d) ("No extension or establishment of National Monuments in Wyoming may be undertaken except by express Congressional authorization").

[634] *See* 16 U.S.C. § 3213 ("No future Executive Branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the state of Alaska shall be effective … unless Congress passes a joint resolution of approval within one year ….").

[635] *See* "New Reserve Stirs Animosity in Utah," *New York Times*, October 13, 1996.

[636] *See* The Antiquities Act, 54 U.S.C. § 320301. By the Act, Congress also made it a crime to "appropriate, excavate, injure, or destroy" historic or prehistoric ruins or antiquities located on U.S. land.

In the exercise of this authority, the President is not required to consult with anyone – not Congress, not inferior Executive Branch departments, not the States, not the Tribes, and not the private sector. The President is not required to give advanced public notice or solicit public comments. The President is not required to conduct any environmental assessments (as the Department of Interior must do when considering whether to designate some public lands as wilderness.) When President Clinton designated the Grand Staircase Escalante National Monument, Utah's congressional delegation and state leaders learned of his plans from the newspaper.[637]

By delegating politically controversial public lands reservation decisions to the President, Congress insulated itself to a degree from criticism. The lighting rod for such criticism has been the Executive. Yet the President is not as politically accountable to local western interests as are their Congressional delegates. By delegating Congressional power under the Property Clause to the President, Congress ensured monument designation decisions would be less the product of parliamentary debate and compromise, and more the product of executive discretion. This housing of the Property Clause power in a single executive entity ensured that that public lands decisions in the West would more fully reflect a national, unified policy, rather than policies that were the products of compromise, crafted by locally-elected and locally-accountable officials.

Who is the Landlord?

The key historical moment for the accretion of power over land in the West to the Federal government was from the 1880s through the first decade of the twentieth century. In that period, Congress systematized the mapping and scientific exploration of the West. It began extensive reservations of the public domain from sale. It restricted the ability of states to sell their own

[637] *See* James R. Rasband, "Utah's Grand Staircase: The right Path to Wilderness Preservation?" 70 *U. Colo. L. Rev.* 483 (1999).

granted lands. It began policing federal lands in the West through the hiring of forest rangers and national park rangers. Perhaps most importantly, Congress hired a landlord. Congress enlisted the Executive branch to manage the property of the United States and gave the President wide latitude. Under both the Forest Service Act and the Antiquities Act, Congress set broad policy objectives but allowed the President to fill in the blanks.

After the last continental states had been organized, and the West had been thoroughly explored, platted and sold, Congress made a few more bureaucratic changes. Concerned about unrestricted grazing on the public domain, Congress in 1934 passed the Taylor Grazing Act, which authorized the Department of the Interior to regulate grazing. The law requires livestock owners to obtain permits from the Department of the Interior in order to graze on public lands, and it permits the Department to limit the number of permits, or eliminate them altogether for areas in drought or for other reasons. Through this Act, Congress created the United States Grazing Service. Then, in 1946, Congress merged the Grazing Service with the General Land Office to create the Bureau of Land Management within the Department of the Interior. Congress passed the Federal Land Policies and Management Act in 1976, formally eliminating the disposition policy and setting a multi-use policy for the public domain, which uses include recreation, timber harvesting, mineral extraction, grazing, and protection of historic and cultural artifacts.[638] The control of public land in the West includes the control its natural resources, the police power over those lands, as well as the power of taxation. In the West, the national government asserted a preemptive right against the states and the tribes to declare and manage permanent public lands.

[638] 43 U.S.C § 1701 et seq.

CONCLUSION:

HOW A NEW FEDERALISM CONGEALED IN THE WEST

John Wesley Powell and other members of the Public Lands Commission wrote in 1879 that national land policy had become "one which regarded the public lands as a field in which the great and rich harvest to be reached consisted of thousands and perhaps millions of good citizens."[639] In order to reap a harvest of "good" American citizens, though, Congress needed to remove some of the tares. These undesirable elements included local laws, customs, values, and people.

An episode from the 1870s demonstrates the ways in which the sovereign boundaries between the federal government, the states, the territories and the tribes were all reorganized in a contest for control of public space and natural resources. Congress created Yellowstone National Park in 1872. By then Congress had abandoned its initial idea to allow state management of public recreation parks. Members of Congress had come to distrust the competence and integrity of local governance. The assertion of direct national management of public parks served to "remove" local authorities – state or territorial – from public lands management. Congress further removed, in a more literal way, another competing sovereign entity from public recreation space – Indians. Initially, Congress did not concern itself with a continued Native American presence in Yellowstone. A small band of Shoshone Indians lived permanently within the boundaries of the new park, as they had for centuries. Other Native American tribes visited the park seasonally for hunting and fishing. Congress, though, came to believe that Native Americans would scare away Anglo-American tourists. To emphasize that it believed National Parks should preserve wilderness, not people, Congress induced the Shoshone to leave Yellowstone, and join a reservation elsewhere. It also authorized the U.S. Army, and later the National Park Service, to

[639] Report of the Public Lands Commission, 1879, VII.

police the boundaries of the park, and prevent Native American hunting and fishing there.[640] Thus, with the creation of national parks, Congress excluded territorial, state, and tribal authority from a defined national space.

What brought about the close of this important period of transformation to the American Federal system? American Imperialism reached its apex in the 1890s with the acquisition and organization of new territory in the Caribbean and across the Pacific. Other scholars have examined the causes of this hunger for new territory and there is no need to replicate their findings here.[641] However, far-flung real estate holdings that were unlikely to attract settlement and governance from Anglo-Americans necessitated new ideas to explain how territories fit within the United States constitutional puzzle. The Spanish-American War, despite having similar expansionist goals as the Mexican-American War, nevertheless spawned new theories of American territoriality, thus marking a turning point and, for our purposes, an ending point in this chapter of American federalism.

As is often the case with military and political action, justification and theory for the exercise of government power came *ex post facto*. One scholar suggests that United States policy-makers turned to the past to find a model for their administration of new islands – specifically English colonialism. However, because "the term 'colonialism' was anathema, [American imperial relationships] had to be cloaked in an American constitutional mantle of facial respectability."[642] This colonial framework is useful when examining the language of the policy and lawmakers who

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[640] *See* Mark David Spence, *Dispossessing the Wilderness: Indian Removal and the Making of National Parks* (New York: Oxford University Press, 1999), 58.

[641] *See, e.g.*, James C. Bradford, *Crucible of Empire: The Spanish-American War and its Aftermath* (Annapolis: United States Navy Institute Press, 1993); Ivan Musicant, *Empire by Default: The Spanish American War and the Dawn of the American Century* (Henry Holt and Company, 1998); and David Trask, *The War with Spain in 1898* (New York: Macmillan Publishing Company, 1981).

[642] Juan R. Torruella, "The Insular Cases: The Establishment of a Regime of Political Apartheid," 29 *U. Pa. J. Int.'l L.* 283, 290 (2007).

attempted to explain the United States' relationship with its new territories and their residents. Legal elites, especially on the Supreme Court, attempted to fit the proverbial square peg (permanent territories) into a round hole (the Constitution) without invoking the language of colonialism in order to maintain continuity with the proud American heritage of colonial revolt, equal footing, and geographic political equality.

Just as Article IV raised its weary head in the 1850s following the expansionist 1840s, it woke up again in the first decade of the twentieth century. At war's end, Harvard Law Review published a series of essays proposing how to govern the new territories.[643] The election of 1900 was partly a referendum on permanent acquisition of islands taken from Spain, with William Jennings Bryan opposed and William McKinley in favor. One of the primary questions posed during the 1900 campaign was "Does the Constitution Follow the Flag?" Finally, a series of Supreme Court opinions, now referred to as the Insular Cases, grappled with the constitutional status of the formerly Spanish islands and their residents.

[643] *Ibid.*, note 30. *See, e.g.*, Simeon E. Baldwin, "The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory," 12 *Harv. L. Rev*. 393, 412 (1899) (arguing that the acquisition of Puerto Rico and the Philippines was constitutional, stating that Congress could establish governments therein once the treaty with Spain is ratified, but also stating that there were several open questions including "[w]hether Puerto Rico can be held permanently and avowedly as a colonial dependence"); C. C. Langdell, "The Status of Our New Territories," 12 *Harv. L. Rev*. 365, 371 (1899) (discussing the definition and scope of the term "United States," and arguing that while the term might encompass the Territories, "the use of the word ... has ... no legal or constitutional significance."); Abbott Lawrence Lowell, "The Status of Our New Possessions: A Third View," 13 *Harv. L. Rev*. 155 (1899) (examining the legal status of territories acquired by conquest or cession, and differentiating between territory acquired with the intention of incorporating it into the United States and territory acquired without that purpose, and stating that constitutional rights do not apply to territory acquired without that purpose); Carman F. Randolph, "Constitutional Aspects of Annexation," 12 *Harv. L. Rev*. 291 (1898) (arguing that the Constitution applies to Filipinos, and that because upon annexation Filipinos owed allegiance to the United States, that they ought to be considered citizens); James Bradley Thayer, "Our New Possessions," 12 *Harv. L. Rev*. 464, 484 (1899) (discussing the constitutional powers over the newly acquired Hawaii and Philippines and urging caution with respect to settling the territorial fate of the Philippines, but less caution with respect to Hawaii).

Scholars disagree about what constitutes the canon of the Insular Cases, with the number of cases ranging from five to sixteen and the dates of decision ranging from 1901 to 1979. For the present purpose of discussing how the theory of territorial governance changed from that of continental territories, the first five cases, all argued in January 1901 and decided on the same day in May 1901, suffice.[644] Juan Torruella identifies three key components of territorial law as applied to the acquisitions from Spain: (1) plenary Congressional authority over the islands and their inhabitants; (2) a distinction between these island territories and all other prior acquisition, based on a new theory of incorporation; and (3) a new set of rules to deal with the particular "problems" associated with the Philippines, which set of rules continued to govern other territories after Filipino independence.[645] As we have seen, Congress did not hesitate to exercise plenary power in the continental western territories when it deemed necessary. Plenary power had been used prior to the governance of Spanish acquisitions and its continued use denotes continuity, not change. What did change, however, was the inevitability of statehood – a theoretical transformation quickly noted by the Supreme Court.

The Court, in order to decide cases involving tariffs on items to and from Puerto Rico as well as the taxation system to be imposed in the islands, drew a distinction between incorporated and unincorporated territories – a distinction that had not previously existed. According to the court, people living in *incorporated* territories were entitled to all the rights of United States citizenship – their territories were on a path to statehood anyway. Those living in *unincorporated* territories could benefit from some, but not all rights and privileges of citizenship. Further, Congress could maintain unincorporated territories in political limbo – not independent, and not a state; not wholly

[644] *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182. U.S. 244 (1901); and *Huus v. New York and Porto Rico S.S. Co*., 182 U.S. 392 (1901).

[645] Torruella, "The Insular Cases," *supra* note 642.

sovereign and not entirely part of the United States.[646] While setting the Philippines on a path to independence that was realized in 1946, Congress has maintained Puerto Rico as a United States Territory with a unique status – a constitution, an Article III judiciary, and its own Olympic team.

In 2012, American citizens in Puerto Rico held a plebiscite to determine the political future of the island. They voted on two questions: (1) whether they wished to maintain territorial status; and (2) what would be their preferred alternative – U.S. state, independent nation, or sovereign nation in "free association" with the United States. A majority voted "No" on the first question. The preferred status of over 60% of Puerto Ricans would be a sovereign state of the United States. Only 5% expressed a desire to become an independent nation. Puerto Rico held another referendum on June 11, 2017, asking essentially the same questions. Although turnout was low, those who voted again voted in favor of statehood.[647] The vote is not binding on Congress. Further, Congress has shown little interest for more than a century in granting greater sovereignty to Puerto Rico.[648] Puerto Rico thus maintains a political position most founders rejected – that of permanent colony.

Three developments converged to bring finality and permanence to the unique period of American law and federalism in the West: statehood (with all attendant conditions), the policy and

[646] For a thorough examination of the legal and political context of the Insular cases, *see* Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* (Lawrence: The University Press of Kansas, 2006). See also James Kerr, *The Insular Cases: the Role of the Judiciary in American Expansionism* (Port Washington, NY: Kennikat Press, 1982). For a recent series of essays by legal scholars examining the Insular Cases, see *Reconsidering the Insular Cases: the Past and Future of American Empire*, Martha Minow, ed. (Cambridge: Human Rights Program, Harvard Law School, 2015). For an argument that the traditional historiography of the Insular Cases (the Constitution did not follow the flag) is wrong, and that the Insular Cases allowed for later de-colonization while respecting elements of republicanism, see Christina Duffy Burnett, "Untied States: American Expansion and Territorial Deannexation," 72 *Chicago Law Rev*. 797 (2005).

[647] *See* Frances Robes, "Despite Vote in Favor, Puerto Rico Faces a Daunting Road toward Statehood," *New York Times*, June 12, 2017.

[648] The political purgatory in which Puerto Rico resides manifests itself in many ways. Puerto Rican citizens are exempt from the federal income tax, but Puerto Rican business are required to pay the federal minimum wage, which some politicians argue hinders the Puerto Rican economy. *See* Kevin Derby,

law developing out of the Spanish-American War, and the decline of federal common law. Statehood allowed for local control of the judiciary, as well as local control of the common law. Even with this local control, states in the West have maintained the law they inherited from federal officials. The lengthy period when federal common law reigned supreme in the West also had lasting effects on substantive law in western states, even after it was disavowed. Finally, the 1898 acquisition of far flung territories populated with racially, culturally and linguistically diverse peoples caused another re-evaluation of territorial sovereignty that demonstrated the flexibility with which Article IV of the Constitution can be interpreted. The governance of the Spanish-American War territories in many ways represented a continuation of previous territorial policies, but with one important distinction – the seeming inevitability of statehood.

The ways in which American Federalism took shape in the late nineteenth and early twentieth century continues to shape modern debates and controversies. Three vignettes from the past 3 years help illustrate how. A better understanding of how the American West shaped American federalism has real potential to influence how we think about these important issues.

The Cattle Rancher

Nevada cattle rancher Cliven Bundy stopped paying federal grazing fees in 1993 after the Bureau of Land Management (BLM), in an effort to protect the desert tortoise, reduced access to public land his family had grazed their cattle upon since the 1880s. Bundy initially fought the

"Marco Rubio unveils EMPLEO Act to jump start Puerto Rico's Economy," Sunshine State News, Dec. 7, 2016, archived at http://sunshinestatenews.com/story/marco-rubio-unveils-empleo-act-jump-start-puerto-ricos-economy. Further, recent federal hurricane relief efforts in Puerto Rico, especially when compared to efforts in Texas and Florida, have again illustrated for many the second or third tier status of Puerto Ricans within the American citizenship framework. *See, e.g.*, Julio Ricardo Varela, "Puerto Rico is being treated like a colony after Hurricane Maria," The Washington Post, September 26, 2017, archived at https://www.washingtonpost.com/news/posteverything/wp/2017/09/26/puerto-rico-may-not-be-a-colony-but-its-getting-treated-that-way/?utm_term=.34ac47924a30.

BLM in federal court. Among other arguments, Bundy contended that his family's use of the land should be exempt from fees because it pre-dated the introduction of the fees in the Taylor Grazing Act of 1934. Bundy lost in court, but continued to refuse to pay the fees, and continued to graze his cattle on BLM land, rendering him a trespasser in the eyes of the BLM. Bundy's obstinacy, and the federal government's attempted round-up of Bundy's cattle in 2014, precipitated an armed stand-off. When a video depiction of the FBI tasering one of Bundy's sons went viral, cattle ranchers and others sympathetic to Bundy rallied to his side in Bunkerville, Nevada. They brought horses, ATVs, trucks, and guns, threatening to shoot federal officials who removed cattle. Federal officials eventually backed down and returned previously apprehended cattle to Bundy, vowing to find an administrative and judicial solution to the impasse. Bundy is currently incarcerated in a federal detention center in Pahrump, Nevada, awaiting trial for his role in the 2014 stand off as well as in another stand off organized by his son Ammon in a wildlife refuge in Oregon.[649]

Bundy characterized his problems with the national government as more than just cattle grazing. "My cattle is only one issue … what they have done is seized Nevada statehood, Nevada law, Clark County public land, access to the land."[650] Bundy argued that the land in Nevada should be controlled by the state, the county, or put into private hands. Bundy, for all the attention he received in the press, was not the first to make such arguments. His battle was not only a continuation of the Sagebrush Rebellion of the 1970s and 80s,[651] but also held echoes of shots

[649] *See* "Matt Ford," The Irony of Cliven Bundy's Unconstitutional Stand," *The Atlantic*, April 14, 2014, archived at https://www.theatlantic.com/politics/ archive/2014/04/the-irony-of-cliven- bundys-unconstitutional-stand/360587.

[650] *Ibid*.

[651] The Sagebrush Rebellion was a movement of the 1970s and 80s to change federal land policy in the West by giving more control to local entities, or at least convincing the federal government to change its use policies back to disposal and/or resource exploitation. *See*, *e.g*., John Baden and Richard Stroup, "Political Economy Perspectives on the Sagebrush Rebellion," 3 *Pub. Land Law Rev*. 103 (1982); Richard D. Clayton, "The Sagebrush Rebellion: Who Should Control the Public Lands," 1980 *Utah Law Rev*. 505

fired by the sheep rancher Pierre Grimaud in the 1890s and early 1900s, who also resisted federal grazing fees and permits. Grimaud lost his legal battle in the Supreme Court in 1911.[652] Bundy lost his battle in the lower federal courts. Bundy's fight is not new, but old – with origins dating to the changes in federal land policy in the late nineteenth century.

The Tribal Leader

Bundy's complaints about the national government's alleged intrusion to local sovereignty are not unique. In 2016, the federal government was set to approve the final leg of an oil pipeline connecting the Bakken oil fields of North Dakota with storage and refining facilities in Illinois. Due to the pipeline's close proximity to the Standing Rock Reservation, its traversing of water supplied to the tribe by Lake Oahe and the Missouri River, and its alleged disruption of sacred sites outside the reservation, the Standing Rock Sioux tribe organized a protest of the pipeline. Protest organizer LaDonna Brave Bull Allard wrote, "The U.S. government is wiping out our most important cultural and spiritual areas. And it erases our footprint from the world, it erases us as a people. These sites must be protected, or our world will end, it is that simple."[653] For Allard, the pipeline represented a threat to tribal sovereignty and even existence.

Proponents of the pipeline argued that it does not cross the boundaries of the reservation. Opponents of the pipeline responded with two points. First, the pipeline crosses land that was promised to the tribe in the Treaty of Fort Laramie of 1851. The United States did not honor that promise, but instead broke up the Indian land into smaller parcels. The tribe's major legal hurdle in making this argument is the United States Supreme Court decision in *Lone Wolf v. Hitchcock*

(1980); and Johanna H. Wald, "The Sagebrush Rebellion: the West against Itself – Again," 2 *U.C.L.A. J. Envt'l Law and Pol'y* 187 (1981-82).

[652] *See* United States v. Grimaud, 220 U.S. 506 (1911).

[653] LaDonna Brave Bull Allard, "Why the Founder of Standing Rock Sioux Camp Can't Forget the Whitestone Massacre," *Yes Magazine*, Sept. 3, 2016, archived at http://www.yesmagazine.org/people-power/why-the-founder-of-standing-rock-sioux-camp-cant- forget-the-whitestone-massacre-20160903.

from 1903 with facts very similar to those surrounding the Standing Rock / DACA protests. As discussed herein, the Court in *Lone Wolf* explicitly stated that Congress has the power to abrogate treaties made with Indian tribes.[654] The Court's decision came near the end of a lengthy renegotiation of sovereign boundaries within the United States and after the Court had declared that in the United States, there can be but two sovereigns – the federal government and the states.

The second argument the tribe has made against the pipeline speaks to the idea of a sovereignty *writ large*. Even though the pipeline falls outside the federally-recognized reservation boundaries, it nevertheless implicates tribal sovereignty in its threat to access to water and access to cultural and spiritual heritage, both of which exist outside the reservation, but are essential to tribal life. The Dakota Access Pipeline protestors ask us to reconsider whether local entities, be they tribes, civic communities, or other organizations, have a say in decisions that fall outside their territorial and legal jurisdiction, but nevertheless affect them as a community.

The Environmentalist

The type of Federal – Indian communication and collaboration envisioned by LaDonna Brave Bull Allard and the Standing Rock Sioux found expression in the designation of the Bears Ears National Monument in Utah in late 2016. During the decision-making process for Bears Ears, President Obama deliberately solicited feed back from local communities, including five Native American tribes with a presence in southeastern Utah. President Obama proceeded with the designation of the 1.35 million acre monument only after having received assurance that a majority of tribal members approved. Some scholars and activists hail this process as a new model for public lands management in the West.[655]

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[654] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

[655] *See* Ethel Branch, "Native Tribes Deserve Respect for Work on Bears Ears Monument," The Hill, Sept. 26, 2017, archived at http://thehill.com/opinion/energy-environment/352386-navajo-nation-deserves-respect-for-work-on-bears-ears-monument.

This is not to say the Bears Ears National Monument in particular, and Monument Designations in general, are not controversial. Utah county and state leaders objected to the Bears Ears Monument Designation, alleging a violation of Utah sovereignty. Upon taking office, President Trump issued an executive order instructing the Department of the Interior to review any monument designation since 1996 of at least 100,000 acres and to make recommendations regarding rescission or reduction.[656] President Trump vowed to "end these abuses and return control to the people."[657] Secretary of the Interior Ryan Zinke began his review in April 2017, upon taking office. On June 12, 2017, Zinke recommended to President Trump that he significantly reduce the size of the Bears Ears Monument and grant greater control of the remaining monument to local Native American Tribes.[658] The legal battle taking shape revolves around the issue of whether the President, who has unilateral authority to create monuments, also has unilateral authority to rescind or reduce them.[659]

For many western states, the controversy generated by the creation of the Bears Ears National Monument was déjà vu all over again. Western state leaders objected to presidential authority to reserve national forests in 1891. As noted in Part III, the Antiquities Act has been divisive since its inception in 1906. Even among those who advocate for federal control of public lands, there is disagreement over the appropriate management policy. Ken Sleight is the real life inspiration for

[656] *See* "Presidential Executive Order on the Review of Designations Under the Antiquities Act," https://www.whitehouse.gov/the-press- office/2017/04/26/ presidential-executive-order-review-designations-under-antiquities-act. By taking the review back to 1996, the Department of Interior can review all the monument designations of Presidents Clinton and George W. Bush, including the even more controversial Grand Staircase Escalante National Monument.

[657] *See* "Trump Orders Review of National Monuments," Washington Post, April 26, 2017.

[658] *See* "Interior Secretary Recommends Shrinking Borders of Bears Ears Monument," New York Times, June 12, 2017.

[659] *See* Mark Squillace, Eric Biber, Nicholas Bryner and Sean Hecht, *Presidents Lack Authority to Abolish or Diminish National Monuments*, 103 VIRGINIA LAW REVIEW ONLINE 55 (2017). *See also* Todd Gaziano and John Yoo, *Presidential Authority to Revoke or Reduce National Monument Designations*, AMERICAN ENTERPRISE INSTITUTE (March 2017).

Edward Abbey's fictional character Seldom Seen Smith in the eco-warrior novel *The Monkey Wrench Gang*. Seldom Seen Smith and three conspirators engage in acts of sabotage against the tools of industrialization in the West. Sleight's environmentalist credentials are bona fide. But even Sleight has significant misgivings over the Bears Ears Monument Designation. "I'm afraid it's going to end up like Arches and Canyonlands [National Parks]. What are we going to do with the hordes of people? That's what I'm afraid of." [660] Sleight's "hordes of people" who threaten the environment are not unlike Muir's "wooly locusts" who likewise brought destructive capacities to the wilderness. Sleight, with his preservationist tendencies, finds himself battling with proponents of the Bears Ears monument over the desirability of increased tourism to fragile eco-systems. The battle between preservationists and conservationists has been fought before, notably between John Muir and Gifford Pinchot. President Obama's designations and President Trump's threatened rescissions are the most recent flashpoints in the lengthy war over public lands in the American West – a continuing heritage of the American Federalism that congealed in the late nineteenth and early twentieth century.

The West is a legal space where the "hazily defined and capacious" concept of federalism received fuller form and clearer definition. The diminution of Native American tribal sovereignty led the Supreme Court to announce that in the United States there can be "but two" sovereigns, instead of many. Territorial administrators in the West, including judges, swept away both traditional common law and territorial legislation that interfered with nationalizing projects – such as railroad installation. In the West, Congress succeeded in putting national policies regarding marriage, education, and land use into law. In the West, Congress attempted, with less success, to

[660] *See* Christopher Smart, "At 87, Eco-legend Ken Sleight of Edward Abbey Fame is Still Fighting Lake Powell, but knows it's a Losing Battle," *Salt Lake Tribune*, June 21, 2017, archived at http://archive.sltrib.com/article.php?id=5398857&itype=CMSID.

control the manner in which state officials, including judges, were selected. In the West, the national government asserted greater control over land than it did in the East. The national government's sovereign boundaries expanded in the West, while those of tribes, states, and territories shrunk.

The boundaries of federalism continue to be debated to this day. Recent flashpoints in the discussion regarding sovereign power include immigration, healthcare, drug legalization, marriage, oil pipelines, national monuments and public grazing. The modern debates, though, are conducted within a federalism framework that gelled not at the Founding, and not during the Civil War, but during the latter half of the long nineteenth century in the American West.

APPENDIX A:
Western Territorial Supreme Court Citations in Contracts Cases

	Total Cases	English Law	Other States	Same Territory	US Supreme Court	No Citations	Treatises
Arizona	18	1	30	6	17	3	9
Colorado	13	6	38	0	7	1	11
Idaho	3	0	0	0	0	0	7
Montana	17	0	118	4	5	5	31
New Mexico	30	9	89	32	42	5	50
Oregon	6	0	14	0	2	3	3
Utah	14	1	27	2	14	4	10
Washington	5	0	13	0	1	2	4
Wyoming	7	0	16	5	2	0	12
Totals	**113**	**17**	**345**	**49**	**90**	**23**	**137**

APPENDIX B:
Western State Supreme Court Citations in Contract Law
(First Fifteen Years of Statehood)

	Total Cases	Territorial Decision	Supreme Court	Other states	Treatise
Arizona	44	15	6	17	23
Colorado	63	18	3	9	51
Idaho	17	0	1	3	7
Montana	33	15	4	4	7
New Mexico	41	9	3	3	57
Oregon	22	0	4	16	16
Utah	61	12	18	12	42
Wyoming	20	4	0	4	8
Washington	78	5	12	12	30
Totals	**379**	**78**	**51**	**80**	**241**

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J.D., 2005; B.A., Economics, 2002; B.A., Philosophy, 2002

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Darling Fellow and Lecturer, Constitutional Law and History, 2017–2018
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Brigham Young University
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Deputy Director, Preserve Nevada, 2014–2015
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Graduate Assistant, History Department, 2010–2014
Editorial Assistant, *Law and History Review*, 2010–2011

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PUBLICATIONS

Tribal Sovereignty and the Recognition Power, 42 American Indian Law Rev. (forthcoming 2018)

Protecting Your Most Valuable Assets: Non-Competition Agreements in the Age of Employee Mobility, ABA Journal (2008)

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The Hybrid Nature of the Property Clause: Implications for Public Lands Management

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TEACHING EXPERIENCE

Stanford Law School, Conflicts of Law, Winter Quarter 2018

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The Incorporation of the Indigenous "Other" into the American Legal System, American History Association, August 2016

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