Indian Sovereignty and Police Powers, 1780-1830

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Between 1780 and 1830, Americans and Natives shared the territory between the Appalachian Mountains and the Mississippi River. Even as the United States claimed sovereignty over the entire region, the reality "on the ground" was that the most significant element of sovereignty, police powers, e.g. defining, judging, and punishing crimes, was often exercised by Indian communities. In those terms, one can glimpse three distinct if often overlapping phases of Native sovereignty. From the 1780s through the early 1800s, the U.S. formally acknowledged the right of indigenous nations to judge and punish crimes by their own people as well as outsiders (including Americans) in their territory. After 1800 the U.S. increasingly sought police powers over non-Natives who committed trespass and other crimes in "Indian Country," and by 1820 the national government began to claim jurisdiction over Indian crimes against Americans throughout the nation. During the subsequent decade a few states arrogantly extended their laws and police powers over Native communities, with at least one (New York) insisting that this was necessary to protect the rights of individuals against "savage" retribution. Yet the extent of federal and state power remained doubtful, particularly in areas still held by Native nations along the edges of federal and state control, and — with the exception of those state efforts to impose jurisdiction — Indian-on-Indian crime remained a matter for traditional Native norms of justice.

The foundations for U.S.-Native legal relations, of course, were laid down in the initial English colonial period during before the Revolution. While some seventeenth-century legal theorists like Sir Edward Coke and John Locke insisted that the English held sway over the wilderness, in reality they recognized the need to negotiate with Natives for land and influence. The royal charters issued before 1650 made no assertion of authority over Natives, and the few issued after the Restoration seemed to envision tribes as jurisdictionally separate from the

colony. As exemplified by the 1621 agreement between Plymouth and Massasoit, the colonial governments generally acknowledged Native sovereignty while simultaneously claiming the right to judge conflicts between individuals from the two groups; this confusing constitution fit English traditions of local varied institutions, with many courts holding intersecting areas of jurisdiction. Before the Seven Years War, each colony jealously sought to control relations with Native nations in or near the territories sketched out by royal charter. After that chaotic war, British imperial reforms included the appointment of two superintendents to hold (supposedly) full authority over relations with Native peoples, and they were instructed that English criminal law did not extend to Indians living outside the reach of provincial authority.[1]

During the War for Independence, most of the Indian Nations between the Ohio and the Mississippi fought alongside the British against the Americans who they (correctly) viewed as aggressive invaders. The conflict in the west was nasty and quite personal, and mostly resulted in a draw although the Americans gained victories in campaigns against the Cherokees, Mohawks, and Senecas. No Indians attended the Paris peace talks, and the resulting treaty in 1783 ending the war and recognizing U.S. independence literally did not mention Native Americans even as it gave the infant nation rights to most of the land between the Atlantic and the Mississippi south of Canada. Under the Articles of Confederation, Section 9, Congress had the sole and exclusive right of "regulating the trade and managing all affairs with the Indians not members of any states" as long as "legislative right of any State with its own limits be not infringed or violated." Today the inherent conflicts of this clause seem obvious, as the territories of the Iroquois, Cherokee, Creek, and others lay within the boundaries of several states. But at the time it seems clear that police powers followed community connections far more than imposed boundaries, and within this framework the infant United States would initially follow the pattern established

by Britain at mid-century.

This structure became clear in the treaties that the U.S. signed with various Native nations between the Appalachians and the Mississippi River in the aftermath of the Paris agreement. This included the 1785 Treaty of Fort M'Intosh with the Wyandots, Ottawas, and others between the Ohio River and Great Lakes; the 1786 Treaty of Hopewell with the Cherokees, Creeks, and Choctaws; the 1786 Treaty of Fort Finney with the Shawnees; and two separate treaties signed at Fort Harmar in January 1789, one with the Six Nations, and the other with the powerful Northwest tribes including the Wyandot, Ojibwe, Delaware, Miami, and others. Congress's commissioners at these conferences took the contemptuous attitude that the Indians had lost the war and would need to surrender some land and formally acknowledge that they were "under the protection of the United States" and so would deal with "no other sovereign" (e.g. England or Spain). But although the U.S. claimed the power to judge violent incidents between individual Natives and Americans, those treaties also explicitly recognized the extensive legal and political powers retained by Native nations. That included not only the police power to judge their own people but to punish "as they please" any outsiders including U.S. citizens seeking to "settle" on their lands, e.g. trespassers.[2]

The United States in this stage of its evolution, a confederation of sovereign states connected only through Congress under the Articles of Confederation, lacked the structure and power to do many things, including enforcing the terms of those treaties — even upon its own people. In July 1787, the Secretary of War described Americans and Indians in the Ohio Valley as equally ready to be "judges and prompt executioners in their own cause," and bemoaned that the national government lacked the funds and troops to "keep both in awe." Two weeks later, Congress's committee on Indian relations recommended taking actions to establish "a system of

civil law" and forestall war in the Northwest, including barring settlers completely from the region and subjecting anyone committing a crime against Indians in the territory to arrest by the Army and court martial before a military tribunal.[3] Nothing noticeable resulted. Such shortcomings were among the many reasons U.S. leaders pushed to replace the Articles with the stronger Constitution.

That stronger national government created in 1789 simultaneously recognized the sovereignty of Native communities while treating tribes as slightly subordinate entities.[4] This makes sense in the system of divided powers imbedded in the new Constitution, *imperium et empirio*, which reserved interstate and international concerns to the national government while leaving other things to states including the broad arena of police powers. That concept developed during the Renaissance when Italian jurists interpreted Roman law in new ways to justify their cities' political autonomy within the Holy Roman Empire.[5] The Constitution reserved to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Article I, Section 8), seemingly placing Indians on par with states and foreign nations. Yet it failed to list Indians or tribes among the long list of potential parties in controversies to be judged by federal courts—an absence unexplained by the records from the Philadelphia convention or the debates over the proposed Constitution, and which four decades later would provide the foundation for Marshall's critical ruling in *Cherokee Nation v. Georgia*.[6]

This ambiguity about the status of Native nations continued as the new government gathered. Congress implied that it considered tribes *not* sovereign by assigning "Indian affairs" to the Department of War rather than the Department of State, yet Henry Knox, the first Secretary of War, told President George Washington in July 1789 that Native nations "ought to be considered as foreign nations, not as the subjects of any particular state."[7] Ten months later,

Secretary of State Thomas Jefferson pointed at the international norms advocated by Grotius and Vitoria in insisting that Native peoples held absolute title to their lands—for him the ultimate evidence of sovereignty—unless the United States obtained it by war or treaty.[8] A few months later, as Creek delegates met with U.S. officials in New York to negotiate a new treaty, Jefferson insisted that nation had the right "to withhold their commerce, to place it under what monopolies or regulations they please," including trading with only a "company of *British* merchants"[9]—recognition of a substantial level of Indian sovereignty.

For many years federal Indian policy held this course even as the extent of Native police powers to deal with white crime remained unclear. The first comprehensive Native policy, the Trade and Intercourse Act (TIA), enacted by Congress on July 22, 1790, mandated that if any American committed any crime or trespass against "the person or property of any peaceable and friendly Indians" in "any town, settlement or territory belonging to any nation or tribe of Indians," they would be tried in federal courts as if committed "against a citizen or white inhabitant" of that state or territory.[10] That last measure seemed to strip Native nations of the power to punish trespassers that had clearly been part of those initial treaties, a clear and unexplained contradiction. That contradiction is best explained by the Act's primary purpose: to remind Americans that the new national government held absolute authority over relations with Native peoples, as most of the articles focused on the power that the President held to license and regulate traders and to negotiate land purchases from Native peoples.

Congress renewed the Trade and Intercourse Act every three years, repeating most of the measures from the first along with increasing detail about why and how American trespassers were to be apprehended and tried in federal courts, and by 1802 providing for the reimbursement of property damage from acts by Natives outside the designated "Indian Country." None

recognized Native authority to deal with *any* offenses committed against them by outsiders. On the other hand, the Acts barely sought to regulate Native behavior *within* Indian Country, only barring compensation if an aggrieved Indian took revenge instead of using the federal courts, which "presupposed the continuation of a robust indigenous jurisdiction."[11]

Thus, although the TIA was very significant in terms of national-state relations, treaties were far more important in shaping the "ground rules" for relations between Native nations and American citizens. Indeed, a treaty with the Creeks signed just three weeks after the TIA was enacted repeated much of the 1786 Treaty of Hopewell including the right of that tribe to punish American and other trespassers as they wished.[12] The next major treaty, between the Cherokee Nation and the U.S. signed on July 2, 1791, moved a little closer to the few TIA rules. It gave the Cherokee power to punish "as they please" any U.S. citizens trying to settle on their lands, but as per the TIA any American who committed a crime in Cherokee territory against any friendly Indians were to be delivered to a federal court where they would be tried and punished, and more significantly the same was to be done with any Cherokee who committed capital crimes against any U.S. citizens. In addition, state governors rather than Cherokee or federal officials were given the duty and authority to issue passes to U.S. citizens entering Cherokee lands. The treaty further specified that in case of violence on persons or property by an American against a Cherokee, or vice versa, neither nation would retaliate until they were explicitly denied satisfaction.[13] But the most significant aspect of both agreements was left unstated and simply assumed: that Native communities, inside and outside state boundaries, retained absolute police powers over their own, which was also the primary power held by state governments.

The TIA and these treaties meant that, at the turn of the century, as the infant national

government sought traction, the territory between the Mississippi River and the Appalachian Mountains became a region with fluid jurisdictional boundaries between Natives, national authorities, and some states. Perhaps the best study of this situation is Lisa Ford's examination of Cherokees, Creeks, and settlers in western Georgia. Ford points out that Georgia's 1797 and 1799 Judiciary Acts made the boundaries of the state's *settled* counties the effective boundaries of its police powers, while within Georgia's far more expansive political lines the Trade and Intercourse Acts created a separate federal jurisdiction *and* the Cherokee and Creek exercised sovereign powers. With these overlapping zones and the weak federal administration, individual conflicts and crimes often involved diplomacy as well as legal jurisdiction (as it had in early Plymouth); and to settle conflicts Natives and Americans both resorted to traditional modes of reciprocity and retaliation or to "liminal, extrajudicial forums, set up by federal officers in Indian Country with Indian consent." This situation as well as political strife among the states on the Atlantic coast meant that "federalism itself was in the process of becoming" through the War of 1812.[14]

Not surprisingly, such jurisdictional ambiguity could result in violence, highlighting the grey zone between crime and war. This was immediately apparent in the Appalachian borderlands along the Cumberland River as aggressive American colonists sparred with Creek and Cherokee factions who had refused to sign the peace treaties. In fall 1791, Secretary of War Knox told Southwest Territory Governor William Blount to deal with recent "depredations" by Indians in the Cumberland area by calling up the local militia and sending an emissary to the offending tribe demanding that they "devise some mode for the punishment of their guilty young men."[15] On the other side, just two weeks later, Blount warned the local U.S. commanding officer to anticipate trespassers because a grand jury had refused to indict Americans who had

sought to establish a settlement that violated treaty boundaries.[16] Territorial Judge David Campbell urged President Washington to get Congress to authorize attorneys to investigate and indict treaty violators, and to give him and other judges the explicit power to try and punish those violators. Interestingly, it was Secretary of State Thomas Jefferson, not Knox, who wrote back thanking Campbell and noting his own preference for "making war against the intruders" over war with outraged Natives.[17]

The violence continued, fed in part by Native anger at American settlements but more so by the resulting cycle of punishment and revenge. In July 1792, Blount reported Creek raids on American settlements along the Cumberland River and acknowledged that those actions were punishment for trespass for which the Natives believed they had "a right to steal horses and in case of opposition to kill.[18] Nine months later, he told Knox of his efforts, in the wake of continued attacks by Creeks, to stop "*disorderly, ill disposed*" Americans from violating treaties by attacking nearby Cherokee towns and expressed his frustration at trying to keep the peace in an area where settlers threatened to trigger new wars and territorial judges told him that they lacked the authority to try the offenders.[19] North Carolina Senator Benjamin Hawkins, three years later appointed U.S. agent to the Creeks, told President Washington that these conflicts were generated by American intrusions, and that forts and other federal posts should be established on the U.S. side of the treaty border in order to avoid war.[20]

Native and U.S. officials sought to keep a lid on the violence by following the terms of the treaties that had recognized Native sovereignty and their right to punish lawbreakers. In mid-1793, a frustrated Governor Blount called for "a victorious *national* war" against the Creeks, but Secretary Knox warned him that Congress had to first declare war and authorize offensive measures against Native nations.[21] At the end of the year, two Creek men in a hunting party

were “treacherously murdered” by Georgians, and the seven survivors ran to a nearby U.S. fort to demand justice as well as protection. Their leader, Bird-Tail King, reminded the fort commander that the President in 1790 had personally given him assurances of safety and peace, but—as per treaty terms—agreed to wait to see how American officials would deal with the situation before retaliating.[22]

The situation in the Cumberland area in the 1790s highlighted the ambiguities of crime and punishment in an area of fluid jurisdictions. In July 1794, a raiding party of Creeks killed an American farmer, John Ash; the leader of a Cherokee community who had maintained good relations with the United States sent his son and others to join two U.S. officers in pursuit, capturing one. That man was indicted for murder by a grand jury, and in response told the court that his people were at war with the United States. The jury found him guilty of murder anyway and sentenced him to die; he clearly saw that as no different than the torture and death his people often dealt out to war captives, and told the Americans that his death would similarly be revenged.[23] About a year later, Secretary of War Timothy Pickering told Blount that the U.S. had the responsibility to protect the peace with Native nations. We cannot complain about Cherokees stealing horses from American settlers, he told the Governor, “while we suffer our own Citizens to rob them of their Lands” or (in violation of the Holston Treaty) to hunt or destroy game on Cherokee lands.[24] Governor Blount told a couple of territorial officials that he suspected that American settlers were heading for Cherokee territory, violating the Holston Treaty, whereby Native leaders would consider themselves “authorized to take what they term Satisfaction by Killing the Citizens of the United States.”[25]

The same fluid jurisdictional patterns marked Native-U.S. relations in the Northwest territories, shaped by the same wars, similar treaties, strong Native nations, intrusive groups of

colonists, and the national Trade and Intercourse Act, As Beth Saler noted in *Settlers' Empire*, until 1816 "federal agents, state officials, and independent western settlers stepped on each other's toes as they competed for sovereign rights to the lower Northwestern region," along with "Native peoples who themselves were organized into formidable multi-tribal alliances" often supported by England.[26] "Stepped on each other's toes" is an apt description of how the grey area of jurisdiction and police powers, and with it the boundary between crime and war, was marked by violence against persons and property.

As in the Southeast, Native nations maintained autonomous systems of crime and systems of punishment, usually barely noticed or acknowledged by Euro-Americans colonists or U.S. officials. Witchcraft seemed to increase as a problem at the turn of the century, particularly among the Seneca in the area coming under New York's sway, but also further west among the Shawnee and Delaware in the Ohio Valley, and many elderly women and a few controversial sachems were executed at the direction of prophets or community leaders. Witchcraft accusations were often connected to the disruptive influence of Christian missionaries, land agents, or American officials, and the controversies and killings roiled communities and sometimes generated further conflict and violence.[27] The few U.S. agents sent to live among Indian nations, tasked with warding off white intrusions and implementing the administration's "civilization policy," sought to get tribes to implement Anglo-style rules and courts, but found that traditions of communal property and clan revenge still held sway.[28]

Efforts to fulfill the terms of treaties faced problems with clashing interests and traditions, not just with regards to boundaries and land rights but also the "system" of dealing with crimes committed by Natives against Americans. Indeed, retaliation and the primacy of family had deep roots in both American and Native cultures. In late 1790, the Senecas (as per

the recent Treaty of Fort Harmar) surrendered two men charged by the U.S. for crimes against Americans, to be tried in federal courts and punished according to New York law. Instead, the two men were brutally lynched by whites. A month later, when Cornplanter and two other Senecas leaders met with President Washington in Philadelphia, their complaint about the outrage emphasized their people's sovereignty. In the Harmar treaty, they told the President

> . . . we agreed to deliver up those of our people who should do you any wrong, that you might try them, and punish them according to your law. We delivered up two men accordingly, but instead of trying them according to your law, the lowest of your people took them from your magistrate, and put them immediately to death. It is just to punish murder with death; but the Senecas will not deliver up their people to men who disregard the treaties of their own nation. Innocent men of our nation are killed one after another, and of our best families; but none of your people who have committed the murder have been punished. . . was it intended that your people should kill the Senecas, and not only remain unpunished by you, but be protected by you against the revenge of the next of kin?[29]

President Washington responded that he "sincerely lament[ed]" the violation and promised to continue "the rewards offered for appropriating the murderers" until they were caught and punished "as if they had killed white men." But soon after, four Senecas, three men and a woman, were murdered at Big Beaver Creek in Pennsylvania by twenty-seven white men, and Secretary Knox promised "to bring the murderers to justice," and ordered General St. Clair to look into the affair, console the relatives and compensate them for stolen property.[30] The U.S. also followed Native traditions to settle such problems, and provided public recognition of Iroquois sovereignty, by sending Timothy Pickering to gather the Six Nations, provide gifts including compensation for stolen property, and repeat Washington's promise to punish the men who had murdered their people. Pickering's instructions pointed to how U.S. officials were motivated in part by the desire to get Iroquois men to join their forces and avoid the hostile Northwest Confederation which included the Miami, Delaware, Shawnee, and others.[31]

There must have been many additional instances of violence between Indians and whites in the region at the end of the century, as there had been in the Southeast, but those were probably cloaked by the "hot war" from 1791 through 1795. As already noted, in a time of war it was difficult to distinguish murders from killings justifiable under international norms of warfare, and in such circumstances Native punishment of crimes committed by Americans against their territory or people, as authorized by treaties, would have gone unnoticed, unreported, or misinterpreted. After the U.S. victory at the Battle of Fallen Timbers, most of the leaders of Native nations in the Northwest Confederation signed the Treaty of Greenville on August 3, 1795, in which both sides promised an end to the war in exchange for Native recognition of U.S. control of about three-quarters of what would become Ohio. The treaty included the same provision as in earlier treaties, that if any white person presumed to settle upon Indian lands, the tribe "may drive off the Settler, or punish him in such manner as they shall think fit," and the U.S. promised on its side to consider taking action "to break up and remove and punish the Settlers."[32]

By 1800 it had become clear that the Treaty of Greenville along with two other contemporaneous agreements had fundamentally shifted the balance of power between Native nations and the United States. The Greenville agreement opened the contested area to U.S. forts and colonists and dramatically increased American political and cultural influence in the upper Ohio Valley. Perhaps even more significant in geopolitical terms were the treaties that the U.S. signed with Britain and Spain, in which the former agreed to leave a series of strategic forts in the Great Lakes area and the latter opened the Mississippi River to American traffic. Together the three agreements opened the gates to large-scale American settlement and provided a huge

stop towards making real the American dreams of a continental "Empire of Liberty." As already noted, each new Trade and Intercourse Acts provided more details in warning how Americans who committed trespass and other crimes against Indians would be captured, tried, and punished in federal courts under territorial or state law. But now U.S. officials, in a much stronger geopolitical position, began to also tell Native peoples that they insisted on the power to bring to trial and potential punishment any and all Americans who committed crimes including trespass in territories still held by Native nations.

Thus immediately after the passage of the 1802 TIA, the new Choctaw agent Silas Dismoor was instructed to tell the Choctaws that if they found any Americans attempting to settle or hunt they "must do him no injury or violence" aside from driving off his cattle or horses before delivering the violator to a federal magistrate to be fined or imprisoned. Similarly, he should arrest any trader operating in Choctaw territory without a U.S. permit (regardless of what the Choctaws wanted), after which they could confiscate his goods. Dismoor was also to tell the Choctaw that (as per the TIA) the U.S. had the duty to imprison and fine any American who entered Choctaw territory and "commit[ted] robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians. The U.S. would even pay for any damage or theft done by Americans — unless the Choctaw sought to enforce their own laws (if that involved violence) against the transgressor.[33]

Yet even with that expansion of federal authority, "Indian Country" remained a region effectively outside the reach of state and territorial laws and courts. Non-Indians who had connections to Native communities, or who were willing to risk potential danger, could escape arrest, imprisonment, and punishment for minor transgressions. In December 1805, Mississippi Territorial Judge Harry Toulmin told a friend that he and others thought debtors could escape

civil proceedings by crossing into Choctaw territory, although though their property on the U.S. side of the border could be attached and confiscated. A few years later, the acting governor of the same territory, Thomas Williams tells the Secretary of War that a court there had recently issued a judgement against a debtor, but that individual by leaving and residing among the Choctaws could no longer be reached by territorial agents.[34] This could have been another incentive for U.S. agents to push to extend the country's law and courts into Native territories, carving out absolute jurisdiction in anything related to their own people.

In 1803 the Louisiana Purchase nearly doubled the size of the United States overnight, and similarly increased its willingness to assert authority over Native nations. The connections between the country's expansion of territory and jurisdiction became apparent in the new treaties negotiated with Native nations around the Great Lakes and the lower Mississippi Valley. In November 1804, at St. Louis, the U.S. signed its first treaty with the Meskwaki (Fox) and Sauk (Sac), promising to protect them "against their own citizens, and against all other white persons, who may intrude upon them." Those nations were barred from punishing violations or injuries by "private revenge," in a clear change from treaties in the 1780s and 1790s. Instead, the injured individual was to report the violation to the nearest U.S. Indian agent and turn over the violator to be punished in the state or territorial court. Native leaders promised to try and find and return any horses or other property stolen from American citizens, and U.S. promised to pay for any property a citizen might steal from Indians. Most significantly, the U.S. insisted on the sole power to arrest and try any "white person" who tried settling on tribal lands.[35] This new wave of treaties explicitly forbade Natives from exercising internal police powers against outsiders. though the U.S. in them made no effort to impose its laws or courts upon those Nations but instead left them to govern and regulate themselves as they pleased.

During the following year, the Sauk became involved in a war with the Osage, a powerful tribe in the Missouri territory that played a critical role in the fur trade operating out of St. Louis. Rumors reached the new Louisiana Territorial Governor, James Wilkinson, that the Sauk also intended to attack American settlements in the region. In October 1805, Wilkinson and Indiana Territorial Governor William Henry Harrison negotiated a treaty, intended to settle intertribal conflicts and prevent attacks on Americans, between the Osage and Native nations along the upper Mississippi including the Sauk, Meskwaki, Delawares, Miamis, Potawataomis, Kickapoos, Kaskaskias, and Ioways. All of them promised peace, and that if that peace was disturbed by the "misconduct of individuals" they would not retaliate but make a formal complaint to the injuring party and seek a peaceful resolution. If that effort had no result, they promised to go to a U.S. official who would then use their influence to force a resolution.[36]

Just two months later, Wilkinson warned Sauk leaders that some of their warriors had been accused of killing four white men—three who were hunting along the branch of the Missouri River sixty miles from St. Charles, and one near Freemore's Salt Lick, near modern Hannibal—and warned them of terrible retribution if they did not surrender the men. He also angrily reminded the Sauk that, under the recent treaty, U.S. jurisdiction extended to crimes committed between members of two different tribes. (He also told them that authority extended to incidents of violence within a Native community, though that claim seems contrary to the laws and treaties at the time.[37] Apparently the Sauk or others managed to mollify Wilkinson, as he nor other American officials pursued the matter.

Perhaps the problem was that, despite the treaty and Wilkinson's bluster, U.S. as well as Native leaders were dubious that Americans laws and courts had jurisdiction in "Indian Country." That was highlighted by the first case I could find of Natives tried for murder in the

Missouri territory: two Ioway men accused of killing Joseph Marechal (or Joseph Tebeau), "a white Citizen of the United States, on May 30, 1808, at an outpost where the Grand River emptied into the Missouri River. They were captured, jailed in St. Louis, and indicted and tried there by a special court of oyer and terminer, ordered by Territorial Governor Meriweather Lewis under authority of 1802 Trade and Intercourse Act. When the jury found the two guilty, their lawyer moved for a new trial with at least some jurors who spoke the same language (French?) as the accused. The judge agreed, whereupon the new jury again found them guilty. At this point, on July 1809, their lawyer moved to stay the judgement on the grounds that the offense in the indictment "is not contemplated nor provided for by the law of Congress regulating intercourse with Indian tribes." —and the judge agreed.[38] Early in the following year, now-Territorial Governor William Clark pointed to this trial as showing that it was "indispensably necessary" for the U.S. to purchase rights to the region from the Osage in order to extend American jurisdiction over the territory.[39]

The reality that Indians lived outside U.S. effective jurisdiction was also demonstrated further northeast. The story began at Portage de Sioux on the Missouri River about 100 miles north of St. Louis where, on July 20, 1810, a Native party stole goods and horses from some white settlers and headed west. The settlers gave chase, and when they stopped for the night the Indians attacked, killing four of the pursuers. Governor Clark investigated, determined that the likely culprits were Potawatamis, and on September 10th met with the Potawatami leader Gomo at his village near Peoria. Gomo told Clark that his people were not involved, hinted that those responsible were allied with Tecumseh and Tenskwatwa, and (Clark thought) promised to get them to surrender to Illinois authorities. Nothing happened until June 1811, after several Potawatamis raided several homesteads in St. Clair County, Illinois, stealing forty horses, killing

two settlers, and taking a girl captive until a pursuing party allowed her to escape. Illinois Territorial Governor Ninian Edwards sent a force of rangers to arrest the suspects, but instructed its leader to check with Gomo to ensure that they were pursuing the right men. In the resulting negotiations, Gomo argues that American settlers had recently abused and killed Indians without punishment, and that the Treaty of Greenville required reciprocity so that when Indians delivered killers then the Americans must do likewise. These discussions dragged into the summer of 1812, ending only with the onset of the War of 1812, when Edwards led Illinois militia on a scorched-earth campaign in the area, killing many and destroying villages including Gomo's.[40]

The situation in these U.S. territories in the early nineteenth century is strikingly similar to that created nearly two centuries earlier by the 1621 treaty between Plymouth and Massasoit. That agreement recognized Wampanoag sovereignty *and* colonial jurisdiction over Anglo-Indian conflicts, so that (despite the seemingly one-sided language) cross-community conflicts were actually diplomatic matters, and when such disputes occurred a Wampanoag sachem served as the gatekeeper for the Indian side of the process even as Plymouth's courts became the places to resolve the conflict.[41] In such cases, jurisdiction could would inevitably be affected by many elements, including conflicting cultural norms such as potential punishments. A particularly prominent example was the deep Native disgust at the public hangings imposed for murder by American judges. U.S. officials were quite aware of this problem; indeed, in January 1802, President Jefferson asked Congress to consider mandating that in the future Indians subject to capital punishment would be shot by a military firing squad rather than hung, as that would make it far more likely for Native nations to surrender suspects to U.S. authorities. Later that year, as if to confirm Jefferson's concerns, the prominent lawyer John Edgar at Kaskaskia reported that, after a Delaware man had been condemned to die, about fifty of that Nation had gathered and

angrily declared that if he was hung they would kill every white man they met. “They appear to be dissatisfied chiefly with the mode of execution,” he worriedly noted, and “our own Indians [Osage?] are also dissatisfied.”[42] In such circumstances, acknowledging the Native right to diplomacy — an essential aspect of sovereignty — was more necessary and useful than insisting that the U.S. possessed absolute police power.

Not surprisingly, U.S. jurisdiction over Indian-on-Indian crime faced far greater handicaps. A particularly enlightening example, in late 1806, was what happened to Mechosee (Younger Bear) after that Ojibwe chief went to Michigan Territorial Governor William Hull to report that he had killed one of his Nation, a “bad Man” who had “murdered a number” of Ojibwe and twice tried to poison him — essentially an execution. Mechosee was immediately arrested by the territorial marshal and imprisoned, indicted for murder, and tried in the territorial Supreme Court. Before the trial, Hull asked President Jefferson to pardon the “very powerful Chief.” Secretary of State James Madison quickly dispatched a pardon, which proved unnecessary as, by the time it arrived in Detroit, the jury (many with French surnames) had already found Mechosee not guilty and accused freed.[43] It seems clear that the jury either accepted the Ojibwe leader’s justifications or considered members of that Nation outside the jurisdiction of U.S. law, and apparently that was also the view of Governor Hull and President Jefferson.

A similar conclusion must have been reached by Mississippi Territorial Governor David Holmes in June 1810 when, after Territorial judge Harry Toulmin jailed two Indians (Illetchetubb and Jim), on charges of murdering a third Indian, Chealebeh, when he considered the circumstances and issued pardons for the two before a trial could occur.[44] Then there were the many Native communities within the limits of the United States that lay beyond the effective

reach of American authorities, such as those at Prophetstown in the Indiana territory, where Tecumseh and his brother Tenskwatawa condemned several opponents to death, including the Wyandot leader Shateiaronhia who in 1810 was accused of witchcraft and executed.[45] Of course federal officials pushing the "Civilization" program hoped that Indian groups would adopt EuroAmerican modes of justice, controlling their own people in line with states and territorial laws and preparing the way to be incorporated into the United States. This seemed to be the trend among the Creeks, as Benjamin Hawkins reported in 1812 that Nation had punished their own for murder and theft by ear cropping, whipping, and executions, rather than the traditional restitution or revenge.[46]

After 1815 this jurisdictional pluralism and with it Native sovereignty would be increasingly undermined. U.S. victory in the War of 1812 eliminated the English and Spanish as counterweights to American power, and in the Ghent peace negotiations the U.S. commissioners spurned Indian autonomy within the nation's boundaries.[47] The country's mushrooming population and ever-more commercialized agriculture, especially in the South with its staple crop of cotton, drove and pulled more Americans into borderland territories and beyond, generating more power for state and territorial governments along with more problems for Native peoples. American officials became quite willing to manipulate, cheat, and intimidate Native leaders in order to get land cessions, pressure Natives to move west, and more firmly establish American law and institutions.[48] They were also increasingly likely, like the head of the St. Stephens Land Office in Mississippi Territory in 1816, to demand that the U.S. military attack Native communities in order to ensure the security of U.S. citizens "within the jurisdiction of our laws."[49]

Perhaps most notably, Congress in 1817 enacted a measure that assigned federal courts jurisdiction over any crime committed by an Indian against an American within any U.S. territory.[50] The effective reach of that measure can be glimpsed in the arrest and trial of Santee Sioux (Dakota) believed to have for killing "a Frenchman and a half breed" near a fort being constructed at Council Bluffs. Secretary of War John C. Calhoun had instructed General Henry Atkinson to tell the Santee band that "the Government held the entire band responsible for the conduct of its people, and unless they prevent such outrages in future and arrest and surrender the offenders, in the present case, as soon as they can be found, that summary punishment will eventually fall upon the band." By June 1821 the accused were jailed in St. Louis, and Calhoun told Territorial Governor William Clark that their trial was deemed critical "to make a proper impression upon the Indians as to the justice and dignity" of the United States government.[51]

That same year a Menominee and an Objiwa were tried in the Supreme Court of the Michigan Territory (in Detroit) for two separate murders of Americans residing in the Upper Mississippi Valley. At the arraignment, the attorney for the Ojibwa argued that those Native nations "were both sovereign and independent, exercising exclusive jurisdiction" in their territories. While the territorial attorney admitted that the crimes had taken place in areas not yet sold to the United States, he insisted that Indian tribes were conquered and so had lost soil and dominion — the same argument Chief Justice John Marshall would make two years later in *Johnson v. McIntosh*. The Court agreed with the latter and found the two defendants guilty; they were hung on Dec. 27, 1821.[52]

Yet U.S. officials continued to recognize the need for diplomacy rather than force, particularly in outlying areas far from American populations and power where they lacked the troops necessary to police boundaries and stop whites from abusing Natives or vis versa.[53] This

seems to have particularly apparent in the Michigan Territory. Governor Cass told Secretary of War Calhoun in May 1819 that Michigan had as many or more Indians than white settlers and that he needed more troops to enforce federal laws. At the time he also reported several Native assaults on whites and killings of their horses and livestock, but noted that none of these represented organized hostilities.[54] Three years later, the territorial governor told the newly appointed Indian agent, Henry R. Schoolcraft, that the Natives he would be working with lived "beyond the line of our military posts . . . exposed to an undue share of foreign influence," and that he would have to negotiate carefully in order to support the power and laws of the United States.[55]

Even territorial judges seemed uncertain as to how much authority was held by the U.S. outside of areas settled by Americans. In 1824, Ojibwas intent to raid their traditional Sioux enemies were heading down the Mississippi River when they got into a fight with a trader from Prairie du Chien and killed him and all of his boat crew. Word of the killings reached U.S. officials, who demanded and got twenty-nine to surrender. After questioning, seven were indicted and jailed at Mackinaw, formerly Michilimackinac, which for at least a century had been a prominent Anishinnaabe trading village. When the district court finally met, the Ojibwe or their counselor argued the U.S. lacked jurisdiction over the case, and the judge was sufficiently persuaded to delay the trial until the following term. As winter set in, the irritated, weary, and cold prisoners cut their way out of the log jail and escaped.[56] Over a year later, in August 1826, U.S. Superintendent of Indian Affairs Thomas McKenney joined Governor Cass at a major conference with the Ojibwa and others at Fond du Lac, where the ceremonies were largely shaped by Native traditions. One of those ceremonies involved, by prior arrangement, McKenney demanding the surrender of the escapees. One there "was called up and formally

examined" by McKenney and Cass, who judged him "clearly innocent"—and then told him (and all listeners) that if they thought him guilty then they would have taken him for trial, and if found guilty "he should have been hanged." The next day the four leaders of the band promised to surrender the rest in the spring.[57] This entire exchange seems so shaped by ritual that the modern reader is inclined to the view that it was done to allow the Americans to conclude the mess while saving face.

Michigan's expanse, which at the time also included what became Minnesota and Wisconsin, made it unsurprising that Native sovereignty outweighed U.S. jurisdiction in Michigan's expanse, Thus Calhoun in 1824 told Captain Josiah Snelling, commander of the fort at the junction of the Minnesota and Mississippi rivers, to pursue the Ojibwas who had assaulted and murdered several citizens — but only to warn them of "the just and swift punishment of the Government" in the indeterminate future if those who committed the crimes were not surrendered.[58] One year later, a party of U.S. surveyors were confronted by Potowatami and Ottowa leaders, sparking a brawl in which one American was mortally wounded and the two Indians wounded and arrested. The head of the party decided, however, once he realized the great distance to Detroit, to release the Indians on their promise that in the future they would not interfere with surveyors.[59]

In these "remote" areas, Indian insistence on jurisdiction as well as land and resources was manifest in their punishment of trespassers. For example, in 1827, the Winnebagos (Ho-Chunks) took action against Americans lead miners who had invaded their territory near Prairie du Chien; in retaliation for the Americans' trespass, poaching, and "great indignities," the Natives took to stopping travelers, issuing threats, destroying property, and beating men. The violence crested in the killing of a "half breed" trader and his family, ordered by Winnebago

leaders and carried out by a detachment led by Red Bird. In September, McKenney travelled to Portage for the ceremonial surrender of Red Bird and another from his band. The Indian Superintendent was extremely impressed by Red Bird's appearance: he told the apologetic Winnebago spokesmen that he would accept their offer of twenty horses in place of others who may have committed violence in the outbreak, advised them in the future to seek the assistance of the U.S. agent, and told all present that the two accused would come with them in dignity (rather than in chains) to stand trial. Unfortunately, Red Bird died while in jail in February 1828.[60] Shortly afterwards, Secretary of War Peter Porter ordered U.S. troops into the area to arrest and remove American trespassers, in an effort to maintain peace and increase U.S. authority in the region.[61]

Even as the U.S. worked to extend its authority over all incidents involving Americans in "Indian Country," all recognized that Native-on-Native crime remained under the Native jurisdiction and norms of justice. That was apparent in an incident during the 1827 war between Ojibwe and Sioux. On May 28th, within a short distance of Captain Snelling's fort, the Sioux met to parley with the Ojibwas and accepted their hospitality — but later in the day opened fire on them without provocation, wounding six men, one woman, and an eight-year-old girl. Two died. Two days later about 350 Sioux paraded in front of the fort, apparently to taunt the Americans. The captain ordered out an Army detachment which managed to capture nine of the Sioux; he then handed them over to the Ojibwas who promptly executed the two Snelling thought responsible for organizing the assault.[62] Two years later, in a Michigan Territory circuit court, the Menominee war chief Oshkosh was put on trial for murdering a Pawnee in an area that all agreed had been sold to the United States, with all Native rights extinguished. But the jury exonerated Oshkosh any way, accepting his plea of *Lex Talionis*, the law of retaliation, holding

that that action was acceptable under the tribe's custom.[63] In October 1837, Michigan Indian agent Henry Schoolcraft told an Odawa that, with regards to an accusation of murder, that "an Indian killing an Indian on a reserve . . . Which is still 'Indian Country,' did not call for the interposition of our law. Our criminal Indian code, which is defective, applies only to the murder of white men in the Indian country."[64]

By the 1820s there was a noticeable shift in how Americans perceived Native peoples. Popular culture including novels (most notably James Fenimore Cooper's *Leatherstocking Tales*), plays (*Metamora*), and children's stories from New England women writers, embraced the "Noble Savage" motif that sympathetically cast Indians as innocents. Some even depicted the Indians as deeply wronged by aggressive Puritans. But regardless of this more sympathetic view of the past, this fiction along with the emerging wave of local histories agreed that it was all inevitable: that Indians by nature were unable to adapt to civilization and those that remained in "settled" areas were headed for extinction.[65]

These perceptions were echoed by federal officials who began to urge enticing or requiring Indian nations to move west of the Mississippi. Although Indian Removal (aka the Trail of Tears) is connected (for good reason) with President Andrew Jackson, the drive for the new policy became clear after the War of 1812. One of the first public calls for removal appeared a report from the Senate Committee on Public Lands in January 1817, which emphasized that policy as a solution for the "evils and inconvenience" of the current irregular frontier including "mixed" towns like Vincennes and St. Louis. The uncertainty of jurisdiction in such circumstances was clearly part of that concern. By 1824, U.S officials from President James Monroe to Calhoun to McKenney were urging removal as necessary to *foster* Native nations,

especially those already along the road to "civilization." Intriguingly, they did not discuss Indian sovereignty in relation to that prospective policy, and McKenney long protested that his support for removal was predicated on *effective* U.S. support for Native sovereignty and land rights once they'd taken land west of the Mississippi.[66]

But Americans *were* becoming increasingly dismissive of Native sovereignty during the 1820s. The flourishing of scientific racism joined with the centuries-old Discovery doctrine to recharge older tropes that Indians were savage hunters who lacked government and therefore ownership of the areas across which they chased game. As Chief Justice John Marshall opined in the 1823 case *Johnson v. McIntosh*, the first Supreme Court case focused on Native peoples, "the tribes of Indians inhabiting this country were fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible because they were . . . ready to repel by arms every attempt on their independence."[67] Cass, McKenney, and others increasingly emphasized that Natives peoples were rapidly falling into "decay" and approaching extinction east of the Mississippi River due to their inability to adapt to civilized society. That view became U.S. policy after Andrew Jackson's election.

Closely connected to this shift was the effort by some states to extend their criminal laws and jurisdiction over Native nations. The most famous was Georgia's moves in 1828 and 1829, designed to dynamite and expel the Cherokee Nation, and included a ban on Indians testifying against white men. Andrew Jackson made it clear during his 1828 campaign, and again after taking office, that Indian tribes must move beyond state boundaries or accept state laws, and in April 1829 the new Secretary of War John Eaton told Cherokee leaders that they had no legal standing, that Indians were merely occupants and the states were sovereign. President Jackson

delivered the same message to Congress eight months later, that the Indians must remove or accept state laws. In 1830, Georgia arrested and convicted Corn Tassel for killing another Cherokee on tribal lands; while the Supreme Court ordered the state not to execute him until it could hear his appeal, the state carried out the sentence after commissioning a panel of judges to decide in their favor on the question of sovereignty.[68]

Georgia's aggression was driven by the twin desire to take Cherokee land and eliminate the threat of a Native nation that had just demonstrated its independence by writing a constitution. But it was not the first state to take such action, and in fact when they did so they pointed to the precedent set by New York. In 1822 the Empire State imposed its laws on the Iroquois and other Native peoples, in part for the same motivations that later drove Georgia, but also because two controversies involving Senecas seemed to confirm the "vanishing Indian" trope, particularly the idea that those who remained east of the Appalachians were disorderly and decaying "mixed blood" remnants who would benefit from the individual rights and social order best protected by state law. Those assumptions in part grew out of a broader criminal law reform movement which included, most famously, the establishment in the 1820s of penitentiaries such as those at Auburn and Sing Sing, designed to reform law breakers by isolating them from "bad influences."

This effort in New York began in summer 1796, in Herkimer County about fifty miles northwest of Albany, when magistrates charged three Indians with murder: Saucy Nick (Oneida), who killed American Kearny Grafts at a tavern on the Oneida reservation, and Ayamonte (Tuscarora) and Captain Kee (Cayuga) who killed other Indians. Previously the Six Nations and the U.S. government had maintained the arraignment, formalized by the Treaty of Canandaigua in 1794, that in cases of cross-cultural crime the conflict would be resolved by having the

injuring party "cover the grave" (provide a settlement) for the injured or their relatives. But the Herkimer magistrates now clearly felt that, as an August 23rd article in *Whitestown Gazette* opined, that "It is as much a duty we owe to the human race to subject [the Indians] to the government of our laws, as to confine a madman in society." Cayugas and Oneidas protested this intrusion on their sovereignty, as did the New York attorney general, and the Herkimer County juries apparently acquitted all three men.[69]

Six years later, the state decided to intervene directly when a Seneca man, Stiff-Armed George (or Seneca George), was accused of the assault and murder of John Hewitt, a white man, on the Seneca reservation near Buffalo Creek on July 25, 1802. After the Seneca Nation reluctantly surrendered George, their leader Red Jacket campaigned to stop the trial. He gave several speeches directed at Governor DeWitt Clinton, insisting that the Seneca "are independent of the state of New York," with "different laws, habits, and customs from the white people," and ceremonially presented Clinton a copy of the Canandaigua Treaty. He also appealed to the federal government to fulfill the usual custom and pointed to several murders by whites of Senecas that the U.S. had settled by "covering the grave." Governor Clinton scorned such ceremonial reparations as repugnant to the state laws that he intended to enforce among the Senecas as with other New Yorker, and in keeping with the Jefferson administration's preference for state powers Secretary of War Henry Dearborn refused to get involved. George was convicted on Feb 23, 1803, but the jurors petitioned the state to pardon him as he had killed in self-defense and they acknowledged the frequent abuse of Indians. Dearborn asked Clinton to give George a pardon, and finally he did so— effectively acknowledging Seneca power.[70]

The big shift came in 1822, after the Seneca tribal government condemned Caugh-qua-tauw as a witch and sent Tommy Jemmy to execute her. New York State indicted Jemmy for

murder and jailed him on May 5, 1821. The Senecas immediately insisted on their sovereign immunity, especially since the matter involved only Senecas on Seneca territory. But the state pushed the matter, assuming that the reason for the killing, witchcraft, would discredit the Indians and (in the name of progress and rights) smooth the effort to impose its jurisdiction. The judge provided room in the court for a Seneca delegation, and Red Jacket actually sat next to Jemmy's attorneys and helped in the trial. His attorneys decided to assert Seneca sovereignty and challenge the court's authority, calling Jemmy's act a lawful action beyond the reach of New York courts. The jury reached a verdict that confirmed that argument, so the prosecution moved to hold judgement and asked for the case to be transferred to the State Supreme Court. That trial in August 1821 went over the same territory, and at the end the judges decided to release Jemmy without ruling on the matter. The following spring, at Clinton's behest, the state legislature formally pardoned Jemmy and enacted a law asserting criminal jurisdiction over Indian tribes. New York would exercise that power without challenge until 1912.[71]

Georgia's more infamous actions triggered the significant Supreme Court decisions in *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgi*a (1832), in which Marshall backtracked from his *McIntosh* doctrine to affirm that Indian tribes were "domestic dependent nations" outside of the reach of state governments. His rulings spotlit the ambivalent state of American Indian constitutionalism; he held that Native nations were *not* subject to the political or legal jurisdiction of states, but as "domestic dependent nations" they *were* subject to federal authority. Together those rulings shoved Indians into constitutional quicksand. Rarely noted is that, in February 1830, the House Committee on Indian Affairs had issued a report insisting not only that Europeans had long held "the fundamental principle that Indians had no rights, by virtue of their ancient possession, either of soil or sovereignty," but also that such powers were

properly welded by the state governments grounded in the civilized Christian principles of the Bible. That was, not surprisingly, also the report introducing the controversial Removal Bill.[72]

Of course, as we all know, Marshall's decision in the Worcester case had little immediate effect and a small group of Cherokees leaders soon felt forced to sign the Treaty of New Echota giving up the Nation's land in exchange for recognition of land and sovereignty west of the Mississippi. Other states soon followed New York and Georgia. By 1832, Alabama and Mississippi had proclaimed their jurisdiction over the Creeks and Choctaws, and in 1833 the Alabama Supreme Court sneered in *Caldwell v. State* that the Creek Nation's laws were at best "a high pretension of savage sovereignty."[73] One year after that ruling, Governor Robert Lucas of Ohio tried to put pressure on the Wyandots to go west by threatening to have state laws extended over their Grand Reserve. By late March 1835, Lucas reported hearing that the legislature was assigning the area of the Grand Reserve to various townships, preparatory (as Georgia had done) to expanding their jurisdiction and laws over the tribe.[74]

This movement brings us to southern New England and the Native groups there who had survived King Philip's War (1675-1676) and rebuilt their communities during the eighteenth century. The provincial legislatures gave them a distinctive legal status along with reservations of varying sizes, generally with a fair level of autonomy although (especially with regards to economic matters) sometimes under the authority of appointed guardians. They never signed any treaties with the new United States. By the mid-nineteenth century, two hundred years after the English invaded, Indians in the region were highly literate Christians working mostly as mariners or farmers and, particularly to outsiders, seemed very much like non-Indians, especially since most were the children of endogamous marriages—they simply did not "look" Indian, but "black." As a result, they became the first target of termination in the name of human rights and

civil equality. New England elites increasingly embraced a vision of liberal human rights and racial equality that, along with their biochromatic racialism, inspired them to call for the end of the laws that had set aside tribal reserves and treated Indians as legally distinct. Between 1860 and 1880, all three states terminated nearly all of the tribes in the region.[75] When this program was widened by the federal government, the end of Native sovereignty became an explicit part of the nation's "civilization" program.

Native sovereignty is usually considered purely in terms of territory. But this story highlights how, although an indigenous community's clear right to a delineated area was important to maintain its autonomy (perhaps increasingly so), critical elements of jurisdiction and police powers were not always coterminous with reserved territory. Instead, particularly during the first few decades of this country's history, Indian sovereignty was acknowledged and respected within the internationally recognized boundaries of the U.S. In addition, while scholars generally (and correctly) emphasize how American policies towards Native peoples were driven by ethnocentrism, fears of foreign conspiracy, and land hunger, this history points to the evolution of U.S. federal system of government between 1780 and 1830 as another significant element. We all know that during that period the national government gained political and economic power within and without. A strong argument can also be made that the states made similar gains during the same period, even as constitutional conflicts often involved tensions between central and state governments. But Native nations need to be acknowledged and studied as major elements in and even shapers of this evolving federal system, as they maneuvered to maintain their sovereignty against both national and state American governments.

[1] PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004), 94, 106.

[2] Gregory Dowd, *A Spirited Resistance*, *The North American Indian Struggle for Unity, 1745-1815* (Baltimore: Johns Hopkins University Press, 1992); Reginald Horsman, *Expansion and American Indian Policy, 1783-1812* (Michigan State University Press, 1967), 19-30; Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* (University Nebraska Press, 1962), 32-33; Charles Kappler, ed., *Indian Affairs: Laws and Treaties*, Vol. II, *Treaties* (Washington, D.C.: GPO, 1904), 6-21. The Hopewell Treaty clearly supplanted the 1785 Treaty of Galphinton between Georgia and some Creek leaders, in which that state had claimed the power to try and punish any whites who injured Indians and (more ambiguously) required that any Indian who committed a "capital crime on any white person" to "receive a punishment adequate to such offense; Treaty of Galphinton, Georgia and Creek Indians, November 12, 1785, in *Indian Treaties, Cessions of Land in Georgia, 1705-1837,* ed. J. E. (Louise) Hays, WPA Project, no. 7158, 1941, in Georgia Department of Archives and History, pp. 171-73. Transcribed from Treaty Book 1773-1796, pp. 1236-1239, in Department of Archives (Georgia).

[3] Clarence Edwin Carter, ed., *The Territorial Papers of the United States*, vol. 2, *The Territory Northwest of the River Ohio, 1787-1803* (Washington, D.C.: GPO, 1934). 31, 58.

[4] One of the few Native-centered studies of American Indian sovereignty, Russel Barsh and James Henderson's *The Road,* emphasizes that the men who forged the Constitution believed that the country's character featured distinctive small territorially bounded political communities, which readily included autonomous Indian tribes; Barsh and Henderson, *Road: Indian Tribes and Political Liberty* (University of California Press, 1980), 6-26.

[5] Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge, University Press, 1978), 1: 6-82; Anthony Pagden, *The Burdens of Empire: 1539 to the Present* (Cambridge University Press, 2015), 3-14.

[6] The Articles of Confederation had reserved for Congress the power to make agreements or treaties "with any king, prince, or state" (Article 6) and of "regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own lists be not infringed or violated" (Article 9). The Articles did not create any federal courts or executive.

[7] An Act to Establish an Executive Department, to be denominated the Department of War, August 7, 1789, Ch. 7, 1 Stat. 50; Henry Knox to George Washington, July 7, 1789, *The Papers of George Washington*, ed. William Abbot, *Presidential Series* (Charlottesville: University Press of Virginia, 1989), 3: 138.

[8] Jefferson, "Opinion on Certain Georgia Land Grants, May 3, 1790, *Papers of Thomas Jefferson*, 16: 406-9.

[9] Jefferson, "Opinion on Macgillivray's Monopoly of Commerce with Creek Indians," 29 July 1790, *Papers of Thomas Jefferson*, 17: 288. My emphasis in the quotation.

[10] An Act to Regulate Trade and Intercourse With the Indian Tribes, July 22, 1790, https://avalon.law.yale.edu/18th_century/na024.asp, accessed April 4, 2022.

[11] For the texts of all of the Trade and Intercourse Act see *Statutes of the United States Concerning Native Americans*, The Avalon Project, Yale University, http://avalon.law.yale.edu/subject_menus/namenu.asp, accessed January 18, 2019; quotation from Ford, *Settler Sovereignty*, 34.

[12] Treaty between Creeks and the United States, August 7, 1790, *American State Papers*,

vol. 1, *Indian Affairs* (Washington: Gales and Seaton, 1832), 82.

[13] Cherokee-U.S. agreement, July 2, 1791, *American State Papers*, vol. 1, *Indian Affairs,* 124.

[14] Ford, *Settler Sovereignty*, 32.

[15] Clarence Edwin Carter, ed., *The Territorial Papers of the United States*, vol. 4, *Territory South of the River Ohio, 1790-1796* (Washington, D.C.: GPO, 1936), 77.

[16] Carter, ed., *Territorial Papers*, vol. 4, 79.

[17] Carter, ed., *Territorial Papers*, vol. 4, 101, 131.

[18] Carter, ed., *Territorial Papers*, vol. 4, 160.

[19] Carter, ed., *Territorial Papers*, vol. 4, 435-36.

[20] Hawkins to Washington, February 10, 1792, in Carter, ed., *The Territorial Papers of the United States*, vol. 2, *Northwest 1787-1803* (Washington: Gales and Seaton, 1834), 368.

[21] Sec of War to Blount, May 14, 1793, Carter, ed., *Territorial Papers*, vol. 4, 257.

[22] *American State Papers*, *Indian Affairs*, 1: 474-476, quotes pp. 474, 475.

[23] *American State Papers*, *Indian Affairs*, 1: 502; Albert Goodpasture, "Indian Wars and Warriors of the Old Southwest, 1730-1807," T*ennessee Historical Magazine* 4 (1918): 3254-55..

[24] Carter, ed., *Territorial Papers*, vol. 4, 387, 392.

[25] Governor Blount to Alexander Kelley and Littlepage Sims, December 1, 1795, in Carter, *Territorial Papers*, vol. 4, 408-9.

[26] Bethel Saler, *The Settlers' Empire: Colonialism and State Formation in America's Old Northwest* (Philadelphia: Univ of Pennsylvania Press, 2015), 27; Bruce Smith, "Negotiating Law on the Frontier," in *The Boundaries Between Us: Natives and Newcomers along the Frontiers of the Old Northwest Territory, 1750-1850*, ed. Daniel Barr (Kent: Kent State University Press,

2006), 161-77.

[27] Matthew Dennis, *Seneca Possessed: Indians, Witchcraft and Power in the Early American Republic* (Philadelphia: Univ of Pennsylvania Press, 2010), 83-110; Dowd, *A Spirited Resistance*, 38-40, 136-38.

[28] On Benjamin Hawkins' experience among the Creeks, circa 1799, see Florette Henri, *The Southern Indians and Benjamin Hawkins, 1796-1816* (Norman: University of Oklahoma Press, 1986), 216-18.

[29] Cornplanter, Half-Tree, and Great-Tree to George Washington, December 1, 1790, *American State Papers*, *Indian Affairs*, 1: 142. The transcript identifies the relevant treaty as the Treaty of Fort Stanwix, signed in 1784, but the terms about dealing with crimes only appeared in the later Treaty of Fort Harmar, January 1789.

[30] *American State Papers, Indian Affairs*, 1: 142, 145.

[31] *American State Papers*, *Indian Affairs*, 1: 142-45, 165-66.

[32] Carter, ed., *Territorial Papers*, vol. 2, 529.

[33] Carter, ed., *Territorial Papers*, vol. 5, *The Territory of Mississippi, 1798-1817* (Washington DC: GPO, 1937), 147-48. Section 2 of the 1802 Act imposed on violators a fine of up to $100 or imprisonment for up to 6 months; Richard Peters, ed., *The Public Statutes at Large of the United States . . . 1789 to March 3, 1845*, 8 vols. (Boston: Little and Brown, 1846), 7: 141.

[34] Carter, ed., *Territorial Papers*, vol. 5, 436, 730; see also generally Ford, *Settler Sovereignty*. Toulmin was Superior Court Judge for the Tombigbee District of Mississippi Territory, and the first U.S. district judge to hold court on Alabama soil

[35] Sac and Fox agreement with the U.S., November 3, 1804, *American State Papers*, vol. 4, *Indian Affairs* (Washington: Gales and Seaton, 1832), 694.

[36] Carter, ed., *Territorial Papers*, vol. 13, *Papers relating to the Foundation of the territory of Missouri-Louisiana, 1803-1806* (Washington DC: GPO, 1948), 234-37, 245-47.

[37] Carter, ed., *Territorial Papers*, vol. 13, 300-302.

[38] Carter, ed., *Territorial Papers*, vol. 14, *Papers relating to the Territory of Missouri-Louisiana, 1806-1814* (Washington, D.C.: GPO, 1949), 301-312. This was where in 1723, Etienne de Veniard, Sieur de Bourgmont built Fort Orleans, which was to become a central part of the French Louisiana territory. Today it is located in Brunswick, Missouri, in the central north part of the state, which boasts that it is the state's pecan capital.

[39] *American State Papers*, *Indian Affairs*, 1: 765

[40] Smith, "Negotiating Law on the Frontier," 161-70.

[41] Daniel Mandell, "The 1621 Massasoit-Plymouth Agreement and the Genesis of American Indian Constitutionalism," Pauline Maier Early American History Seminar, Massachusetts Historical Society, March 3, 2020; Katherine Hermes, "Jurisdiction in the Colonial Northeast," *American Journal of Legal History* (1999): 65-66.

[42] A*merican State Papers*, *Indian Relations*, 1: 653, 655.

[43] Carter, ed., *Territorial Papers*, vol. 10, *Territory of Michigan 1805-1820* (Washington DC: GPO, 1942), 79; William Wirt Blume, ed., *Transactions of the Supreme Court of the Territory of Michigan*, 6 vols. (Ann Arbor: University of Michigan Press, 1935-1940), 1: 71, 369-70.

[44] Carter, ed., *Territorial Papers*, Vol. 6, *The Territory of Mississippi, 1809-1817, continued*, (Washington DC: GPO, 1938), 69-70.

[45] Frederick Hodge, *Handbook of North American Indians North of Mexico,* 2 vols. (Washington, D.C.: GPO, 1907), 1: 761.

[46] *American State Papers*, *Indian Affairs,* 1: 811. 839, 844.

[47] United States commissioners to British commissioners, Ghent, October 1814, in Papers of *Henry Clay* (Lexington: University of Kentucky Press, 1959-1991), 1: 984-985.

[48] Ford, *Settler Sovereignty*; Richard White, *The Roots of Dependency: Subsistence, Environment, and Social Change among the Choctaws, Pawnees, and Navajos* (Lincoln: University of Nebraska Press, 1983); Daniel Usner, "American Indians on the Cotton Frontier," *Journal of American History* (1985): 297-317; White, *The Middle Ground*.

[49] Carter, ed., *Territorial Papers*, vol. 6, *The Territory of Mississippi, 1809-1817, continued*, (Washington DC: GPO, 1938), 659.

[50] "Crimes and Offenses Committed within the Indian Boundaries," US House Journal, 1817, Fourteenth Congress, session 2, Ch. 93, 93, Statute II, 527

[51] Carter, ed., *Territorial Papers*, vol. 15, *The Territory of Louisiana-Missouri, 1815-1821, continued*, (Washington DC, 1951), 636-37, 674-75, 685,732.

[52] Michael Witgen, "Seeing Red: Race, Citizenship, and Indignity in the Old Northwest," *Journal of the Early Republic* 38 (2018): 601-602

[53] John Jamison to Sec. of War Calhoun, March 31, 1817, Carter, ed., *Territorial Papers*, vol. 15, 257-258.

[54] Carter, ed., *Territorial Papers*, vol. 10, *Territory of Michigan 1805-1820* (Washington DC: GPO, 1942), 827-831.

[55] Carter, ed., *Territorial Papers of the United States*, vol 11, *The Territory of Michigan 1820-1829 Continued*, (Washington, D.C.: GPO, 1943), 148, 250.

[56] Thomas McKenney and James Hall, *History of the Indian Tribes of North America*, 3 vols. (Philadelphia: Edward Biddle, 1836), 1: 57. McKenney noted that U.S. demands for

Natives charged with crime "has always been a difficult and delicate subject, in the relations of our government with the Indians, in consequence of the very wide difference between their moral code and our own."

[57] Thomas McKenney, *Sketches of a Tour to the Lakes, of the Character and Customs of the Ojibwey Indians, and of incidents connected with the Treaty of Fond du Lac* (Baltimore: Fielding Lucas, Jr., 1827).

[58] Carter, *Territorial Papers*, vol 11, 587

[59] Carter, *Territorial Papers*, vol 11, 662-63, 667-69.

[60] Carter, *Territorial Papers*, vol 11, 1101-1103; Thomas McKenney, *Memoirs, Official and Personal; with Sketches of Travels Among the Northern and Southern Indians . . . Two Volumes in One, 2nd ed.* (New York: Paine and Burgess 1846), 108-111, "great indignities" and details on the killing, pp. 130-31.

[61] Carter, *Territorial Papers*, vol 11, 1209.

[62] Carter, *Territorial Papers*, vol 11, 1082-83.

[63] Witgen, "Seeing Red," 601-602

[64] Witgen, "Seeing Red," 581-82, 603, citing Schoolcraft, *Personal Memoirs*, 610.

[65] Mandell, *Tribe, Race, History: Native Americans in Southern New England, 1780-1880* (Baltimore: Johns Hopkins University Press, 2008), ch. 5.

[66] John P Bowes, *Land Too Good for Indians: Northern Indian Removal* (Normal: University of Oklahoma Press, 2016), 57-58.

[67] J*ohnson & Graham's Lessee v. McIntosh*, 1823, 21 U.S. 590.

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

27-39.

69 Alan Taylor, *The Divided Ground*: *Indians, Settlers, and the Northern Borderland of the American Revolution* (New York: Vintage, 2007), 317-19.

[70] Taylor, *Divided Ground*, 319-21; Dennis, *Seneca Possessed,* 206-8.; Clinton to Dearborn, August 21, 1802, *American State Papers Indian Affairs*, 1: 667.

[71] Dennis, *Seneca Possessed,* 208-14.

[72] Bowes, *Land Too Good for Indians: Northern Indian Removal* (Norman: University of Oklahoma Press, 2016), 61-62, citing "Removal of Indians," House of Representatives Reports of Committees, *U.S. Serial Set,* 21st Cong., 1st Session, No. 200, Report No. 227.

[73] Harring, *Crow Dog's Case*, 17, 38-39.

[74] Bowes, *Land Too Good for Indians*, 137-38.

[75] Mandell, *Tribe, Race History*.