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# The Adjudicatory State: Sovereignty, Property, and Law in the U.S. Territories, 1783-1802

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# The Adjudicatory State: Sovereignty, Property, and Law in the U.S. Territories, 1783-1802

## **Abstract**

“The Adjudicatory State” traces the collision between the federal legal vision for the early American West and the preexisting laws and customs that governed the region. To administer the vast region it obtained in the 1783 Treaty of Paris, the United States created the territorial system, under which federal officials would temporarily govern western “territories” until they achieved statehood. The federal government would also survey and sell the public domain to private purchasers. But these grand plans ran afoul of territorial realities. Both the Northwest Territory, encompassing much of the present-day Midwest, and the Southwest Territory, encompassing present-day Tennessee, were borderlands, places where Native peoples, French settlers, Anglo-American intruders, and land companies contended for sovereignty and property. Instead of crafting a new legal order, federal officials found themselves barraged with preexisting claims. The polyphony of claims played out especially clearly in the contests over land and so-called “Indian affairs.” In the territories, title derived from a complicated blend of Native, French, British, and state law. It fell to federal officials to understand and translate these plural rights of ownership into the single federal title that would undergird the federal land system. In Indian affairs, federal officials embraced a vision of federal sovereignty in which federal law would serve as the impartial arbiter in conflicts between Native nations and U.S. citizens. Yet early American law encompassed too much ambiguity and localism for centralized authority to succeed. Instead of relying on law, federal officials ultimately attempted to secure both peace and allegiance through liberal payments of federal funds to both Natives and U.S. citizens. The federal government’s role in the territories as an adjudicatory state adhered neither to an account that emphasizes federal power’s inexorable westward march nor to a straightforward narrative of federal failure against local customary practice. Through resolving claims, federal government slowly accreted authority, but in ways that defied

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THE ADJUDICATORY STATE:  
SOVEREIGNTY, PROPERTY, AND LAW IN THE U.S. TERRITORIES, 1783-1802

Gregory Ablavsky

A DISSERTATION

in

History

Presented to the Faculties of the University of Pennsylvania

in

Partial Fulfillment of the Requirements for the

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To the memory of Lev Ablavsky, who had hoped to see the completion of my  
doktorskaya dissertatsiya

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Every work on the history of the public lands seems to feel the need to apologize for the technicality and occasional dryness of the topic. I was fortunate: I found early American land practices so strange, at least to modern eyes, and full of such interesting characters as to obviate much of this tediousness. But I was doubly fortunate in having an exceptional community of advisors and supporters to sustain me when the legislative history of obscure land statutes occasionally bogged me down.

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research, forthcoming as a published comment, on Natives and the constitutional law of war in the 1790s.

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## **ABSTRACT**

### **THE ADJUDICATORY STATE: SOVEREIGNTY, PROPERTY, AND LAW IN THE U.S. TERRITORIES, 1783-1802**

Gregory Ablavsky

Daniel K. Richter

“The Adjudicatory State” traces the collision between the federal legal vision for the early American West and the preexisting laws and customs that governed the region. To administer the vast region it obtained in the 1783 Treaty of Paris, the United States created the territorial system, under which federal officials would temporarily govern western “territories” until they achieved statehood. The federal government would also survey and sell the public domain to private purchasers. But these grand plans ran afoul of territorial realities. Both the Northwest Territory, encompassing much of the present-day Midwest, and the Southwest Territory, encompassing present-day Tennessee, were borderlands, places where Native peoples, French settlers, Anglo-American intruders, and land companies contended for sovereignty and property. Instead of crafting a new legal order, federal officials found themselves barraged with preexisting claims.

The polyphony of claims played out especially clearly in the contests over land and so-called “Indian affairs.” In the territories, title derived from a complicated blend of Native, French, British, and state law. It fell to federal officials to understand and translate these plural rights of ownership into the single federal title that would undergird the federal land system. In Indian affairs, federal officials embraced a vision of federal sovereignty in which federal law would serve as the impartial arbiter in conflicts between Native nations and U.S. citizens. Yet early American law encompassed too much ambiguity and localism for centralized authority to succeed. Instead of relying on law, federal officials ultimately attempted to secure both peace and allegiance through liberal payments of federal funds to both Natives and U.S. citizens.

The federal government’s role in the territories as an adjudicatory state adhered neither to an account that emphasizes federal power’s inexorable westward march nor to a straightforward narrative of federal failure against local customary practice. Through resolving claims, federal government slowly accreted authority, but in ways that defied classification as strong or weak. The process traced here also blurred the sharp dichotomy between informal and formal law, and suggests how the rise of federalism helped channel the plural claims of the borderlands into a framework of dual sovereignty.

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## Introduction

In 1783, two Anglo-American settlers, William McCormick and Edward Lucas, recorded legal land claims known as preemption rights before the local court. McCormick and Lucas lived in a tiny settlement along the Cumberland River formerly known as French Lick, recently renamed Nashville, described by one visitor as a “recently founded place” with only two real houses. The court was labeled the District Court, North Carolina Cumberland District, since Nashville was nominally part of North Carolina, though in fact the court existed without any formal state authorization. Later that year, the court’s presiding officer and the town’s founder, James Robertson, entered a contract with the North Carolina politician William Blount. Blount was to obtain as many military land rights as he could, probably fifty or one hundred thousand acres, for Robertson to locate around Nashville.<sup>1</sup>

Two hundred miles north, residents of the town of Vincennes along the Wabash River—a nearly century-old French settlement that had recently become part of the expansive territory of Virginia—were also engaged in routine legal transactions. Dominique Burguant, Josete Poirer, and Vital Bouche had entered a land contract, recorded in French and sworn before a local notary, that sold a lot “of the depth of one street to the next” for 2,000 livres in pelts. A couple of years earlier, Thomas Jefferson, Virginia’s governor, had sent a letter to Vincennes. It was for Jean Baptiste Ducoigne, a leader of the local Piankeshaw nation. Jefferson assured the Piankeshaws that the “great

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<sup>1</sup> “Cumberland District Ct. Records,” 3R, January 20, 1783, Reel 224, Tennessee State Library and Archives; *ibid.*, May 6, 1783; “Col. James Roberson to William Blount, Articles of Agreement” October 30, 1783, Folder 1, MSS49353, William Blount Papers, Manuscript Division, Library of Congress [hereinafter WBP:LC]. On early Nashville, see Kristofer Ray, *Middle Tennessee, 1775-1825: Progress and Popular Democracy on the Southwestern Frontier* (Knoxville, Tenn.: University of Tennessee Press, 2007); an older and somewhat romantic account can be found in Harriette Simpson Arnow, *Seedtime on the Cumberland*, (East Lansing, MI, USA: Michigan State University Press, 2013).

council in Philadelphia” would see “justice done you.” Responding to Piankashaw complaints about “the want of goods,” Jefferson informed Ducoigne that he would try to send them ammunition and other items, but that after the war’s end the Piankashaws would “be well supplied through the rest of your lives.” This diplomacy reflected the long-standing regional custom of using gifts to cement relationships between Natives and non-Natives.<sup>2</sup>

While the residents of Nashville and Vincennes practiced everyday law, they likely had only a vague sense that, much further east, across the Atlantic, representatives of the United States were concluding a treaty that purported to determine the question of sovereignty over both settlements, along with much of the rest of North America. Ultimately, the agreement they reached, the 1783 Treaty of Paris, ended the Revolutionary War between Britain and the United States and ceded the United States all British territory east of the Mississippi River, north of Spanish Florida and south of British Canada.<sup>3</sup>

To the leaders of the United States, the Treaty represented a watershed, a validation of their long struggle for independence, nationhood, and territory. For the next twenty years, the United States would struggle to determine what, exactly, sovereignty and ownership over such an enormous swath of the continent meant. There were

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<sup>2</sup> “Land Sale Contract Between Dominique Burguant and Josete Poirier and Vital Bouche” (typescript translation), December 24, 1782, I.164, Lasselle Family Papers, L127, Indiana State Library, Manuscripts & Rare Books Division, Indianapolis, Ind.; “Advertisement from Johnas Scoggan,” April 26, 1783, Laselle Family Papers, L127, Indiana State Library, Manuscripts & Rare Books Division; “Draft of a Petition of Officers in the Continental Line of the Army to the President and Delegates of the United States in Congress Assembled,” May 7, 1783, Box 4, Folder 2, Series I: Business Records, Manuscripts and Documents of the Ohio Company of Associates, Special Collections, Marietta College Library, Marietta, Ohio; Speech to Jean Baptiste Ducoigne, June 1781, in *Papers of Thomas Jefferson: Main Series*, 6:60-64[hereinafter *PTJ:MS*]. On the history of Vincennes, see Andrew R. L. Cayton, *Frontier Indiana* (Bloomington, Ind.: Indiana University Press, 1998); Denise Marie Wilson, “Vincennes: From French Colonial Village to American Frontier Town, 1730-1820” (Ph.D. Dissertation, West Virginia University, 1997); Carl J. Ekberg, *French Roots in the Illinois Country: The Mississippi Frontier in Colonial Times* (Urbana: University of Illinois Press, 1998).

<sup>3</sup> Definitive Treaty of Peace, U.S.-Great Britain, September 3, 1783, 8 Stat. 84.

extensive debates over how the United States should govern such vast and distant expanses. Gazing west from Philadelphia and New York, politicians and statesmen crafted visions for national expansion that they codified in the Northwest Ordinance and U.S. Constitution. These foundational charters created the territorial system. After states ceded their claims of both property and jurisdiction over western lands to the national government, that government would divide these lands into “territories,” appointing governors, judges, and federal officials to oversee them until they were ready for statehood on equal terms with the existing states. The federal government would also carve up the territorial lands into neatly gridded parcels, which it would then sell to private purchasers. The Northwest Territory was the first of these federally administered governments, created in 1787 from the vast lands north of the Ohio River ceded by Virginia. The Southwest Territory soon followed in 1790 when North Carolina ceded the federal government its claim to jurisdiction and ownership of lands in present-day Tennessee.<sup>4</sup>

But while Congress built schemes and systems, the residents of the newly proclaimed “territories”—in towns like Vincennes; Nashville; Chota, the Cherokee “beloved town”; and the “Glaize,” the polyglot Native village of the upper Miami

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<sup>4</sup> For considerations of visions of the West during this period, focusing particularly on the state territorial cessions, see Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia: University of Pennsylvania Press, 1983); Peter S. Onuf, “Liberty, Development, and Union: Visions of the West in the 1780s,” *The William and Mary Quarterly*, Third Series, 43, no. 2 (April 1, 1986): 179–213. Explorations focused specifically on the territories include John Porter Bloom, ed., *The American Territorial System* (Athens: Ohio University Press, 1973); Jack Ericson Eblen, *The First and Second United States Empires: Governors and Territorial Government, 1784-1912*. ([Pittsburgh]: University of Pittsburgh Press, 1968); Stefan Heumann, “The Tutelary Empire: State- and Nation-Building in the 19th Century United States” (Ph.D. Dissertation, University of Pennsylvania, 2009). For the implications of the constitution for territorial governance, see Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* (New Haven: Yale University Press, 2004). Studies of the Northwest Ordinance are especially numerous, clustered around its bicentennial. See Peter S Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington: Indiana University Press, 1987). R. Douglas Hurt, “Historians and the Northwest Ordinance,” *The Western Historical Quarterly* 20, no. 3 (1989): 261–80; Frederick D. Williams, ed. *The Northwest Ordinance: Essays on Its Formulation, Provisions, and Legacy*, (East Lansing, Mich: Michigan State University Press, 1989); Denis P. Duffey, “The Northwest Ordinance as a Constitutional Document,” *Columbia Law Review* 95, no. 4 (1995): 929–68.

country—continued living under their own ideas of law and governance. For them, the visions dreamed up by distant officials were largely an irrelevancy. They had seen such self-proclaimed sovereigns come and go with grand plans unrealized: their homes were both the crossroads and the graveyard of empires, and the territory the federal government now claimed had been fought over for centuries among the French, Spanish, and British, as well as Virginia, North Carolina, Connecticut, and Georgia. Out of the thin soil of the few official papers left behind by these mostly absent governments—laws, deeds, and treaties—a hothouse growth of local customary law and practice had flourished. Despite, and in part because of, forty years of war, the regions’ dominant sovereigns remained Native nations, who still owned and controlled nearly all the lands within the territories. The few long-standing Euro-American settlements like Vincennes remained remote outposts in this Native land; they had survived largely due to the norms and close relationships they had established with surrounding Native nations. More recent arrivals like the Nashville residents, who settled on dubiously obtained land in 1779, might have more jaundiced views of their Native neighbors and wished to exert power over them, but they, too, found themselves thrust into adapting to prevailing norms. This did not mean peace; violence often accompanied coexistence. But Natives and non-Natives employed a shared vocabulary and diplomatic framework to interpret and resolve such conflicts. For all the residents of the territories, these quotidian issues—who owns this parcel of land? how could an unsanctioned killing be remedied?—loomed larger than the questions of constitutions and governments that dominated in Philadelphia.<sup>5</sup>

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<sup>5</sup> For a fuller discussion of the prior histories of the regions that became the territories, see the Prologue.



This dissertation recounts what happened when these worlds of high federal law and policy and territorial reality collided. Over the course of the late 1780s and 1790s, officials dispatched by the federal government arrived in the territories, satchels full of laws, ordinances, and instructions on how to govern. What they encountered confused and frustrated them, as they found themselves attempting to reshape along federal lines a world that they only dimly understood. Often, they felt powerless in the face of a cacophony of claims and demands, produced by autonomous peoples who seemed to have little respect for the federal government or its representatives.

Nonetheless, federal officials were reshaping the territories, albeit not in ways that they necessarily intended or even realized. Those in the territories may have given little thought to matters of state, but they cared a great deal about having their claims—to land, to justice, to protection—honored and acknowledged by some sort of authority. Here, formal law and custom fused: the federal government’s claim to sovereignty often made it the only definitive pronouncement available. Even sovereign Native nations looked to the federal government to affirm their rights, particularly against other Native nations. In this sense, the federal government in the territories functioned as what might be termed an “adjudicatory state”—one in which the government sifted through and resolved contending claims. The result was the accretion of federal authority almost by default. As Arthur St. Clair, governor of the Northwest Territory, stated, dimly acknowledging this role, “[T]here is perhaps nothing that contributes more to induce an affectionate

Submission to any power, than the habit of looking up to that power as the depository and dispenser of Justice in the last resort.”<sup>6</sup>

This process played out in two intertwined areas that dominated territorial governance. The first was land. Beginning with the Land Ordinance of 1785, Congress established a template for subdividing and then selling the public domain. But territorial land was not vacant. Claims to title covered enormous swaths of land that federal officials had believed empty, derived from a profusion of sources—Native title, purchases from Natives, state land schemes, preexisting Euroamerican laws, improvement rights, federal military bounty rights. The federal government’s initial effort to sweep aside this thorny tangle and create a new land system of government-sanctioned land companies ended up heightening, rather than resolving, the profusion of land rights. As a result of all this confusion, federal officials spent most of the next decade and a half sifting through these claims, often with great reluctance, rather than selling the public domain. But all this effort worked to translate this crazy-quilt of sources of ownership into title that rested on federal authority, which increasingly became the basis for all land rights in the former territories.<sup>7</sup>

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<sup>6</sup> Gov. Arthur St. Clair to Secretary of State, December 15, 1794, in *The Territorial Papers of the United States, Vol. II, The Territory Northwest of the River Ohio, 1787-1803*, ed. Clarence Edward Carter (Washington, D.C.: Government Printing Office, 1934), 499-500 [hereinafter *TP: Vol. II*]. Gordon Wood briefly uses the phrase “adjudicatory state” to describe James Madison’s vision for the new federal government, contrasting it with Hamilton’s more aggressive interpretation of federal authority. Gordon S Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (Oxford: Oxford University Press, 2009), 91, 103, 148. As the history presented here suggests, however, adjudication did not necessarily imply a limited or passive role for government; in the territories, adjudication involved a considerable and at times aggressive expansion of national state authority.

<sup>7</sup> Paul Frymer offers the most current account of the role of the public land system in the exercise of federal state authority, in which he stresses the ways in which the federal government could use the availability and access to land as a method to govern and control westward expansion without expending financial or military resources. Paul Frymer, “A Rush and a Push and the Land Is Ours”: Territorial Expansion, Land Policy, and U.S. State Formation,” *Perspectives on Politics* 12, no. 01 (March 2014): 119–44. Though Frymer’s convincing account of land as a instrument of governance coincides with some of the contentions made here, he arguably overstates the extent to which the federal government was successful in its effort to police access to title, at least during the early period. As Frymer’s account implicitly notes, the federal government was just as frequently constrained to honor the title of preexisting settlers as it was able to govern by distributing public lands. This dynamic has largely been absent from histories of the public domain, and ignores the complicated interplay between constraint and authority suggested by the federal government’s role as adjudicator of preexisting private land claims.

The second area was what federal officials called “Indian affairs.” This was a broad category, encompassing all the issues that implicated the relationship between the United States and Native nations: treaties, trade, warfare, and cross-cultural crime. Here, too, the federal government embarked on a bold effort to recast long-standing practices. Through federal Indian treaties, the Trade and Intercourse Acts, and the Constitution, the national government sought to end seemingly interminable cross-cultural violence by inserting the federal government as an arbiter between Natives and non-Natives in the territories, promising impartial justice. But conflict continued, in large part because federal officials’ insistence on the clarity and supremacy of federal law was ill-matched to the ambiguities both of early American law and of the territories. When justice failed, federal officials turned in desperation to a readier source of authority than law—money. Throughout the 1790s, federal funds flowed into the territories, both as compensation for unpunished crimes and as an attempt to purchase the tenuous loyalties of both Native and non-Native territorial residents through presents and protection, respectively. Though a crude, expensive, and often ineffective tool, federal money reoriented the territories around federal policy, as both Natives and non-Natives came to look to the federal government, and its treasury, for redress of wrongs committed by the other.

By the time the Southwest Territory became the state of Tennessee in 1796 and a portion of the Northwest Territory became Ohio in 1802, much of law and governance now flowed from the federal government. This is not to suggest that the federal government could rule by dictate: adjudication often produced conflict, not submission or affection, and citizens of the new states proved remarkably adept at using federal power

to secure goals at odds with federal policy. Statehood and its aftermath also provoked some of the fiercest contentions over national authority, as the federal government and newly minted states struggled bitterly to control both lands and Indian affairs. These controversies underscore how much territorial governance and the process of state admission had channeled polyvocal struggles over local custom and law into a frame of dual state and federal sovereignty. The showy efforts to resist federal control also suggest just how much the federal government had insinuated itself into the lives of territorial citizens, who simultaneously disliked federal involvement and yet craved federal sanction and support. Whether welcomed or despised, federal law and authority had become inescapable.

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How historians have interpreted the territories and the early American West more generally in the first few decades of the early republic has depended on where they grounded their perspective and centered their narratives. Some have followed the gaze of Anglo-American politicians westward from Philadelphia, while others have rooted themselves in the particularities of the multiethnic communities of the Ohio and Tennessee countries. The result has been diverging narratives, especially about the “state”—a somewhat abstract term rarely used in early America that has nonetheless become the subject of considerable historiographical discussion.

Views on the early American state have shifted. A traditional narrative depicted the early American national state as small, weak, and insignificant—a “midget institution in a giant land,” in John Murrin’s memorable phrase. In this earlier account, the great

transformations wrought between the American Revolution and the Civil War, especially the rapid expansion of the United States across North America into lands owned by Native peoples and foreign empires, reflected an inexorable demographic force that swept across the landscape, dragging a reluctant federal government in its wake. But increasingly, historians and political scientists have rejected this vision of early American statelessness as a “myth,” propagated in part by early Americans themselves, that ignored the substantial role of the federal government throughout American society. Drawing from the literature on early modern state-building in Europe, they have found striking parallels between the United States and the centralizing European nations of the same era.<sup>8</sup>

Though these scholars point to evidence of federal strength throughout the United States, the region early Americans labeled the “West,” the lands between the Appalachians and the Mississippi River, looms especially large in their argument. No other region, these scholars convincingly claim, was as reliant on the federal government, which governed Indian affairs, territorial administration, the public domain, the national

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<sup>8</sup> For examples of the older history of the state, see Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982); Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (Cambridge [England]: Cambridge University Press, 1990); John Murrin, “A Roof Without Walls: The Dilemma of American National Identity,” in *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press, 1987); John M. Murrin, “The Great Inversion, or Court versus Country: A Comparison of the Revolution Settlements in England (1688-1721) and America (1776-1816),” in *Three British Revolutions: 1641, 1688, 1776*, ed. J. G. A. Pocock (Princeton, N.J., 1980). Instances of the newer history that emphasizes the reach and scope of the early American state, especially the federal government, see William J. Novak, “The Myth of the ‘Weak’ American State,” *The American Historical Review* 113, no. 3 (June 2008): 752–72; William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton: Princeton University Press, 2015); Max M. Edling, *A Hercules in the Cradle: War, Money, and the American State, 1783-1867* (Chicago: University of Chicago Press, 2014); Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford; New York: Oxford University Press, 2003); Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge; New York: Cambridge University Press, 2009). The political science literature on American political development is large, though its focus on early American history is limited. For an overview, see Richard R. John, “Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787-1835,” *Studies in American Political Development* 11 (Fall 1997): 347–80; Richard R. John, “American Political Development and Political History,” in *Oxford Handbook of American Political Development*, ed. Richard Valelly, Suzanne Mettler, and Ronald Lieberman (New York: Oxford University Press, 2015); Ira Katznelson, “Flexible Capacity: The Military and Early American Statebuilding,” in *Shaped by War and Trade: International Influences on American Political Development*, Ira Katznelson and Martin Shefter, eds. (Princeton, N.J.: Princeton University Press, 2002), 82-110.

military, and foreign relations, all of which had an outsized impact in the early American West. Taken altogether, these scholars conclude, “The territories, not the capital, were the repository of national authority.”<sup>9</sup>

Yet standing apart from these debates over the comparative strength of the early American state is a third narrative strand, in which the state is conspicuous by its absence. These historians focus on the early American West not as a colony of the federal government but as a borderland—a place where multiple peoples and sovereigns collided in an often-violent struggle for coexistence and power. These histories, too, put the United States in an internationalist frame, in this case in a comparative context against global experiences of encounter and empire. In these narratives, the United States and its federal government are rarely central protagonists. Rather, other peoples held the power to dictate events, particularly the Native peoples who dominated the continent well into the nineteenth century, a time long after earlier histories had described Native autonomy as already in eclipse. In the borderlands, the plans and visions concocted in distant imperial capitals melted away, and governments frequently appeared the hapless pawns of complicated local dynamics of power and interrelationship that they little understood and could not control. As two recent commentators summarized the field, “Borderlands history is everything that state-centered histories are not.”<sup>10</sup>

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<sup>9</sup> Balogh, *A Government Out of Sight*, 154. For additional works that focus on the strength of the federal state in the early American west, see William H. Bergmann, *The American National State and the Early West* (Cambridge ; New York: Cambridge University Press, 2012); Jeff Pasley, “Midget on Horseback: American Indians and the History of the American State,” *Common-Place* 9, no. 1 (October 2008), <http://www.common-place.org/vol-09/no-01/pasley/>; Paul Frymer, “Building an American Empire: Territorial Expansion in the Antebellum Era,” *U.C. Irvine Law Review* 1 (2011): 913; Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (Cambridge: Cambridge University Press, 2010); Heumann, “The Tutelary Empire.”

<sup>10</sup> Quotation from Pekka Hämäläinen and Samuel Truett, “On Borderlands,” *Journal of American History* 98, no. 2 (September 1, 2011): 338–61. The literature on the early American borderlands has grown enormously in the last decade. For some examples, see Juliana Barr and Edward Countryman, eds., *Contested Spaces of Early America* (Philadelphia: University of Pennsylvania Press, 2014); Pekka Hämäläinen, *The Comanche Empire* (New Haven: Yale University Press, 2008); Kathleen DuVal, *The Native Ground: Indians and Colonists in the Heart of the Continent* (Philadelphia: University of Pennsylvania Press, 2006); Michael J. Witgen, *An*

There is, however, an unspoken narrative about the state embedded in much of borderlands history. These works extend to the frontier the story famously related by Hendrick Hartog of free-range pigs roaming the streets of New York in defiance of municipal ordinances and judicial decrees outlawing the practice: custom prevails over the state's formal edicts, thanks to what Hartog terms the "implicit pluralism" of American law. This narrative of the failure of the centralized state to overcome the local and the particular has considerable currency, even outside historical circles. Two of the foremost proponents of this account in different fields—James Scott, describing abortive efforts to recast traditional land structures along rational lines, and Hernando de Soto, depicting how customary practices overcame formal titling schemes—both rely on the history of land in the early American West to illuminate this overarching point about state failure.<sup>11</sup>

These portrayals of the early American West as a region simultaneously dominated by the state and yet outside state control seem paradoxical and contradictory, but the scholars of the state and of the borderlands are mostly talking past each other. This problem has several layers. One is that, when closely examined, the early American "state" slips like sand through fingers, devolving into its diverse constituent parts, many of which looked almost nothing like the archetypal images of hierarchical bureaucracies.

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*Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia: University of Pennsylvania Press, 2012); Juliana Barr, *Peace Came in the Form of a Woman: Indians and Spaniards in the Texas Borderlands* (Chapel Hill: University of North Carolina Press, 2007); James Brooks, *Captives & Cousins: Slavery, Kinship, and Community in the Southwest Borderlands* (Chapel Hill [N.C.]: University of North Carolina Press, 2002).

<sup>11</sup> Hartog's famous argument on pluralism appears in Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* 1985 (1985): 899–935. For Scott's substantive discussion of the federal land system, see James C. Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1999), 11–52; Scott also places a picture of the federal land system's rectangular western grid on his book's cover. For De Soto's discussion, see Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000), 105–152. A similar account appears in Eduardo Moisés Peñalver and Sonia Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (New Haven: Yale University Press, 2010), 55–63

Much of the early American state seems indistinguishable to modern eyes from “the people,” as then defined: white propertied men serving on juries or in the militia, selecting members of local elites as magistrates and officers. Other, seemingly familiar parts of the state—legislatures and the executive, for instance—played unfamiliar roles as quasi-judicial bodies, expending inordinate amounts of time resolving individual claims when not engaged in what present-day standards would deem breathtaking acts of venality and self-dealing. And the closest analogs of present-day bureaucracies, places like the War Department or the Land Office that dealt with matters of enormous concern, often consisted of a handful of clerks in makeshift rooms. This unfamiliarity of the origins and nature of state authority in early America can often blind us to when and how it was exercised.<sup>12</sup>

This challenge carries over into sources. Because of the federal government’s often slapdash early recordkeeping, the history of the early American state in the territories cannot be written solely from Washington; retelling this past requires delving into the records that survive scattered in regional archives throughout the former territories. By the same token, because so much of federal authority was exercised through local institutions, understanding federal power involves juxtaposing the documents of high policy with the correspondence, deeds, warrants, lawsuits, and petitions that together comprised the stuff of governance in the territories. This perspective also shifts understandings of which historical actors mattered: even histories

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<sup>12</sup> Similar arguments about the challenge of observing aspects of the early American state appear in Novak, “The Myth of the ‘Weak American State’”; Novak develops and elaborates on many of these arguments in William J. Novak, “The Concept of the State in American History,” in *Boundaries of the State in US History*, ed. James T. Sparrow, William J. Novak, and Stephen W. Sawyer (Chicago; London: University Of Chicago Press, 2015), 325–49. Novak in particular criticizes the tendency to anthropomorphize and reify the state, stressing work that argues that the “*the state is not ‘a thing.’*” *Ibid.*, 337. On the role of legislatures as adjudicative bodies in early America, see Christine A. Desan, “The Constitutional Commitment to Legislative Adjudication in the Early American Tradition,” *Harvard Law Review* 111 (1998): 1383.



that emphasize the importance of Natives, intruders, and others in the construction of the federal state often present them as *subjects* of federal policy, transforming a dialogue into a univocal process of subjugation. For their part, borderlands historians have been adept at delving deep into the records produced in the peripheries, reading them against the grain to illuminate the experiences of Native peoples and other marginalized groups who produced few records of their own. But in the process, they have sometimes then missed the insights to be gained by interpreting these documents *with* the grain: that is, to read them as the administrative documents that they were, illustrating how early American institutions functioned when pressed with claims by Natives and others.

Another, and related, problem is the challenge of figuring out how to assess state authority and power in practice. Historians and political scientists have increasingly eschewed earlier labels of states as “strong” or “weak” to focus on finer distinctions. Some scholars have stressed the contrast between “despotic power,” the state’s ability to impose its agenda unfettered, and “infrastructural power,” the state’s authority to “implement logistically political decisions throughout the realm”; others have similarly emphasized how the early American state operated “out of sight,” or was “light and inconspicuous.” Yet even these careful typologies fail to capture fully the often counterintuitive and paradoxical ways that the early American national state exerted power and influence. Federal authority was ubiquitous in the territories, literally written into every land grant, passport into Indian country, or territorial court case. Moreover, in dealing with land, the territories, and Indian affairs, the federal government was operating where it enjoyed extensive and often exclusive constitutional responsibility. But, to an

extent scholars have not appreciated, this pervasiveness often failed to provide the power to impose policies, either through coercion or the subtler power of infrastructure. Federal officials often felt put-upon and helpless, unable to shape events or resist the demands made of them. Yet ironically, territorial citizens and Natives *also* spoke of their powerlessness, bemoaning their dependence on a federal government that they nonetheless were remarkably able to twist to their own ends.<sup>13</sup>

This seeming contradiction reflected the fact that federal authority in the territories only rarely dictated outcomes and controlled policy; it consisted, rather, of defining the rules and norms that governed territorial conflicts. Territorial inhabitants were right to complain that they could not escape federal authority: even as they resisted federal law, the inhabitants enhanced its legitimacy and scope by implicitly accepting the federal government's legislative and adjudicatory power. But federal officials were right, too, that in practice their interpretations of federal law rarely prevailed over the dissenting views of territorial residents. In this sense, the federal government in the territories was not simply weak in some ways but strong in others. Rather, the cause of federal powerlessness in the territories—its seeming inability to control how territorial inhabitants exploited federal authority and resources—was also simultaneously the source of federal government's primary power: territorial inhabitants' craving for, and dependence on, the legitimating role of federal law.

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<sup>13</sup> The contrast between despotic and infrastructural power appears in Michael Mann, "The Autonomous Power of the State: Its Origins, Mechanisms and Results," *European Journal of Sociology* 25, no. 2 (1984): 185–213; that the federal government operated "out of sight" and lightly and inconspicuously are the claims of Brian Balogh, *A Government Out of Sight*, and Max Edling, *A Revolution in Favor of Government*. Efforts to capture how the federal government was both strong and weak appear in Gerstle, *Liberty and Coercion*; James T. Sparrow, William J. Novak, and Stephen W. Sawyer, eds., "Introduction," in *Boundaries of the State in US History*, 1–19.

Grounding “the state” more firmly in these historical particulars, this dissertation suggests, offers an interpretation of governance and borderlands not as antithetical and antagonistic, but as mutually constitutive. It was the proliferation of polities and jurisdictions deemed legitimate that created the borderlands as places marked by multiple centers of power, authority, and sources of rights. Yet at the same time, the constant conflict and violence among multiple claimants led many in the borderlands to seek an arbiter with some claim to legitimacy and sovereignty. The early national state in the U.S. territories, in short, was as much a product of the borderlands as it was of the capital. If its authority came to suffuse much of everyday law and practice in the territories, it was often because so many borderlands residents—Native, French, and Anglo-American—wished it to, if only to defend what they believed to be their own rights and entitlements.

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To capture these complicated dynamics of early American governance, this dissertation employs a different focus from the existing literature on the territories and state-building, which has seen substantial growth in recent years. One difference is the attention given the Southwest Territory. Nearly all the current work fixates on the Northwest Territory and the Ohio River Valley. The Southwest Territory appears, to the limited extent that it does, as a negative counterpoint, a largely stateless realm that reflects the failure of federal state-building. In fact, sustained comparison suggests that the broad structural forces at work in the two territories were strikingly similar, and that the federal state was present along the southwestern borderlands to a degree current

scholarship downplays. That the Southwest Territory was deemed a failure while the Northwest Territory was lauded as a success is itself a historical artifact that reflects the contentions of the territorial period and requires exploration.<sup>14</sup>

This dissertation also differs from prior work by adopting as its interpretive frame the allied concepts of law and administration. For early Americans, law constituted the state in ways difficult to capture now, when law has been mythologized as a specialized and technical discipline dominated by experts. For late eighteenth-century Anglo-Americans, law was not an arcane abstraction, but a language and habit of thought that suffused their everyday lives: most white men routinely went to court to sue or be sued, court day was the center of community social and economic life, and criminal law was regarded as a reflection of community will. Legality was fundamental to how territorial residents understood authority and government. Law's centrality encompassed Natives as well: Native perceptions of Anglo-American law, and Anglo-Americans' perceptions of

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<sup>14</sup> For a sampling of works that focus on the state in the Northwest Territory and the Ohio Valley, see Bethel Saler, *The Settlers' Empire: Colonialism and State Formation in America's Old Northwest* (Philadelphia: University of Pennsylvania Press, 2014); Lucy Eldersveld Murphy, *Great Lakes Creoles: A French-Indian Community on the Northern Borderlands, Prairie Du Chien, 1750-1860* (New York, NY: Cambridge University Press, 2014); Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York: Hill and Wang, 2007); Andrew R. L. Cayton and Stuart D. Hobbs, eds., *The Center of a Great Empire: The Ohio Country in the Early American Republic* (Athens: Ohio University Press, 2005); Heumann, "The Tutelary Empire"; John Robinson Harper, "Revolution and Conquest: Politics, Violence, and Social Change in the Ohio Valley, 1765—1795" (Ph.D. Dissertation, The University of Wisconsin — Madison, 2008).

Studies on the Southwest Territory are fewer and less focused on the role of the federal government. Examples of histories that focus specifically on the Southwest Territory include Walter T. Durham, *Before Tennessee: The Southwest Territory, 1790-1796: A Narrative History of the Territory of the United States South of the River Ohio* (Rocky Mount Historical Association, 1990); William Michael Toomey, "Prelude to Statehood: The Southwest Territory, 1790-1796" (Ph.D. Dissertation, University of Tennessee, 1991). Histories that discuss the Southwest Territory as part of Tennessean history include Cynthia Cumfer, *Separate Peoples, One Land: The Minds of Cherokees, Blacks, and Whites on the Tennessee Frontier* (Chapel Hill: University of North Carolina Press, 2007); John R. Finger, *Tennessee Frontiers: Three Regions in Transition* (Bloomington: Indiana University Press, 2001); Thomas Perkins Abernethy, *From Frontier to Plantation in Tennessee; a Study in Frontier Democracy* (Chapel Hill: University of North Carolina Press, 1932); Kristofer Ray, ed., *Before the Volunteer State: New Thoughts on Early Tennessee, 1540-1800* (Knoxville: University of Tennessee Press, 2015).

Comparisons of the Southwest and Northwest Territories that emphasize the differences between the two territories include Andrew R. L. Cayton, "'Separate Interests' and the Nation-State: The Washington Administration and the Origins of Regionalism in the Trans-Appalachian West," *The Journal of American History* 79, no. 1 (June 1, 1992): 39–67; Andrew R. L. Cayton, "'When Shall We Cease to Have Judases?' The Blount Conspiracy and the Limits of the 'Extended Republic,'" in *Launching the "Extended Republic": The Federalist Era*, ed. Ronald Hoffman and Peter J. Albert, (Charlottesville: University Press of Virginia, 1996); Walter T. Durham, "The Southwest and Northwest Territories: A Comparison, 1787-1796," *Tennessee Historical Quarterly* 49, no. 3 (October 1, 1990): 188–96. I consider the arguments of these works more fully in Chapter 6.

Native law, helped structure the relationship between Native nations and the United States.<sup>15</sup>

Understanding law in the territories requires taking institutions seriously, particularly early American administration. As a new generation of legal historians has emphasized, administration—in this instance, officers of the executive branch appointed by the federal government—was often where questions of law were worked out. This was particularly true in the territories, where federally appointed officials like territorial governors, Indian agents, and army paymasters had to resolve a remarkable array of important legal questions both in dialogue with and outside of courts. In the context of both land rights and Indian affairs, this was often because the federal government was creating legal rights, or at least formalizing inchoate rights, a task for which courts were often ill-equipped. In thinking through late eighteenth-century administration, we should not read the large literature on the twentieth-century “administrative state” backward in time. As it then existed, federal administration was barely organized, and often consisted of loose and fluid networks of personal relationships. But what is striking, and surprising, about early American administration, especially when set against later developments, is how this small handful of officials often managed to exercise disproportionate influence.<sup>16</sup>

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<sup>15</sup> For considerations of law’s constitutive role in colonial American communities, see Peter Charles Hoffer, *Law and People in Colonial America*, Rev. ed (Baltimore: Johns Hopkins University Press, 1998); Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut*, Studies in Legal History (Chapel Hill: University of North Carolina Press, 1987). Other works trace this continuity after the American Revolution, albeit in very different contexts. For instances, see Laura F Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009); Novak, *The People’s Welfare*; Hendrik Hartog, “Abigail Bailey’s Coverture: Law in a Married Women’s Consciousness,” in *Law in Everyday Life*, ed. Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 1993).

<sup>16</sup> For older works focusing on administration, see Leonard Dupee White, *The Jeffersonians : A Study in Administrative History, 1801-1829* (New York : Macmillan, 1951); Leonard Dupee White, *The Federalists : A Study in Administrative History* (New York, N.Y. : Macmillan, 1956). Newer works that are part of the resurgence of the interest in administrative history include Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale

Law in the territories was also “legally pluralist”—a term of art that refers to the coexistence of multiple legitimate sources of law within a single jurisdiction. As a large literature on law and empire underscores, legal pluralism was particularly rife in imperial borderlands, where the law promulgated by imperial powers had to accommodate the diverse legal practices of other peoples and sovereigns, whether through formal structures or implicit acknowledgment. As an analytic, legal pluralism offers a helpful tool with which to think through the processes that unfolded in the U.S. territories, and it also points to similarities between the United States and other global empires. The process of centralization traced here follows in some respects the legal history of empire offered by Lauren A. Benton, in which the proliferation of claims produced by pluralism tended to strengthen, rather than undermine, the central state.<sup>17</sup>

But, while useful, legal pluralism should also not be employed uncritically or as a default explanatory model. The risks are twofold. First, many scholars, particularly in U.S. context, have followed Hartog’s use of legal pluralism as a synonym for the well-worn dichotomy between customary and formal law. This version casts legal pluralism as antithetical to state-ordered legal systems. In fact, as the comparative literature on law and empire demonstrates, so-called “strong” legal pluralism exists when plural law

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University Press, 2012); Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940* (New Haven: Yale University Press, 2013); Gautham Rao, “Administering Entitlement: Governance, Public Health Care, and the Early American State,” *Law & Social Inquiry* 37, no. 3 (September 1, 2012): 627–56. For an overview of this focus in American legal history more broadly, see Jeremy K. Kessler, “Struggle for Administrative Legitimacy,” *Harvard Law Review* 129 (2016): 774.

<sup>17</sup> Explorations of legal pluralism appear in Sally Engle Merry, “Legal Pluralism,” *Law & Society Review* 22 (1988): 869; Lauren Benton and Richard J. Ross, eds., *Legal Pluralism and Empires, 1500-1850* (New York: NYU Press, 2013); Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, Studies in Comparative World History (Cambridge: Cambridge University Press, 2002). Merry offers a broad definition of legal pluralism: “a situation in which two or more legal systems coexist in the same social field.” Merry, “Legal Pluralism,” 870. Work explicitly invoking legal pluralism in the United States is more limited; considerations include Richard J. Ross, “Puritan Godly Discipline in Comparative Perspective: Legal Pluralism and the Sources of ‘Intensity’ .,” *American Historical Review* 113, no. 4 (October 2008): 975–1002; Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, Mass: Harvard University Press, 2010); Richard White, “Legal Pluralism and Native Sovereignty,” *The William and Mary Quarterly* 68, no. 4 (October 1, 2011): 720–24; Alan McPherson, “The Irony of Legal Pluralism in U.S. Occupations,” *The American Historical Review* 117, no. 4 (October 1, 2012): 1149–72.

*becomes* formal law—when, as in colonial India, multiple legal orders are granted formal recognition and institutionalized within state law and courts. Exploring pluralism in the territories, in other words, does not require concluding that customary practice thwarted state orderings.<sup>18</sup>

Related to this risk of conflating pluralism and weak state authority is the assumption that borderlands and legal pluralism are inevitably twinned concepts. In fact, the U.S. Constitution made the American borderlands formally *less* legally plural than the rest of the nation. Federalism created overlapping jurisdictions with multiple legitimate sources of law throughout the United States—*except* in the territories, where the federal government was the sole sovereign, at least outside of Indian country. And, for most practical purposes, Indian country—legally, the land that remained under Native control and jurisdiction—was foreign territory under federal law, mapmakers’ pretensions notwithstanding.<sup>19</sup>

In this sense, the legal complexities of the territories stemmed more from *neighboring* as *overlapping* jurisdictions—from, in other words, the challenge of borders. In both the Northwest and Southwest Territories, the United States abutted foreign jurisdictions that it could not control, including Native nations as well as the British and Spanish empires. Accordingly, issues of diplomacy infused territorial law. But even with respect to the proliferation of neighboring foreign jurisdictions, the

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<sup>18</sup> Benton, for instance, contrasts “strong” legal pluralism, where governments attempt to fix rules on the relationships between different sources of law, and “weak” legal pluralism, where alternate sources of law receive implicit recognition. Benton, *Law and Colonial Cultures*, 10-11.

<sup>19</sup> Besides the territories, the largest spaces where the federal government had sole sovereignty, the federal government also held sole and exclusive jurisdiction over federal enclaves like federal arsenals and fortresses, and over the District of Columbia. For a discussion of D.C., see Kate Masur, *An Example for All the Land: Emancipation and the Struggle over Equality in Washington, D.C.* (Chapel Hill: The University of North Carolina Press, 2012).

territories were distinctive but not unique: the nation's long northern, southern, and maritime borders often posed similar challenges.<sup>20</sup>

The legal history of the territories, in short, is not a simple account of how diversity and customary practices thwarted arbitrarily drawn national boundaries. On the contrary, the role of federal government as an adjudicatory state emphasizes how formal jurisdictional borders, however abstract and artificial, became meaningful and real to ordinary citizens, who relied on official exercises of federal jurisdiction to resolve and confirm their plural rights.

This dissertation also differs from other works in what it omits. Unlike prior studies, it does not rely on political partisanship as a fundamental explanatory paradigm. To be sure, there were deep ideological differences among early Americans about how the United States should govern the territories, distribute lands, and negotiate with Native peoples, and, by the late 1790s, these positions were associated with contending political parties labeled as Federalists and Democratic-Republicans. But this paradigm obscures as well as illuminates, especially when pushed backward in time to the much more fluid and uncertain period of the late 1780s and early 1790s. Fixating on high politics ignores what we might call the politics of the everyday—the quotidian clashes over self-interest, individual personalities, and shifting allegiances that were often far more consequential than ideological divides. This was especially true in the territories, where partisan labels

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<sup>20</sup> For a consideration of the northern, southern, and maritime borders, see Alan Taylor, *The Divided Ground: Indians, Settlers and the Northern Borderland of the American Revolution* (New York: Alfred A. Knopf, 2006); J. C. A. Stagg, *Borderlines in Borderlands: James Madison and the Spanish-American Frontier, 1776-1821* (New Haven: Yale University Press, 2009); Eliga H. Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (Cambridge, Mass: Harvard University Press, 2012). Nathan Perl-Rosenthal, *Citizen Sailors: Becoming American in the Age of Revolution*, (Cambridge, Mass.: Belknap Press, 2015).



were often applied post hoc to factions grounded in intensely personal disagreements. Moreover, interpreting territorial government through partisanship ignores the role of empire and of administration. The most meaningful divides were often those between periphery and center: the fractious Washington Cabinet pursued a strikingly unified approach to territorial governance, even as many territorial citizens embraced a clear, and often very different, set of expectations for federal rule. Territorial officials fell in between. As a result, their politics were often more administrative than ideological, reflecting their acute role-consciousness of negotiating between the instructions of distant superiors and the demands of those they governed.<sup>21</sup>

This dissertation also considers only briefly the issue of slavery. This may seem counterintuitive, since the presence or absence of slavery was perhaps the most glaring difference between the two territories: Congress extended the Northwest Ordinance to the Southwest Territory verbatim *except* for the Ordinance's ban on slavery, an action required by North Carolina's cession. But this contrast should not be overdrawn. As much excellent work traces, slavery existed north as well south of the Ohio, where it was the subject of intense legal and political struggles. Meanwhile, the Southwest Territory was far from the plantation society that central Tennessee in particular would later become: most of the population was then clustered in present-day eastern Tennessee, a region where slavery remained relatively marginal through the Civil War. This is not to downplay the extent to which slavery was central to the early history of both territories,

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<sup>21</sup> Explorations of the public lands and Indian policy that emphasize partisanship include Daniel Feller, *The Public Lands in Jacksonian Politics* (Madison: University of Wisconsin Press, 1984); John Robert Van Atta, *Securing the West: Politics, Public Lands, and the Fate of the Old Republic, 1785-1850* (Baltimore: Johns Hopkins University Press, 2014); David Andrew Nichols, *Red Gentlemen & White Savages: Indians, Federalists, and the Search for Order on the American Frontier* (Charlottesville: University of Virginia Press, 2008). Feller, however, argues for a shift toward partisanship from regionalism over the 1820s. For an argument that even the high politics of the 1790s were organized around personalities, see Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven: Yale University Press, 2002).

where enslaved Africans and Natives were both ubiquitous and entangled in relationships between Natives and the United States. But there is also a danger of reading the territories' early history in light of mid-nineteenth-century preoccupations over the ostensibly sharp boundaries between slave and free territory and the scope of federal power over slavery. This approach risks obscuring the work of empire that the federal government engaged in in *both* the Southwest and Northwest Territories—the process of dispossessing Native peoples and making land alienable. In this sense, the accomplishments of federal power in the late eighteenth century were the necessary precondition to the rapid spread of imported labor, both enslaved and free, that followed over the next half-century.<sup>22</sup>

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For all the work on the early American West in the last several decades, the process of its transformation from borderland to “bordered land,” in the memorable phrase of Jeremy Adelman and Stephen Aron, still remains somewhat mysterious. The broad causes of this shift in power are apparent: the rising demographic, military, and financial might of the United States, coupled with the waning of alternate sources of power and patronage in the borderlands. Yet, notwithstanding these factors, there were good reasons to doubt that a federal government hobbled by internal divisions, weak allegiances, and a miniscule cadre of officials could overcome its rivals to secure its

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<sup>22</sup> For the existence of slavery in the Northwest Territory, notwithstanding the prohibition in the Northwest Ordinance, see John Craig Hammond, *Slavery, Freedom, and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007); Matthew Salafia, *Slavery's Borderland: Freedom and Bondage Along the Ohio River* (Philadelphia: University of Pennsylvania Press, 2013); Paul Finkelman, “Slavery and the Northwest Ordinance: A Study in Ambiguity,” *Journal of the Early Republic* 6, no. 4 (1986): 343–70; Paul Finkelman, “Evading the Ordinance: The Persistence of Bondage in Indiana and Illinois,” *Journal of the Early Republic* 9, no. 1 (1989): 21–51. For studies of Native slaves in both the Northwest and Southwest Territories, see Carl J Ekberg, *Stealing Indian Women: Native Slavery in the Illinois Country* (Urbana: University of Illinois Press, 2007); Brett Rushforth, *Bonds of Alliance: Indigenous and Atlantic Slavery in New France* (Chapel Hill: The University of North Carolina Press, 2012); Christina Snyder, *Slavery in Indian Country: The Changing Face of Captivity in Early America* (Cambridge, Mass: Harvard University Press, 2010), 152–81.

tenuous hold on the trans-Appalachian West—an outcome that Francois Furstenberg justifiably dubbed the “most unlikely scenario of all.”<sup>23</sup>

The history explored here suggests one way the federal government managed to gain the borderlands: with the help of its residents themselves. This is at odds with standard accounts of the relationship between the peoples of the borderlands, especially Native peoples, and the United States, which is usually portrayed as one of resistance. As the history that follows shows, there was plenty of struggle against the federal government and its policies in the territories. But these clashes should not blind us to the reality that many of the same people who fought the federal government also at times welcomed and relied on it, reinforcing its authority and legitimacy in the process. In hindsight, perhaps, this gamble on federal power seems a mistake on the inhabitants’ part, as federal authority rarely proved a boon for most borderlands residents, whether Native, French, or impoverished white settlers. But this judgment imposes an unrealistic expectation of foresight on people in difficult and constrained circumstances; it also obscures the federal government’s contradictory dual role as both agent of and occasional check on expansionist impulses. At the time, federal officials held out both the promise of resolving lengthy and tedious conflicts and the possibility that federal law would protect some modicum of residents’ deeply felt rights. For many, this offer was too tempting to resist.

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<sup>23</sup> Jeremy Adelman and Stephen Aron, “From Borderlands to Borders: Empires, Nation-States, and the Peoples in between in North American History,” *The American Historical Review* 104, no. 3 (1999): 814–4; Francois Furstenberg, “The Significance of the Trans-Appalachian Frontier in Atlantic History,” *The American Historical Review* 113, no. 3 (2008): 647–77. One response has been to deny the “narrative closure” of this arc—to emphasize the persistence of autonomy and agency for many supposedly colonized peoples throughout the nineteenth and twentieth centuries. See Hämäläinen and Truett, “On Borderlands,” 338–61. But while this critique has much to recommend it, it is also somewhat disingenuous. No doubt, many peoples confronted by the growing power of the United States nonetheless maintained independence and control. But this was likely cold comfort to once-powerful peoples and nations uprooted from their homelands by the whim of distant federal officials. Understandably, they themselves understood this history in terms of loss and tragedy.

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### **A Note on Terminology**

Part of the challenge of the territories is the difficulty of applying terms that suggest rigid boundaries onto more fluid situations and identities. In general, I favor the term Native to describe the descendants of the indigenous peoples of North America, and I capitalize it to signify its status as a marker of national status—as a member of a Native nation—as well as of ethnicity. At times I use the term “Indian,” the more common parlance of the time, particularly when I speak of the views of federal officials and others. Consistent with the usage of the time, especially in formal diplomacy, I refer to Native “nations,” though I occasionally also employ “tribe” or “tribal.” I use Natives’ national affiliations when speaking of a single nation or its members. Following the practice of many federal officials, particularly on formal occasions, I often refer to “U.S. citizens” more broadly and “territorial citizens” more specifically, in contradistinction to Native peoples, though the meaning and scope of U.S. citizenship was still hazy at this time. I generally use “Anglo-American” to describe the U.S. citizens who arrived and settled in the territories, who mostly, although not solely, traced their ancestry to the British Isles; this ancestry distinguished them from the territories’ pre-existing French residents, who were also legally U.S. citizens. I also at times describe U.S. citizens of European descent as “white,” a racial category well known and understood at the time to distinguish Euro-Americans from Native peoples.

There are also the challenges of labeling historical institutions and concepts. To ease comprehension, I refer to the federal government or national government. Both terms were used at the time, though not as often as the now less familiar “general

government.” Finally, many in the late eighteenth century employed the term “sovereignty,” though many now criticize the term for being overly abstract or even quasi-metaphysical. For early Americans, sovereignty conveyed both jurisdiction—the power to set and determine the laws for a given territory or people—and autonomy. But sovereignty’s abstract aspect also appealed to many at the time: like “independence,” “sovereignty” was at once protean while also conveying a powerful sense of national dignity and status.

## Abbreviations

ASCP	Arthur St. Clair Papers (microfilm), MIC 96, Ohio Historical Society, Columbus, Ohio.
ASP:IA	Walter Lowrie and Matthew St. Clair Clarke, eds., <i>American State Papers: Indian Affairs</i> , vol. 1 (Washington: Gales and Seaton, 1832).
ASP:PL	Walter Lowrie, ed., <i>Documents Legislative and Executive of the Congress of the United States in Relation to the Public Lands . . . .</i> (Washington: Printed by Duff Green, 1834).
CJCS	Beverly Waugh Bond, ed., <i>The Correspondence of John Cleves Symmes: Founder of the Miami Purchase, Chiefly from the Collection of Peter G. Thomson</i> (New York: Pub. for the Historical and Philosophical Society of Ohio by the Macmillan Co, 1926).
JGBP	Alice Barnwell Keith, ed., <i>The John Gray Blount Papers</i> (Raleigh [N.C.] State Dept. of Archives and History, 1952-65).
JHP	Josiah Harmar Papers, William L. Clements Library, University of Michigan.
MRP	Rowena Buell, ed., <i>The Memoirs of Rufus Putnam and Certain Official Papers and Correspondence</i> (Boston and New York: Houghton, Mifflin, 1903).
NWTC	Northwest Territory Collection, M367, Indiana Historical Society, Indianapolis, Ind.
PAJ	Sam B. Smith and Harriet Fason Chappell Owsley, eds., <i>The Papers of Andrew Jackson</i> (Knoxville: University of Tennessee Press, 1980-2013).
PGW:PS	W. W. Abbot and Dorothy Twohig, eds., <i>The Papers of George Washington, Presidential Series</i> (Charlottesville: University Press of Virginia, 1987-2013).
PTJ:MS	Julian P. Boyd, ed., <i>The Papers of Thomas Jefferson: Main Series</i> (Princeton, N.J.: Princeton University Press, 1950-2014).
RPP	Rufus Putnam Papers, Special Collections, Marietta College Library, Marietta, Ohio.
SCP	William Henry Smith, ed., <i>The St. Clair Papers: The Life and Public Services of Arthur St. Clair . . .</i> Vol. 2 (Cincinnati: R. Clarke & Co., 1881).
TP: Vol. II	Clarence Edward Carter, ed., <i>The Territorial Papers of the United States, Vol. II, The Territory Northwest of the River Ohio, 1787-1803</i> (Washington, D.C.: Government Printing Office, 1934).
TP: Vol. III	Clarence Edward Carter, ed., <i>The Territorial Papers of the United States, Vol. III, The Territory Northwest of the River Ohio, 1787-1803, Continued</i> , (Washington, D.C.: Government Printing Office, 1934).
TP: Vol. IV	Clarence Edward Carter, ed., <i>The Territorial Papers of the United States, Vol. IV, The Territory South of the River Ohio, 1790-1796</i> (Washington, D.C.: Government Printing Office, 1936).
WBP:LC	William Blount Papers (microfilm), MMC-0163, Manuscript Division, Library of Congress.
WSP	Winthrop Sargent Papers (microfilm), Massachusetts Historical Society,

Boston, Mass.



## Prologue

The regions that the United States classified as the territories had older names, as Anglo-Americans bastardized indigenous terms into English forms well known to early Americans. In what became the Northwest Territory, the hilly, forested Ohio Country stretched from Lake Erie down to the Ohio River, the region's main waterway; the river and the region's name derived from the Seneca word "ohiyo'," used as the name for what is now the Allegheny River in western Pennsylvania. Further west were the Wabash and Illinois Countries—versions of the Miami river name "waapaahšiiki" and the Miami tribal name "lenweewa,"—where flatter lands hinted at the prairies further west. Much of the future Southwest Territory went under the name of the Tennessee Country, named after its principal waterway, the Tennessee River, itself a version of the Cherokee town name "Tanasi." The Tennessee flowed from the stony foothills of Smoky Mountains along North Carolina down to the Ohio and ultimately the Mississippi.<sup>1</sup>

All these regions were, first and foremost, Native spaces. "Indians is all we see, know or hear of," one army officer reported; "they are thick as Bees in this part of the World," another officer stated. North of the Ohio, this Native world was marked by mobility and the legacy of eastern colonization. Alongside long-standing residents such as the Miamis and the Wabash Confederacy lived more recent arrivals like the Delawares, whose ancestral homelands lay in eastern Pennsylvania and New Jersey; the Shawnees, who had lived further south; and the Wyandots, who moved south from the western Great Lakes. Many of these newcomers now lived in multi-ethnic, polyglot

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<sup>1</sup> William Bright, *Native American Placenames of the United States* (Norman : University of Oklahoma Press, 2004), 344, 181, 537,

towns alongside other Native nations. Ties of trade and diplomacy linked the Ohio and Illinois countries in all directions—east to the Haudenosaunee (Iroquois), west and north to the Anishinaabe (known to early Americans as the Ottawas, Chippewas, and Potawatomes), and also to the south, to the nations of the Tennessee Country.<sup>2</sup>

The Tennessee Country lay within what historians and anthropologists have labeled the Mississippi Shatter Zone. From the collapse of the hierarchical Mississippian societies that had long occupied the Native Southeast, new Native groups began to emerge in the seventeenth and eighteenth centuries: the Choctaws in present-day Mississippi, the Chickasaws in present-day western Tennessee, the Creeks in present-day Alabama and Georgia, and the Cherokees in present-day eastern Tennessee and northern Georgia. More populous and centralized than the nations north of the Ohio, these Native polities were nonetheless often subdivided based on geography into “upper” and “lower” towns that seemed to American observers only loosely affiliated. The Southwest Territory itself lay within the “Tennessee Corridor,” a long-standing trade, hunting, and diplomatic route shared among the four nations that connected the Native southeast with the Ohio country.<sup>3</sup>

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<sup>2</sup> Jonathan Heart to William Judd, October 14, 1787 (typescript copy), Jonathan Heart Papers, VFM 5748, Ohio Historical Society; Melcher to Paul Fearing, December 1, 1790, Box 1, Folder 2, Paul Fearing Papers, Marietta College Library. On the Native nations of the Ohio Country, see Michael N. McConnell, *A Country Between: The Upper Ohio Valley and Its Peoples, 1724-1774* (Lincoln: University of Nebraska Press, 1992); Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673-1800* (New York: Cambridge University Press, 1997); James H. O'Donnell, *Ohio's First Peoples* (Athens: Ohio University Press, 2004); Sami Lakomäki, *Gathering Together: The Shawnee People through Diaspora and Nationhood, 1600-1870* (New Haven: Yale University Press, 2014); 2004); Stephen Warren, *The Worlds the Shawnees Made: Migration and Violence in Early America* (Chapel Hill: University of North Carolina, 2014); Amy C. Schutt, *Peoples of the River Valleys: The Odyssey of the Delaware Indians* (University of Pennsylvania Press, 2007); Stewart Rafert, *The Miami Indians of Indiana: A Persistent People, 1654-1994* (Indianapolis: Indiana Historical Society, 1996).

<sup>3</sup> On the Tennessee Corridor, see “Introduction,” in Kristofer Ray, ed., *Before the Volunteer State: New Thoughts on Early Tennessee, 1540-1800* (Knoxville: University of Tennessee Press, 2015), ix-xix; Kristofer Ray, “New Directions in Early Tennessee History, 1540—1815,” *Tennessee Historical Quarterly* 69, no. 3 (October 1, 2010): 204–23. On the Mississippi Shatter Zone, see Robbie Franklyn Ethridge and Sheri Marie Shuck-Hall, eds., *Mapping the Mississippian Shatter Zone: The Colonial Indian Slave Trade and Regional Instability in the American South* (Lincoln: University of Nebraska Press, 2009). On the histories of the Creeks, Cherokees, Chickasaws, and Choctaws in this era, see James R. Atkinson, *Splendid Land, Splendid People: The Chickasaw Indians to Removal* (Tuscaloosa: University of Alabama Press, 2004); Greg O'Brien, *Choctaws in a Revolutionary Age, 1750-1830*, Indians of the

Euro-American settlements within these Native homelands were few and scattered. In the mid-eighteenth century, the French had established the remote military and trading outposts of Vincennes, Kaskaskia, and Cahokia along the Mississippi and Wabash Rivers; these small villages survived transfer to the British after the Seven Years' War, and were again seized during the American Revolution, this time by Virginians. A few white settlers had begun to venture down the Ohio River from western Pennsylvania into the Ohio Country, joined by settlers who had crossed the river from "Ken-tuck-ee," rapidly populating with Virginians. In the Tennessee Country, which lay south of Kentucky, Euro-American settlements were divided. To the east, in Cherokee territory along the headwaters of the Tennessee River, North Carolinians began to arrive from across the mountains in the early 1770s, in a region later designated the Washington and Hamilton Districts. Several hundred miles to the west, separated from Washington and Hamilton by the Cherokee homelands, lay the nascent settlement of Nashville on the Cumberland River, established in 1779 by a few hundred North Carolinians travelling south from Kentucky, and known as the Cumberland or Mero District.<sup>4</sup>

In 1783, the British transferred sovereignty over this region—the entire trans-Appalachian West east of the Mississippi, south of the Great Lakes, and north of

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Southeast (Lincoln: University of Nebraska Press, 2002); Robbie Franklyn Ethridge, *Creek Country: The Creek Indians and Their World* (Chapel Hill: University of North Carolina Press, 2003). William Gerald McLoughlin, *Cherokee Renaissance in the New Republic* (Princeton, N.J.: Princeton University Press, c1986.); Claudio Saunt, *A New Order of Things: Property, Power, and the Transformation of the Creek Indians, 1733-1816*, Cambridge Studies in North American Indian History (Cambridge, U.K.: Cambridge University Press, 1999); Angela Pulley Hudson, *Creek Paths and Federal Roads: Indians, Settlers, and Slaves and the Making of the American South* (Chapel Hill: University of North Carolina Press, 2010); Ronald N. Satz, *Tennessee's Indian Peoples: From White Contact to Removal, 1540-1840* (Knoxville: Univ. of Tennessee Press, 1979).

<sup>4</sup> On the Illinois Country, see Carl J. Ekberg, *French Roots in the Illinois Country: The Mississippi Frontier in Colonial Times* (Urbana: University of Illinois Press, 1998); Robert Michael Morrissey, *Empire by Collaboration: Indians, Colonists, and Governments in Colonial Illinois Country* (University of Pennsylvania Press, 2015); Sophie White, *Wild Frenchmen and Frenchified Indians: Material Culture and Race in Colonial Louisiana* (Philadelphia: University of Pennsylvania Press, 2012). On Kentucky, see Stephen Aron, *How the West Was Lost: The Transformation of Kentucky from Daniel Boone to Henry Clay* (Baltimore: Johns Hopkins University Press, 1996). On the settlements in eastern Tennessee, see Kevin T. Barksdale, *The Lost State of Franklin: America's First Secession* (Lexington: University Press of Kentucky, 2008); on the Mero District, see Kristofer Ray, *Middle Tennessee, 1775-1825: Progress and Popular Democracy on the Southwestern Frontier* (Knoxville, Tenn.: University of Tennessee Press, 2007); on both regions, see John R. Finger, *Tennessee Frontiers: Three Regions in Transition* (Bloomington: Indiana University Press, 2001).

Florida—to the United States. Competing European empires, though, still surrounded these newly American regions. Directly across the Mississippi from the Illinois Country lay Spanish Louisiana, populated by fledging settlements such as St. Louis as well as, downriver, the commercial hub of New Orleans. The Spanish also controlled the Gulf Coast. Somewhere south of the Tennessee Country, in lands owned by the Creek, Chickasaw, and Choctaw nations, lay the uncertain and disputed boundary between American and Spanish territory. North of the Ohio and Illinois Countries lay British Canada, still closely linked to the Illinois and Wabash countries by commercial ties. The commercial, diplomatic, and regional hubs of Detroit and Michilimackinac further north formally belonged to the United States under the Treaty of Paris, but the British, alleging American violations of the treaty, had not ceded control.<sup>5</sup>

Sovereignty over the lands *within* the borders of the United States was claimed by the states. By dint of its purported conquest as well as its charter rights, Virginia asserted sovereignty over all the lands north of the Ohio River to the Canadian border, a claim disputed by Connecticut and Massachusetts. Virginia also claimed Kentucky, south of the Ohio River; beyond that, North Carolina held formal jurisdiction over the Tennessee Country, even though the region's residents were constantly plotting to secede from what they regarded as a highly neglectful North Carolinian government. The lands south of the Tennessee Country ostensibly fell within Georgia's jurisdiction.<sup>6</sup>

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<sup>5</sup> On some of these borderlands in the aftermath of the American Revolution, see Kathleen DuVal, *Independence Lost: Lives on the Edge of the American Revolution* (New York: Random House, 2015); Catherine Cangany, *Frontier Seaport: Detroit's Transformation into an Atlantic Entrepôt* (Chicago ; London: University Of Chicago Press, 2014); Carl J. Ekberg, *François Vallé and His World: Upper Louisiana before Lewis and Clark* (Columbia: University of Missouri Press, 2002); Jay Gitlin, *The Bourgeois Frontier: French Towns, French Traders, and American Expansion* (New Haven: Yale University Press, 2010); Alan Taylor, *The Divided Ground: Indians, Settlers and the Northern Borderland of the American Revolution* (New York: Alfred A. Knopf, 2006).

<sup>6</sup> For scholarly treatments of state land claims and cessions, see Peter Onuf, "Toward Federalism: Virginia, Congress, and the Western Lands," *The William and Mary Quarterly*, Third Series, 34, no. 3 (July 1, 1977): 353–74; Peter S. Onuf, *The Origins of the Federal*

Over the course of the 1780s, states ceded many of their land claims to the United States, motivated by a desire to be freed from the burdens of administration as well as by considerable pressure by Congress and the states without western lands. Virginia was among the first: in 1784, it ceded “all right title and claim as well of soil as jurisdiction which this Commonwealth hath to the Territory or Tract of Country” north of the Ohio River to the federal government (the state retained control, however, over Kentucky). After offering and then retracting a cession in 1784, North Carolina finally ceded “all right, title and claim which this State has to the Sovereignty and territory of the Lands” in the Tennessee Country in 1789.<sup>7</sup>

These state acts of cessions were less unilateral gifts than complicated and carefully negotiated contracts with the federal government. They contained elaborate and detailed provisions that required that the federal government honor prior and even future state land grants, guarantee the persistence of certain state laws, and protect territorial residents. They also stipulated that the ceded lands ultimately be admitted as separate states with the same rights of “Sovereignty, Freedom and Independence as the other States.”<sup>8</sup>

The federal government slowly established its authority in the ceded regions. In the 1780s, a small federal military force created several forts along the Ohio River, and federal negotiators met the Ohio Country tribes to negotiate treaties. Congress did not create a government for Virginia’s ceded lands until 1787, when it enacted the Northwest

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*Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia: University of Pennsylvania Press, 1983); Merrill Jensen, “The Creation of the National Domain, 1781-1784,” *The Mississippi Valley Historical Review* 26, no. 3 (December 1939): 323.

<sup>7</sup> “Virginia: Cession of Western Land Claims,” March 1, 1784, in *TP: Vol. II*, 6-9; Act of April 2, 1790, ch. 6, 1 Stat. 106.

<sup>8</sup> “Virginia: Cession of Western Land Claims,” March 1, 1784.

Ordinance. Styled a compact between the territorial residents and the United States, the Ordinance established a government with a federally appointed governor, secretary (effectively lieutenant governor), and three territorial judges; together, the governor and judges would initially constitute the territorial legislature. It also stipulated that, once the territory had reached 60,000 inhabitants, it, or some portion of it, would be entitled to admission to statehood, and guaranteed territorial residents certain fundamental rights. In 1790, when Congress accepted North Carolina's cession, it largely extended the Northwest Ordinance over the newly created Southwest Territory.<sup>9</sup>

In 1788, Congress selected as governor of the Northwest Territory Arthur St. Clair, a Scottish-born Pennsylvanian, Revolutionary War general, and former President of Congress. One territorial citizen recollected St. Clair as a man of "grate humanity & Sencibility," but also a man who "could not beare dictation by inferiors or those of Under rank to him." As territorial secretary, Congress appointed Winthrop Sargent, a surveyor from Massachusetts. In the Southwest Territory, the federal government relied on prominent locals. The President selected William Blount, a politically influential North Carolinian who had served in the Constitutional Convention and the Continental Congress, as governor. North Carolina's congressional delegation all concurred that Blount was the "properest man," though Blount's extensive land speculations had led the Creeks to dub him "Fushe Micco"—the "Dirt King." Daniel Smith, a Nashville surveyor

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<sup>9</sup> Northwest Ordinance, ch. 8, 1 Stat. 50 (1789).

and the “ablest and best character there,” in one congressman’s estimation, secured appointment as territorial secretary.<sup>10</sup>

This handful of federal officials confronted the world that the United States had inherited: regions of jurisdictional uncertainty, with unclear and contested boundaries, where formal sovereignty had passed and repassed between competing would-be imperial powers, and where effective sovereignty remained in Native hands. The clearest consequence of the century of imperial struggle and contest for control over eastern North America that preceded the creation of the federal territories was a jumble of claims to property, sovereignty, and jurisdiction—a tangle that it now fell to these often beleaguered officials to resolve.

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<sup>10</sup> Ichabod Nye, “Journal” (typescript), p. 62, Folder 2, Box 3, Marietta Ohio Collection, Ohio Historical Society; “Recommendations for Federal Offices in North Carolina and the Southwestern Government,” [before June 7, 1790], *PTJ:MS*, 16:476-48; Benjamin Hawkins, “Journal,” November 24, 1797, in *Letters, Journals, and Writings of Benjamin Hawkins*, ed. C. L. Grant (Savannah, Ga.: Beehive Press, 1980), 220-222. St. Clair and the other officers of the Northwest Territory were selected under the Articles of Confederation; by contrast, the government of the Southwest Territory was chosen under the U.S. Constitution, which was why its officers were appointed by the President. For St. Clair’s biography, see William Henry Smith, ed., *The St. Clair Papers: The Life and Public Services of Arthur St. Clair: Soldier of the Revolutionary War, President of the Continental Congress; and Governor of the North-Western Territory: With His Correspondence and Other Papers* (Cincinnati: R. Clarke & Co., 1881) [hereinafter *SCP*]; Jeffrey P. Brown, “Arthur St. Clair and the Establishment of U.S. Authority in the Old Northwest,” in Warren R. Van Tine and Michael Dale Pierce, eds., *Builders of Ohio: A Biographical History* (Columbus: Ohio State University Press, 2003), 26-40. For Blount’s biography, see William H. Masterson, *William Blount* (Baton Rouge: Louisiana State University Press, 1954). On Smith, see Walter T. Durham, *Daniel Smith: Frontier Statesman* (Gallatin, Tenn.: Sumner County Library Board, 1976).

**PART I: LAND**



## Chapter 1: Sources of Title in the Territories

In 1785, Thomas Jefferson helped create the first law governing federal lands. The Land Ordinance of 1785 laid out a plan for the expansive territory that the federal government came to own as states ceded their land claims. Long hailed by historians as the origin point for the federal land system, the law envisioned transforming vacant public domain into rigidly rectangular parcels, divided by federal surveyors into lines that hewed to the four points of the compass, which would then be sold at public auction.<sup>1</sup>

In practice, as Thomas Jefferson soon discovered, the federal government had obtained more a property morass than a public domain. Six years after the Ordinance, Jefferson, now serving as Secretary of State in a new federal government, sent a detailed document to President George Washington: “a report on the lands of the U.S. within the North Western and South Western territories, unclaimed either by Indians, or by citizens of these states.” Ostensibly intended to chart “the residuary unclaimed mass” of land that could be sold by the federal government, the report actually recorded the tangled state of ownership in the territories.<sup>2</sup>

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<sup>1</sup> Worthington Chauncey Ford, ed., *Journals of the Continental Congress* (Washington, D.C.: Government Printing Office, 1922), 28: 375-81. For histories that stress the centrality of the 1785 Land Ordinance, see Paul W. Gates, *History of Public Land Law Development* (Washington: U.S. Govt. Print. Office, 1968), 59-74; Robert V. Hine and John Mack Faragher, *Frontiers: A Short History of the American West* (Yale University Press, 2007), 41-43; Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington: Indiana University Press, 1987), 21-43; Malcolm J. Rohrbough, *The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837* (New York, Oxford University Press, 1968), 6-11. The rectangular survey in particular has received considerable scholarly attention: see, e.g., William David Pattison, “Beginnings of the American Rectangular Land Survey System, 1784-1800,” (Ph.D. Dissertation, University of Chicago, 1957); Hildegard Binder Johnson, *Order upon the Land: The U.S. Rectangular Land Survey and the Upper Mississippi Country*, (New York: Oxford University Press, 1976); Andro Linklater, *Measuring America: How the United States Was Shaped by the Greatest Land Sale in History* (New York: Plume, 2003); Bill Hubbard, *American Boundaries: The Nation, the States, the Rectangular Survey* (Chicago: University of Chicago Press, 2009). There has also been a vigorous debate over Jefferson’s role in creating the Ordinance: while earlier scholarship asserted that Jefferson—a member of the committee assigned to craft the Ordinance—was its primary drafter, later scholars have challenged this claim. For an overview, see George W. Geib, “The Land Ordinance of 1785: A Bicentennial Review,” *Indiana Magazine of History* 81, no. 1 (March 1, 1985): 1-13.

<sup>2</sup> “Report of the Secretary of State to the President,” November 8, 1791, in *The Territorial Papers of the United States, Vol. IV, The Territory South of the River Ohio, 1790-1796*, ed. Clarence Edward Carter (Washington: Government Printing Office, 1936) [hereinafter *TP, Vol. IV*], 85-100.

As measured by Jefferson's report, the Land Ordinance of 1785 was a failure. Harassed by Natives who rejected Anglo-American assertions of ownership, federal surveyors had only slowly surveyed a small corner of the Northwest Territory known as the "Seven Ranges." And only a portion of those lands—just over 150,000 acres—had actually been purchased.<sup>3</sup>

While federal policy floundered, the territories did not lie vacant and "unclaimed." On the contrary, Jefferson chronicled dozens of claims to territorial lands. Nearly all of the Southwest Territory still legally belonged to the Cherokee and Chickasaw Nations; Native title had been "cleared," in Jefferson's parlance, only in two small regions. Jefferson estimated that every acre of this purchased land—as well as large tracts that the Cherokees and Chickasaws still owned under federal law—had been sold or granted by North Carolina, transactions the federal government was obligated to honor under the terms of North Carolina's cession. Besides these claimants, there were also white settlers throughout the territory who asserted ownership "without Right or License."<sup>4</sup>

The Northwest Territory was similar. The Delawares, Shawnees, Miamis, and other Native nations still owned most of the Territory. Treaties with these nations, with ill-defined boundaries, purported to sell some land to the federal government, but many Natives disputed their validity. Nonetheless, there were already myriad claimants for the purchased lands, as Jefferson traced: "Ancient Companies" (companies that had

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<sup>3</sup> Jefferson's report put the amount sold at 150,896 acres. *Ibid.* Instances of Native resistance to surveying the Seven Ranges appear in "Message from the Indian Nations to the United States," 1786, Indians of North America Collection, Burton Historical Collection, Detroit Public Library; George Brickell and Thomas Girty, "Deposition," September 13, 1786, vol. 3, Josiah Harmar Papers, Clement Library, University of Michigan [hereinafter JHP]

<sup>4</sup> "Report of the Secretary of State to the President," 85-100.

purchased from the Indians before the Revolution), French villagers in the Illinois Country, the state of Connecticut, Moravian Indians, Canadian refugees, Revolutionary War veterans, and others. All told, claims by non-Natives amounted to 13 million acres of the land Virginia had ceded to the federal government.<sup>5</sup>

As Jefferson's report demonstrated, though the Continental Congress may have envisioned the territories as vacant land awaiting transformation into a neat grid, neither the Northwest nor Southwest Territory was an empty space to be molded by federal policy. Both teemed with people who advanced myriad, and contested, property claims that predated federal involvement. In short, much of this new "federal" land was not only already owned but also purportedly owned several times over. But by focusing on the expansive "visions" of eastern policymakers and politicians, many historians of property have ignored the messy realities that lurked below this westward gaze.<sup>6</sup>

In both territories, the complicated tangle of claims Jefferson traced resulted from property pluralism—the proliferation of multiple sources of ownership with disputed legitimacy. Historians have often cast narratives of property in early America as a contest between vernacular, anti-statist "squatters" and positivist government officials and speculators. But the fight over property in the territories was not primarily a struggle

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<sup>5</sup> *Ibid.*

<sup>6</sup> With the exceptions of "squatters," standard histories of the federal land system, fixating on federal laws, have largely ignored the messy realities of sorting out land in the territories, particularly omitting any discussion of state or Native claims. See, e.g., Onuf, *Statehood and Union*, 21-43; Rohrbough, 6-11. For their part, historians of Native land rights have largely focused on Anglo-American definitions of Native ownership without exploring how those rights in turn shaped state and federal land systems in early America. Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Belknap Press of Harvard University Press, 2005); Blake A. Watson, *Buying America from the Indians: Johnson v. McIntosh and the History of Native Land Rights* (Norman: University of Oklahoma Press, 2012). To the extent a standard scholarly narrative exists, it assumes that the federal domain was "created" when states ceded their western lands—see, for instance, Merrill Jensen, "The Creation of the National Domain, 1781-1784," *The Mississippi Valley Historical Review* 26, no. 3 (December 1939): 323. And the history of land in the Southwest Territory has received almost no scholarly attention, with the exception of a handful of specialist articles, including Thomas B. Jones, "The Public Lands of Tennessee," *Tennessee Historical Quarterly* 27, no. 1 (April 1, 1968): 13-36; L. D. Smith, "Land Laws of Tennessee," *Tennessee Law Review* 1 (1922): 30. There have, however, been studies of land speculation in the Southwest Territory: see Kristofer Ray, "Land Speculation, Popular Democracy, and Political Transformation on the Tennessee Frontier, 1780-1800," *Tennessee Historical Quarterly* 61, no. 3 (October 1, 2002): 161-81.

between customary norms sanctioned by long-standing community practice and formal statutory law. In practice, most of the sources of ownership on the frontier were neither deeply rooted nor informal. Most land claims in the territories were recent, stemming from the 1780s; the claims Jefferson labeled as “ancient” stretched all the way back to 1775. And although many of these claims reflected deep-seated views about property, nearly all had some grounding in positive law, especially state statutes; all claimants cared deeply about—and fought over—formal law. Even Native land rights, though grounded in immemorial usage, were refracted through Anglo-American statutes and precedent, and, for Anglo-Americans at least, increasingly rested on formal legal recognition.<sup>7</sup>

In short, the territories’ property pluralism resulted from too much, not too little, law. In the Revolution’s confusing aftermath, issues of jurisdiction and sovereignty remained highly unsettled. This was especially true west of the Appalachians, where grand if poorly defined abstractions such as federalism and Native nationhood overlaid local factionalism, producing schisms and secessionist movements. As a result, throughout the 1780s multiple authorities all claimed, and exercised, authority over property law in what became the federal territories. These contending governments favored different claimants with differing concepts of ownership. Even as Native nations insisted on their sovereign land rights, expansionist states strongly endorsed the claims of

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<sup>7</sup> The narrative of customary practice prevailing over formal law implicitly forms the plotline of the most productive area of property law history in the early republic—the large body of work on “squatters.” This has been true both for historical monographs, see Andrew R. L. Cayton, *The Frontier Republic: Ideology and Politics in the Ohio Country, 1780-1825* (Kent, Ohio: Kent State University Press, 1986), 1-11; Onuf, *Statehood and Union*, 28-33; Reeve Huston, “Land Conflict and Land Policy in the United States, 1785-1841,” in *The World of the Revolutionary American Republic: Land, Labor, and the Conflict for a Continent*, ed. Andrew Shankman, The Routledge Worlds (New York: Routledge, 2014), 324-45; and for legal scholarship using this history to cast light on current property questions, see Eduardo Moisés Peñalver, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (New Haven: Yale University Press, 2010); Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

white settlers. State statutory schemes originally constructed to benefit smallholders were twisted by self-interested legislators to facilitate massive and dubious land grabs.<sup>8</sup>

Precisely because little was settled or well-established, the territories presented the fundamental question about which sources of ownership would be recognized and deemed legitimate in early America. As Jefferson's report indicated, the responsibility for addressing this question ostensibly fell within the newly established jurisdiction of the federal government. But the federal government was hampered. State cessions shielded many land claims, even contingent future claims, from federal involvement. Just as substantially, the federal government was not monolithic, and legislators and officials disagreed fiercely over how federal title should be defined. Local disputes within the territories over the sources and nature of ownership found their echo in debates between cabinet officers and local territorial officials, or among members of Congress. The result of these diverging views was that federal land law often seemed inconsistent and oscillating, as politicians debated which features of earlier land regimes to preserve and which to reject.

To the extent a federal land policy emerged from these contentions, its core was a strong preference for clarity, finality, and the absence of conflict—the administrative virtues. Abhorring the property disorder they watched unfold in the territories and throughout the early American borderlands, federal officials sought to use their ownership of federal lands to craft explicit chains of title. Federal lands, one booster of

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<sup>8</sup> On the confusing scramble for jurisdiction over the early American West, see Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia: University of Pennsylvania Press, 1983); Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (Cambridge: Cambridge University Press, 2008), 11–47. Like other historians, Onuf emphasizes that state cessions resolved the jurisdictional controversies under the Articles.

the Northwest Territory optimistically if inaccurately wrote, had a “great advantage” over lands elsewhere: “*the Title is indisputable.*” Similarly, a senator from North Carolina argued that his state’s “cession is not nor ever has been viewed . . . as valuable to the [federal] government, but . . . only desireable in as much as the clashing claims and encroachments of the St[at]es] on their Constitutional powers are thereby silenced and the government freed from the disgrace and expences enivitably attendant on disputes with the Indians.” The handful of land statutes the first Congress enacted reflected this embrace of clarity, particularly in Indian affairs.<sup>9</sup>

Yet even when the federal government could reach an agreement enshrined through formal law, it was still only minimally successful at recasting ownership in the territories. The property mess in the territories proved too tangled, and there were too many other legitimate sources of land law, for new concepts of ownership dictated from Philadelphia to succeed. Rather than a resolution, state cessions of the territorial property morass to the federal government marked merely the beginning of a decades-long struggle over the source and nature of title in early America.

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As Jefferson’s report illustrated, title in early America began with Native nations, who owned the lands Anglo-Americans came to label the Northwest and Southwest Territories. These owners included, among others, the Cherokees who lived in the foothills of Blue Ridge Mountains, the Chickasaws who lived south and west of the

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<sup>9</sup> Samuel Holden Parsons to His Children, January 7, 1786, Folder 6, Samuel Parsons Papers, Connecticut Historical Society, Hartford, Conn.; Benjamin Hawkins to William Blount, April 24, 1792, Folder 4: 1792, William Blount Papers, Manuscript Division, Library of Congress [hereinafter WBP:LC]. Arguably the most important piece of land legislation enacted by the First Congress was the Trade and Intercourse Act, which barred private and state purchases of Indian land except at a federally sanctioned, public treaty. Act of July 22, 1790, 1 Stat. 137; see also discussion below.

Cumberland River, and the Wyandots, Miamis, Shawnees, and Delawares who lived along the rivers of present-day Ohio and Indiana.<sup>10</sup>

By the 1760s and 1770s, when the first Anglo-American settlers settled in the Indian country that would become the U.S. territories, earlier debates over the nature and validity of Native land claims had given way to the near-ubiquitous practice of purchasing Native property rights. In the 1770s, the earliest settlers of Washington County, North Carolina, which became part of the Southwest Territory, recorded a series of individual purchases of land from the Cherokees. In Vincennes, a long-standing French settlement along the Wabash River in present-day Indiana, settlers routinely purchased lands from the local Piankeshaw Indians. An Anglo-American visitor to the town in 1789 noted that many of the town's titles rested on "purchases made from Individual Indians."<sup>11</sup>

The legal controversy over Indian land sales that came to engulf the U.S. territories, then, was not over whether Natives owned land that they could sell. Rather, during and after the Revolution, an intense debate raged over the meaning and nature of Native "consent" to land sales. Both Natives and Anglo-Americans regarded some indication of Native consent to a transaction necessary for it to be legally valid. But, despite widespread and shared use of the term "consent," there was little agreement about what such consent required or what form it should take. Not only did Natives and Anglo-Americans often disagree, but, throughout the 1780s and '90s, Anglo-Americans also

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<sup>10</sup> For an overview of the histories of these diverse Native nations, see the prologue.

<sup>11</sup> *Records of Washington County Court of Pleas and Quarter Sessions, Volume Book 1, 1778-1798* (Nashville, Tenn.: Historical Records Survey, Works Progress Administration, 1938), 20; Indian Land Sale Contract, 20 May 1786, Doc. 1.214, Lasselle Family Papers, L127, Indiana State Library, Manuscripts & Rare Books Division, Indianapolis, Ind.; Land Contract, 22 May 22, Doc. 1.215, Lasselle Papers; "Report of Governor St. Clair to the Secretary of State," February 10, 1791, in *TP: Vol. II*, 352-53. On the prevalence of purchasing land from the Indians from the seventeenth century onward, see Banner, *How the Indians Lost Their Lands*, 10-48.

fiercely struggled among themselves over how to define legitimate Native consent. This conflict manifested in three interrelated legal debates centered in the territories: the legality of private purchases from the Indians, the validity of the doctrine of conquest, and the extent of the federal obligation to conform to Native law on consent.

Cherokee, Delaware, and other Native nations' concepts of consent appeared largely through the complaints they voiced to Anglo-Americans when they felt their norms had been violated. Despite their diversity, these nations shared fundamental structures of authority, and long interaction with Europeans had led to a strong sense of what a legitimate transaction looked like. By the late eighteenth century, Natives, like Anglo-Americans, insisted on written recordation of land sales. "Writings, when they are justly executed never Lye," a group of Miamis told a federal official in reference to past land sales. "Let them therefore be respected." Native representatives placed great emphasis on what the "just execution" of such documents required. It was not enough for a treaty to be written; the terms of the agreement had to be fully explained and accurately translated to them for their consent to be valid.<sup>12</sup>

Natives' most substantial concern—one that caused endless frustration for Anglo-American interlocutors—was that those selling the land possess the proper authority to do so. Native political culture relied heavily on discussion among councils; one group of Cherokee representatives described how a land matter had been "fully discussed before

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<sup>12</sup> "A Journal of the Proceedings at a Council Held with the Indians of the Wabash and Illinois at Post Vincents, by Brigadier General Putnam," October 1792, in Rowena Buell, ed., *The Memoirs of Rufus Putnam and Certain Official Papers and Correspondence* (Boston and New York: Houghton, Mifflin, 1903), 358 [hereinafter *MRP*]. For discussions of Native use of written records during this period, see Greg O'Brien, *Choctaws in a Revolutionary Age, 1750-1830* (Lincoln: University of Nebraska Press, 2002), 65–66; Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (New York: Oxford University Press, 2004), 61-82.



147 chiefs” before a definitive resolution could be reached. In Native eyes, a land sale was only valid if those who entered it had the requisite authority to agree, and if a council subsequently ratified their actions. Without such endorsement, Native nations had not truly consented to the land sale. One Miami chief condemned the sale at the Treaty of Fort Harmar of 1789, which, he observed, had been made not by “chiefs, neither delegates” but by “only young men without authority and instruction from their chiefs”; consequently, the sale would “not be approved.” An Indian agent in Cherokee territory noted that another purported sale was almost certainly invalid, as none of the “principal Chiefs, knows anything of the matter.”<sup>13</sup>

The allocation of authority within tribes was central to Native conceptions of consent. Most nations of the eastern woodlands divided authority between chiefs, who exercised control over peacetime affairs, and the “warriors” or “war chiefs,” who governed military matters. Anglo-Americans well-versed in Indian affairs understood this distinction, addressing letters to tribe’s “headmen and warriors.” Federal Brigadier General Rufus Putnam discovered the significance of the division when a chief of the Wabash Confederacy refused to negotiate with a U.S. army major on the ground that he was “no more then a war Capttain”; the chief would only permit his brother, a war captain to go, as “it was proper one War Captain should Speak with another.” Putnam accordingly shed his military uniform for civilian attire, and adopted the title of agent rather than general.<sup>14</sup>

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<sup>13</sup> James Winchester, “Surveying Notebook,” 1797-1800, Box 4, Folder 16. James Winchester Paper, Tennessee State Library and Archives; “Report of Antoine Gamelin,” May 17, 1790, in *SCP*, 155-60; Joseph Martin to Patrick Henry, July 2, 1789, 2XX30, Draper Manuscripts, Reel 116, Wisconsin Historical Society, Madison, Wis.

<sup>14</sup> Rufus Putnam to Henry Knox, August 16, 1792, in *MRP*, 321. On the division of authority within Native societies, see Shoemaker, *A Strange Likeness*, 35-60.

Traditionally, land sales had fallen within the chiefs' purview. But this division was shifting. The ceaseless invasions of Indian country, and the interconnection between land and violence, gave the war chiefs increasing influence over these decisions. "[O]n the present occasion no lands will be purchased without the consent of the warriors," one agent among the Cherokees wrote. "The Chiefs are governed by them, especially in the sale of lands." Matters among the Delawares, Wyandots, and Shawnees were similar. According to informants in Indian country, the "Warrior Chiefs" of those tribes were proclaiming that "their Old Counsellors & Kings have given up the land to the Big Knife [the Anglo-Americans], But we the Chiefs of the Warriors have not given our Consent." The warriors repudiated the purchases and vowed to "fight for our land while we have a Man."<sup>15</sup>

Many Anglo-Americans cared a great deal about satisfying Native conceptions of consent. In Vincennes, for instance, Indian land sales, like other land sales, were conducted before the notary and enshrined in a written land contract. But unlike other land sales, the transactions' witnesses signed only after the interpreter translated the contract to the Native sellers, "th[e]y understanding him and consenting." For his part, Brigadier General Putnam noted that Anglo-Americans might find the distinction between chiefs and warriors "trivial" or even "Laughable," but he considered it highly important. "[W]e ought to accommodate our selves to their ideas of propriety," Putnam wrote, "especially those which they consider as binding on them." These efforts to

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<sup>15</sup> Colonel Ore to John Sevier, May 31, 1798, in *Messages of the Governors of Tennessee*, ed. Robert H. White (Nashville: Tennessee Historical Commission, 1952), 60-62; David Duncan to Josiah Harmar, March 28, 1786, #22, Vol. 3, JHP. This shift in authority has been thoroughly studied among the Cherokees. See Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court*, 1st ed (Norman: University of Oklahoma Press, 1975), 40-52; Fred O. Gearing, *Priests and Warriors: Social Structures for Cherokee Politics in the 18th Century*. ([Menasha, Wis.]: American Anthropological Association, 1962).

conform to Native ideas about consent were rooted in pragmatism. Anglo-Americans needed to have land sale agreements that Natives would acknowledge, if only to avoid conflict and violence. The simplest way to achieve this goal was to follow Native law.<sup>16</sup>

Not all Anglo-Americans, however, were as scrupulous to obey Native consent norms as Putnam. For many speculators, the important issue was whether the purported sale of land would be recognized under Anglo-American land law, which focused on the written terms of agreement memorialized in land sale records. As a result, questionable Indian deeds tracing back to the 1770s and '80s proliferated in the territories. Outwardly, these documents seemed to conform to the formalized requirements of consent, frequently recording large payments for the land. But “in reality,” one Miami chief reported, “none of these titles have cost more than a Gallon of Rum.” The chief also complained that those selling the land “were never trusted by Indians with any part of their affairs either in War or peace.” Allegations like these led one Anglo-American to denounce such sales as “barefaced pocket picking.” Of course, such fraud and deception were rife in early American land practice, and many white owners poorly understood the documents they signed. But Natives were uniquely vulnerable, because Anglo-Americans often had no ready way to determine their legitimate consent, which required a deep knowledge of Native authority, and Natives had little access to legal redress.<sup>17</sup>

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<sup>16</sup> Indian Land Sale Contract, 20 May 1786, I.214, Lasselie Family Papers; Putnam to Knox, August 16, 1792.

<sup>17</sup> James Ross to Winthrop Sargent, December 22, 1797, Reel 4, Winthrop Sargent Papers (microfilm), Massachusetts Historical Society [hereinafter WSP]. On fraud in Indian land purchases throughout the eighteenth century, see Banner, 62-68. Francis Jennings famously referred to such dubious land practices as the “deed game.” Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York: Norton, 1976), 128-45.

Because of these opportunities for deception, private purchases of Native land had always enjoyed a dubious legal status. Many colonies had heavily regulated them from the seventeenth century onward. In 1763, at the end of the Seven Years' War, the British imperial government, citing the “great Frauds and Abuses . . . committed in purchasing Lands of the Indians,” issued a proclamation asserting its sole authority to purchase Native lands, known as the right of preemption.<sup>18</sup>

This proclamation little altered actual practice. By the middle of the eighteenth century, Native consent had become the legal foundation not merely of small-scale local transactions, but also of speculative schemes to engross enormous chunks of the Ohio, Illinois, and Tennessee Countries. Land companies—usually unincorporated associations of wealthy and politically powerful individuals—mushroomed in the years before the Revolution. These companies pooled assets to buy western territory from Native tribes. Two of the most significant purchases happened on the eve of the Revolution in what would become the U.S. territories. In 1775, North Carolinian Richard Henderson, the head of the Transylvania Company, bought “several millions of Acres” of Cherokee land, including much of present-day central Tennessee, for “large sums in valuable goods, wares, and merchandise” at the Treaty of Sycamore Shoals, even though Cherokee leaders later repudiated the agreement. The same year, the Illinois & Wabash Company

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<sup>18</sup> David C. Douglas, ed., *English Historical Documents*, vol. 9, *American Colonial Documents to 1776*, ed. Merrill Jensen (New York: Oxford University Press, 1955), 640-3. A very large literature discusses the Proclamation; for recent entries, see Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (Oxford: Oxford University Press, 2006); Daniel K. Richter, “Native Americans, the Plan of 1764, and a British Empire That Never Was,” in *Cultures and Identities in Colonial British America*, ed. Robert Olwell and Alan Tully (Baltimore: Johns Hopkins University Press, 2005), 269–92. For a legal perspective, see Robert N. Clinton, “The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs,” *Boston University Law Review* 69 (1989): 329.

made its second of two purchases of a similarly enormous tract of land in present-day Illinois from the Illinois and Piankeshaw Indians.<sup>19</sup>

The companies defended these transactions against charges of illegality by pointing to concepts of Native consent. As proprietors of their lands, the Indians had the right to freely alienate them, British restrictions notwithstanding. The companies took great pains to demonstrate the legitimacy of Native consent and the absence of fraud. The Henderson Company partners insisted that their purchase had occurred in “the most fair and open manner,” and, demonstrating their familiarity with the division of Cherokee authority, stressed that the purchase had occurred “with the consent of the head men and warriors as [well as] of the said [Cherokee] Nation at large.” For its part, the Illinois and Wabash Companies argued that consideration for the purchases was valid, the negotiation “of the most public notoriety,” and the “meaning and interpretation of the parties were interpreted and explained by persons duly qualified.”<sup>20</sup>

As long as British law governed, these arguments had little chance at success. But with the American Revolution, the debate over private purchases recurred, only now within the states that formally enjoyed sovereignty over the Illinois and Tennessee Countries. A heated discussion at Virginia’s 1776 constitutional convention resulted in a provision requiring all purchases to be made under public authority, seemingly dooming

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<sup>19</sup> “Memorial of the Surviving Partners of the Henderson Company,” 30 December 1791, Petitions (re real estate and confiscated property), GASR Dec 1791-Jan 1792, Box 3, North Carolina State Archives, Raleigh, N.C. For additional background on the Henderson purchase, *West of the Revolution: An Uncommon History of 1776* (W. W. Norton & Company, 2015), 17-26; Samuel C. Williams, “Henderson and Company’s Purchase Within the Limits of Tennessee,” *Tennessee Historical Magazine* 5, no. 1 (April 1, 1919): 5-27; William Pitt Palmer, ed., *Calendar of Virginia State Papers and Other Manuscripts ..* (Richmond: R.F. Walker, Superintendent of Public Printing, 1875), 271-311. On the history of the Illinois & Wabash purchases, see Blake A. Watson, *Buying America from the Indians: Johnson v. McIntosh and the History of Native Land Rights* (Norman: University of Oklahoma Press, 2012), 66-92.

<sup>20</sup> “Memorial of the Surviving Partners of the Henderson Company”; William Blount to John Steele, May 5, 1789, Box 1, Folder #4, John Steele Papers, Southern Historical Collection, University of North Carolina, Chapel Hill; Illinois and Wabash Companies to the Senate, 12 December 1791, in *TP, Vol. II*, 333.

the designs of the Illinois & Wabash Company. North Carolina's 1776 Constitution also banned purchases from Indians; in 1783, the state invalidated Henderson's purchase, while awarding him 200,000 acres elsewhere as compensation. After Virginia and North Carolina's cessions to the federal government, though, the speculators pressed their case to the newly created national government, hoping for better results.<sup>21</sup>

The private purchasers had good reason to anticipate success, for the new federal government in the 1780s was itself engaged in a bold legal experiment to write Native consent out of Anglo-American land law altogether, through the so-called doctrine of conquest. A legal theory founded on bluster and arrogance, this approach claimed that, because many Native nations had sided with the British, the United States had conquered them and now owned their land by virtue of Britain's cession at the Treaty of Paris. "You joined the British King against us, and followed his fortunes; we have overcome him, he has cast you off, and given us your country," congressional commissioner Richard Butler told 1,000 Shawnees, Delawares, and Wyandots gathered in the Ohio Country. "We plainly tell you that this country belongs to the United States." North Carolina similarly invoked its supposed conquest of Native lands when it enacted a law limiting the Cherokees to a small parcel of land within the state's borders.<sup>22</sup>

Given this hostility toward the long-standing principles of Native consent, the politically powerful representatives of the Illinois Company had several moments of near success in persuading the federal government to recognize their land claim. In its waning

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<sup>21</sup> Lindsay Gordon Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford: Oxford University Press, 2005), 14–20.

<sup>22</sup> Josiah Harmar to Thomas Mifflin, January 31, 1785, #33-34, Letterbook A, Vol. 28, JHP; "Excerpts from the Journal of General Richard Butler at the Treaty of Fort Finney," Alden T. Vaughan, ed., *Early American Indian Documents: Treaties and Laws, 1607-1789* (Washington, D.C.: University Publications of America, 1979), 18:340–47; Act of Apr. 18, 1783, ch. 2, 1783 N.C. Sess. Laws 322, 322–25. On conquest generally, see Colin Colloway, "Treaties by Right of Conquest," in Vaughan, *Early American Documents*, 18:278–81.

days, the Continental Congress stated that, “however improper it may be in general to countenance private purchases from the Indians,” this transaction appeared to be “fairly conducted.” Another Wabash & Illinois Petition secured similar support in the House of Representatives, where a committee concluded that “principles of justice and equity” merited relief; the proposal ultimately failed in the Senate. The prospect that ratification of the Constitution, and especially the creation of the federal judiciary, would reanimate claims based on these earlier land sales was hotly debated at the Virginia ratification convention in 1788; James Madison described the topic as one of the “principal topics of . . . discussion and intrigue” there.<sup>23</sup>

But at the same time that the Illinois Company seemed to be nearing success, the United States was discovering that Natives refused to allow it to write their consent out of the law. In their negotiations with the United States, Natives “expressed the highest disgust, with the principle of conquest,” and rebutted the legal claims of the United States. “If . . . a bare march, or reconnoitering a country is sufficient reason to ground a claim to it,” the Cherokee leader Corn Tassel argued, then the Cherokees now owned the North Carolinians’ settlements, since “*we* had last marched over [their] territory.” To the north, Ohio Country Natives similarly disdained conquest theory as a “lye.” As a group of Wyandots told a Quaker traveler, “the land belonged to them, and the King of England could not dispose of them . . . they looked upon themselves as a free people & not obliged to part with their lands.” When Shawnee and Delaware leaders made the same

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<sup>23</sup> “Report of Committee: The United Land Companies of the Illinois and Wabash,” June 27, 1788, in *TP: Vol II*, 115-17; “No. 11: Illinois and Wabash Land Companies,” March 26, 1792, in Walter Lowrie, ed., *Documents Legislative and Executive of the Congress of the United States in Relation to the Public Lands, From the First Session of the First Congress to the First Session of the Twenty-Third Congress: March 4, 1789 to June 15, 1834*, 1:21 (Washington: Printed by Duff Green, 1834) [hereinafter *ASP:PL*]; “No. 12: Illinois and Wabash Land Companies,” 3 Apr. 1792, in *ibid.*, 1:22; James Madison to George Washington, June 13, 1788, in Robert A. Rutland, ed., *Papers of James Madison: Congressional Series* (Chicago: University of Chicago Press, 1977), 11:134.

argument to congressional commissioner Samuel Parsons, he confessed, “[T]here appears to me so much Reason in their Observations that I scarcely know a Sufficient Answer.”<sup>24</sup>

Natives’ legal arguments mattered because Native nations retained considerable power. The prospect of the United States taking “their [Native] lands from them without their consent” led “many nations” to unite to form a “powerful” and “formidable” confederacy. Ultimately, the consequence was an extremely costly war in the Northwest Territory that consumed five-sixths of the federal budget and resulted in two cataclysmic defeats for the nascent federal military. Both Natives and federal officials attributed the conflict to the federal effort to abolish Native consent. “[T]he doctrine of conquest is so repugnant to their feelings,” Secretary at War Henry Knox concluded, “that rather than submit thereto, they would prefer continual war.” A chief of the Wabash Confederacy put it more succinctly: “[I]f your people had not told the Indians that their lands belonged to you,” he told a federal emissary, “you would have had no war.”<sup>25</sup>

These tremendous costs led the United States to retreat to Native consent as the foundation of its land law. As “the main spring of the distressing War on our frontiers,” federal officials insisted, conquest theory “cannot be too explicitly renounced.” Instead, to comport with “fundamental Laws of Nature,” Secretary of War Henry Knox urged the passage of a law protecting Native property. “The Indians being the prior occupants possess the right of the Soil—It cannot be taken from them unless by their free consent,

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<sup>24</sup> Samuel C. Williams, ed., “Tatham’s Characters Among the North American Indians,” *Tennessee Historical Magazine* 7, no. 1 (1921): 174–78; John Parrish, “Book Relative to Indian Affairs Journals to Treaties,” June 12, 1791, John Parrish Journals, Ayer MS 3146, Ayer Collection, Newberry Library, Chicago, Ill.; Samuel Holden Parsons to Doctor William Johnson, Oct. 27, 1785, Folder 5, Parsons Papers. For a convincing argument that Native resistance forced the federal government to abandon claims of conquest, see James H. Merrell, “Declarations of Independence: Indian-White Relations in the New Nation,” in *The American Revolution: Its Character and Limits*, ed. Jack P. Greene (New York: New York University Press, 1987).

<sup>25</sup> Rufus Putnam to General [Henry] Knox, 8 July 1792, in *SCP*, 2:302-03; John Francis Hamtramck to Secretary of War, March 31, 1792, in *TP: Vol. II*, 38--83. On the costs of the war against the Northwest Indian Confederacy, see Alan Taylor, *The Divided Ground: Indians, Settlers and the Northern Borderland of the American Revolution*, (New York: Alfred A. Knopf, 2006), 238.



or by the right of Conquest in case of a just War.” (Knox was clear that he did not regard the claims of conquest from the Revolution as “just.”). Echoing Knox, the Northwest Ordinance provided that Indians’ “lands and property shall never be taken from them without their consent.” Knox reiterated this principle in a letter to Haudenosaunee leader Joseph Brant, which he asked Brant to convey to the western tribes at war with the United States. “[T]he United States require no Indian lands,” he stated, “but those which have been ceded by treaties made with the full understanding and free consent of the Chiefs.”<sup>26</sup>

The return to Native consent led Congress and the executive to reject private purchases of Native land decisively. The law Henry Knox had called for became one of the first statutes enacted by Congress, the Trade and Intercourse Act of 1790. The law barred private purchases of Indian lands, unless through federal treaty; subsequent versions made such purchases criminal and punishable by a fine. The federal embrace of preemption was, in some sense, overdetermined. It bolstered the power of the federal state even as it provided a powerful tool to obtain Native lands at below-market rates. Yet federal officials insisted the purpose of preemption was to safeguard the integrity of Native land sales. The “design” of these laws, one prominent Washington administration official stated, “is to protect the Indian Lands [a]gainst . . . bad men,” who “wish[ed] to cheat . . . the Indians.” Though cast as benevolence, this was a hardheaded recognition that the proliferation of dubious treaties would provide neither peace nor security of title. Private purchases by “unprincipled persons” had produced “misunderstandings, quarrels,

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<sup>26</sup> Timothy Pickering to Anthony Wayne, 8 April 1795; Enclosure, Henry Knox to George Washington, 15 June 1789, in W. W. Abbott and Dorothy Twohig, eds., *The Papers of George Washington, Presidential Series* (Charlottesville: University Press of Virginia, 1987-2013), 2:488-94 [hereinafter *PGW:PS*]; [NW Ordinance]; Henry Knox to Joseph Brant, June 27, 1792, Henry and Lucy Knox Collection, Clements Library, University of Michigan, Ann Arbor, Mich.

and wars with the Indians,” James Madison warned on the renewal of the Trade and Intercourse Act. It was therefore “highly important that this whole business should be under the absolute and sole direction of the public authority.”<sup>27</sup>

The law’s success at recasting title in the territories was mixed. Though the Illinois Company continued to press its claims, Congress proved hostile. Speculators who had hoped to follow the Transylvania and Illinois Companies by making enormous purchases from Indians similarly despaired; since they depended on federal recognition, the Trade and Intercourse Act “entirely deranged [their] Plans.”<sup>28</sup>

But for many in the territories, the statute merely forced their schemes underground, leading them to keep their plans to purchase Native lands “a profound Secret.” Those engaged in this “Wildest of all Wild Speculations,” as one observer described the widespread trade in Indian deeds, hoped to persuade or dupe some authority into honoring their bargains. At federal treaty negotiations, speculators lurked on the margins to prevail upon Natives. Illinois country settlers remained confident that Congress would still endorse the Illinois Company’s purchase. Even local territorial officials themselves purchased interests in ongoing Indian purchases of “immense

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<sup>27</sup> Act of July 22, 1790, § 4, 1 Stat. 137; Act of Mar. 1, 1793, § 5, 1 Stat. 329; Timothy Pickering to Anthony Wayne, April 8, 1795, Northwest Territory Collection, M367, Indiana Historical Society, Indianapolis, Ind. [hereinafter NWTC]; “Indian Lands,” January 17, 1793, in *Papers of James Madison: Congressional Series*, 14:441-42. Multiple scholars have critiqued preemption. Eric Kades has employed economic models and game theory to argue that federal policy with respect to Indian lands serve to dispossess Native lands “efficiently.” “Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands,” *University of Pennsylvania Law Review* 148 (2000): 1065. And Alan Taylor has pointed toward preemption’s role in forestalling Native property experiments, insisting that preemption was nothing “more than partisan fiction asserted to dispossess native people.” Taylor, *The Divided Ground*, 404. Though well-taken, these critiques grant preemption too much agency in the process of dispossessing Native peoples; they seem to envision—as unrealistically as President Washington did in his famous letter to Seneca—an late-eighteenth Anglo-American legal system capable of redressing Native claims of fraud. Moreover, federal officials’ own statements of preemption’s purpose were hardly expressions of pure altruism and benevolence; their desire for clarity and finality—which officials believed would also benefit Native peoples—nonetheless served federal interests, as officials themselves argued.

<sup>28</sup> Jonathan Heart to William Judd, July 29, 1790, Folder 2, William Judd Papers, Connecticut Historical Society, Hartford, Conn.

extent,” as they anticipated using their connections with higher-ups to secure confirmation—albeit through secret letters that they urged then be burned.<sup>29</sup>

Others defied the law more openly. Some tried to avoid its strictures by leasing land, a ploy criminalized in 1796. Despite this change, a traveler passing through the Tennessee country shortly afterward stayed with a man who rented his land from the Cherokees “at 600 per annum.” Other would-be purchasers, echoing the arguments of prerevolutionary speculators, rejected federal authority altogether: one group leasing from the Kaskaskias in the Illinois Country said that “Congress has nothing to do with the lands but that they belong to the Indians who may dispose of them as they please.”<sup>30</sup>

By the 1790s, the formal law on private purchases from Indians was remarkably clear, given earlier confusion: they were illegal, and punishable under federal law. Native consent, however, had proved too durable a legal concept in the territories to be transformed by federal edict alone.

As the debate over Indian deeds demonstrated, Anglo-American land law often turned on arguments about the meaning and scope of Native consent from which Natives were excluded. Yet Natives had their own views about their consent. On the one hand, they were deeply suspicious of land speculators and often rejected these men’s claims to their lands as grounded in fraud. On the other hand, Natives were keenly aware of the irony that preemption represented: a restriction on the scope of Native consent in the name of safeguarding that consent’s validity. Natives argued that the federal government

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<sup>29</sup> Lardner Clark to John Overton, October 18, 1797, Box 4, Folder 10, Murdock Collection of Overton Papers, Tennessee State Library and Archives; Peter Audrain to Winthrop Sargent, March 23, 1797, Reel 4, WSP.

<sup>30</sup> “Journal of Bishop Francis Asbury (1788-1800),” in *Early Travels in the Tennessee Country, 1540-1800*, ed. Samuel Cole Williams (Johnson City, TN: Watauga Press, 1928), 312; John Edgar to Arthur St. Clair, August 25, 1797, Reel 4, WSP.

had no authority to thus restrict their power to alienate their own lands. “We have never parted with such a power,” Native leaders told federal commissioners who urged preemption on them. They turned Anglo-Americans’ rhetoric of Native consent on its head: “[W]e consider ourselves free to make any bargain or cession of lands, whenever and to whomsoever we please.”<sup>31</sup>

Natives also contended with the federal government about the precise meaning of their consent. On paper, federal officials charged with overseeing Indian affairs, especially the Secretaries of War, were keenly concerned with obeying Native norms governing consent. Native consent to the treaties required more than signatures, they instructed federal negotiators; it occurred only when Native leaders fully understood treaty terms and possessed proper authority to sell the land. In 1790, Henry Knox wrote William Blount, governor of the Southwest Territory, informing him of the “explicit[] . . . direction of the president of the United States from which you must not depart” at an upcoming negotiation to purchase land from the Cherokees. “However desirable” it was to obtain a cession, Knox commanded, lands could be purchased only “by the free and unconstrained consent of a full and fair representation of the Cherokees, who are the proper proprietors of the lands to be relinquished, and with their full understanding of the act they are performing, and the consideration they are to receive as an equivalent.” Knox’s successor Timothy Pickering sent similar instructions to Anthony Wayne in preparation for the 1795 Treaty of Greenville with the nations of the Ohio Country.

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<sup>31</sup> Letter from Gen. Council of Indian Nations to the Comm’rs of the United States (Aug. 16, 1793), in *American State Papers: Indian Affairs, Vol. 1*, eds. Walter Lowrie and Matthew St. Clair Clarke (Washington: Gales and Seaton, 1832), 356 [hereinafter *ASP:IA*]. The federal government sought to remedy this by writing preemption into subsequent treaties, which stipulated that tribes would sell lands “only to the United States.” Treaty of Peace, U.S.-Wyandot et al, August 3, 1795, Art. V, 7 Stat. 49, 52; Treaty of Peace and Friendship, U.S.-Cherokees, July 2, 1791, Art. II, 7 Stat. 39, 39.

Wayne should keep careful lists of all the principal chiefs of the various nations, Pickering urged, as well as recording the statements of the chiefs as to whether there was an adequate representation from each nation. Wayne also had to give the chiefs “strong and decided proofs that they are not under even the shadow of duress.” “Let them feel,” Pickering wrote, “that they are at perfect liberty to speak their opinions and to sign or refuse to sign.” Above all, Pickering insisted, “[o]ne great principle ought to govern all the negotiations, *a rigid adherence to truth.*”<sup>32</sup>

The Secretaries of War showed such solicitude for Native understandings of consent because, like earlier frontier negotiators, they believed adhering to Native law would benefit the United States in the end. “The United States may conform to the modes and customs of the [I]ndians in the disposal of their lands,” Knox informed Congress, “without the least injury to the national dignity.” In particular, following Native conceptions of consent would avoid “any difficulties arising from any after misconstructions on either side.” Pickering made clear the sorts of “difficulties” he anticipated. Native “[sus]picions,” he urged, “occasion delays, and issue in discontents; [an]d these in depredations and war.”<sup>33</sup>

In principle, then, Natives and federal leaders shared a set of norms—full understanding, the absence of duress, appropriate authority—that governed whether “free consent” had been obtained. In practice, Natives and federal officials fiercely disagreed about whether particular treaty negotiations had satisfied those requirements. Treaty commissioners and Native leaders offered divergent accounts of what transpired on the

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<sup>32</sup> Henry Knox to William Blount, August 27, 1790, NWTC; Timothy Pickering to Anthony Wayne, April 8, 1795, NWTC.

<sup>33</sup> “Report of the Secretary at War: Indian Affairs,” May 2, 1788, in *TP, Vol. II*, 103-05; Knox to Blount, August 27, 1790; Pickering to Wayne, April 8, 1795.

treaty ground, leaving federal officials in Philadelphia to parse the truth. In these deliberations, officials' commitment to Native consent proved less meaningful than their desire to uphold federal authority and keep treaties settled.

These considerations appear particularly clearly in the negotiations surrounding the Treaty of Holston, the subject of Knox's instructions to William Blount. In summer of 1791, Blount met the leaders of the Cherokee Nation at the confluence of the French Broad and Holston Rivers, at the site of what subsequently became the town of Knoxville. There, Blount met a number of Cherokee leaders who reluctantly attended the treaty session, most prominent among them John Watts and Nenetooyah, known to the Anglo-Americans as Bloody Fellow, the prominent leader of the Cherokee lower towns. After several weeks of discussions, the Cherokees agreed to a treaty that ceded large portions of the eastern Tennessee country, as well as a diamond-shaped tract forty miles around Nashville, for an annuity of \$1,000. In November, after Congress ratified the treaty, President Washington proclaimed the treaty as the law of the land.<sup>34</sup>

For the Cherokees, and especially for Bloody Fellow, the treaty's legality was more questionable. Ownership of the area around Nashville, known as the Cumberland District, was especially contested. Part of the purported 1775 Transylvania purchase from the Cherokees by Richard Henderson, the region was included within lands ceded by the Cherokees at the Treaty of Hopewell, and expanded at Holston. Yet Bloody Fellow rejected this pat account of legality. He argued that the North Carolinians who settled along the Cumberland River in the 1770s had done so "before [Cherokee] consent

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<sup>34</sup> Treaty with the Cherokees, July 2, 1791, 7 Stat. 39; "Report of Committee on Treaty of Holston," November 9, 1791, in *ASP:LA*, 135; "Proclamation on the Treaty of Holston," November 11, 1791, in *PGW:PS*, 9:178-80. Though the official record of the treaty negotiations was destroyed, Daniel Smith's copy of the proceedings survives. "Treaty of Holston--June & July, 1791. Between Gov. Wm. Blount & the Cherokees," 15U1-59, Draper Manuscripts, Reel 58, Wisconsin Historical Society, Madison, Wis.

was asked,” arriving stealthily and taking “possession by force.” As for the cession at Hopewell and Holston, Bloody Fellow insisted that the agreements were not “free and lawful treaties,” even if the Americans tried to “make it appear” so. The treaties were not “explained to the Indians,” who learned their contents only upon arriving home. Nor did the treaties receive “the general consent of the nation.” Using these “fraudulent means,” the Americans “usurped the lands of the Indians.”<sup>35</sup>

Bloody Fellow’s complaints against the Treaty of Holston are particularly revealing of the complicated issues surrounding Native consent. In one report that arrived from Indian country secondhand, Bloody Fellow alleged that Blount had committed outright fraud. Bribing the interpreters to misrepresent the treaty to the Cherokees, Blount had allegedly changed material terms, reducing the promised annuity by half, changing the boundary around Nashville from ten to forty miles, and secretly adding provisions granting a road, navigation of the Tennessee, and a congressional right to regulate trade.<sup>36</sup>

In another account, Bloody Fellow offered his own narrative of what had occurred at the treaty ground. This version alleged, not blatant deception, but a more complicated negotiating dynamic that suggested more subtle limits to the “freedom” of Native consent. In Bloody Fellow’s telling, the Cherokees had arrived at the Treaty anticipating only negotiations to end endemic frontier violence. Instead, Blount demanded Cherokee lands for seven days nonstop; Blount’s insistence, Bloody Fellow reported, “made tears come into my eyes daily.” Bloody Fellow and the Cherokee leaders raised a host of

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<sup>35</sup> Cherokee Nation to Baron de Carondelet, 5 April 1793, in Julian P. Boyd, ed., *The Papers of Thomas Jefferson: Main Series* (Princeton, N.J.: Princeton University Press, 1950-2014), 26:316-17 [hereinafter *PTJ:MS*].

<sup>36</sup> “Journal Extract about George Welbank’s Information,” 13 August 1793, in *PGW:PS*, 14:147-52; John Parrish, “Journal 1793 No. 2 Indian Treaty” [#6], August 25, 1793, John Parrish Journals, Clements Library, University of Michigan.

objections, attempting to outlast Blount. The Cherokee leader John Watts expressed skepticism about Blount's selection as a federal representative. The Carolinians, the Cherokees observed, "would not observe the orders of Congress or any body else"; any assurances Blount offered were worthless, since the Carolinians would "have their own way." Hoping to avoid dealing with Blount, Bloody Fellow demanded to go to Congress to see if he "could not obtain better satisfaction." Blount said there was no point, as he was a federal representative, and asked how Bloody Fellow would pay for the journey.<sup>37</sup>

Blount's rejection, Bloody Fellow reported, "struck me forcibly." Realizing that he and all the other Cherokees were "in his [Blount's] power"—suggesting a fear of possible violence--Bloody Fellow agreed to part with a small parcel of land in return for safe passage. This small concession immediately prompted intense bargaining. Blount made extravagant demands, which Bloody Fellow repeatedly rejected; after "a good deal of dispute," Blount finally pressed on the Cherokees a line along a mountain ridge in eastern Tennessee.<sup>38</sup>

The negotiation then shifted to price. Blount offered Bloody Fellow the annuity authorized by Knox—\$1,000 annually. The insulted Bloody Fellow told Blount that the annuity was too small: the sum "would not buy a breech clout [cloth] for each of my nation," while the Creeks had gotten far more for a worse tract. According to Bloody Fellow, Blount responded by reiterating the doctrine of conquest, emphasizing that the land had been "purchased with American blood"; Bloody Fellow pointed out that these

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<sup>37</sup> "Conference of the Chiefs of the Cherokee Nation with the Secretary of War," January 3-11, 1792, in *ASP:IA*, 203-06.

<sup>38</sup> *Ibid.* Bloody Fellow's description of intense bargaining agrees with Daniel Smith's account of the proceeding, in which a generally amicable initial discussion quickly became more heated and acrimonious. Bloody Fellow, for instance, reportedly threatened to leave the treaty if Blount did not agree to the Cherokees' proposed line. By the end, the Cherokees were clearly upset with Blount, complaining that he "only ask'd more and more"; "If your heart was straight," the Cherokee leader Nontuaka told him, "you would have accepted our offers." Treaty of Holston--June & July, 1791. Between Gov. Wm. Blount & the Cherokees."



events were long past. The impasse resolved when Blount promised to write to Congress to authorize more funds. In the interim, Bloody Fellow and the other Cherokees signed the treaty.<sup>39</sup>

Bloody Fellow relayed this narrative to Secretary of War Henry Knox in person in January 1792, in a visit he and a number of other Cherokees made to Philadelphia. Bloody Fellow's trip made good his implicit threat to speak to federal authorities unmediated by Blount: "I am come to ask of you," Bloody Fellow told Knox, "whether he [Blount] was authorized to purchase our lands." Aware of the importance of recordation, Bloody Fellow produced a string of wampum, which, he told Knox, "answer[s] the same purpose as letters with you, and [is] held in the highest estimation." But he also asked that all speeches be done in writing, to be transmitted back to the nation, and brought George Miller, a Cherokee who knew English, to avoid dependence on the federal translator.<sup>40</sup>

Knox proved surprisingly unsympathetic to Bloody Fellow's complaints about the treaty. Though Blount's reported hard bargaining had not employed outright coercion, the governor had strayed far from Knox's insistence that placating the Cherokees was more important than obtaining land, and his continued invocation of conquest was flatly at odds with federal policy. Nonetheless, Knox told Bloody Fellow that the President, the Senate, and the cabinet all believed that the treaty was "a good satisfactory treaty, as well for the red as the white people," and so "confirmed it, printed it as you here see" (Knox presumably displayed a copy), "and it has become the law of the land." To placate

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<sup>39</sup> "Conference of the Chiefs of the Cherokee Nation with the Secretary of War," January 3-11, 1792.

<sup>40</sup> *Ibid.*

the Cherokees, though, the United States agreed to increase the annuity to the \$1,500 that Bloody Fellow had requested.<sup>41</sup>

Knox's seemingly tepid response likely had several causes. The surviving copy of the official treaty record, though it did not flatly contradict Bloody Fellow's account, portrayed the Cherokee sales as far more consensual. When Blount later read the record of Bloody Fellow's meeting with Knox, he complained that the Cherokees "have egregiously lied as to the Means and Manner of [the treaty's] being brought about." But Knox, ostensibly Blount's superior, was also heavily dependent on Blount to enact Indian policy in the Southwest Territory, and so was careful not to undermine the governor's authority. Knox in fact reassured Blount that, although the Cherokees' visit had constrained him to negotiate "separately from you," the outcome "will tend to induce a more perfect confidence on the part of the Indians in your character." Blount would later use this official endorsement to crow about his authority to the Cherokees: "Thus you see you are no more to doubt the truth of what I have said, or shall say to you."<sup>42</sup>

As Knox's comments suggest, however, the sharpest divergence between his conception of consent and Bloody Fellow's was the issue of finality. For Knox, the treaty was settled and had become formal law; the time for deliberation had passed. For their part, the Cherokees continued to try to renegotiate the treaty. At a Cherokee council

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<sup>41</sup> *Ibid.*

<sup>42</sup> William Blount to Secretary Smith, April 27, 1792, in *TP: Vol. IV*, 143-45; Secretary of War to William Blount, January 31, 1792, in *TP: Vol. IV*, 115-17; "The address of Governor Blount to the chiefs and others of the Cherokees," May 23, 1792, in *ASP:IA*, 268. Daniel Smith's treaty journal confirms many of Bloody Fellow's allegations, including the debate over price terms that occurred between Blount and the Cherokees. The journal is less forthcoming on why the Cherokees, who had grown increasingly contemptuous of Blount and his offers, suddenly reversed course and acceded to Blount's demands; Cynthia Cumfer describes the reversal as "inexplicabl[e]." "Treaty of Holston--June & July, 1791. Between Gov. Wm. Blount & the Cherokees"; Cynthia Cumfer, "Local Origins of National Indian Policy: Cherokee and Tennessean Ideas about Sovereignty and Nationhood, 1790-1811," *Journal of the Early Republic* 23, no. 1 (April 1, 2003): 27. But the treaty record also acknowledges frequent private meetings between the Cherokee leaders and Blount—Blount spoke of routinely having dinner with the Cherokee delegates—where Bloody Fellow alleged that many of his conversations with Blount occurred.

in June 1792, Cherokee leaders still “murmured” about the boundary around Nashville; the influential chief Little Turkey, bemoaning that the treaty failed to address Native concerns, proposed moving the treaty boundary further east. Reading these reports, Knox expressed “some doubts whether that part of the line [the Cumberland boundary] was agreeable to the opinion of the Cherokees generally—and it really appears to me that something will yet be to be arranged on that subject.” Ultimately, Knox papered over the difficulty two years later—not by altering the line, but by more than tripling than Cherokees’ annuity to \$5,000 per year, likely in an effort to placate the Cherokees.<sup>43</sup>

This constant reopening of settled law exasperated Anglo-Americans charged with dealing with Natives. They viewed Native claims of coercion and deception as mere posturing, strategic behavior to extract more concessions. James Madison, for instance, described a Native complaint that a treaty had been made by “parts only of the Nations whose consent was necessary” as mere “pretext,” the “usual” argument Natives made when they tried to wriggle out of agreements they disliked. “When the White People give away a thing,” an evidently exasperated federal commissioner lectured a group of gathered Natives, “they never ask for it back again.”<sup>44</sup>

Though Native leaders were just as capable of acting strategically as Anglo-Americans—even if few matched Blount’s contortions—their complaints were more than pretext. The Cherokees understood the significance of written treaties, but they regarded them in relational rather than transactional terms, as an agreement between peoples rather

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<sup>43</sup> “Journal of the Grand Cherokee National Council,” June 26, 1792, in *ASP:IA*, 271-73; Secretary of War to President, July 28, 1792, in *TP: Vol. IV*, 159-61; Treaty with the Cherokees, U.S.-Cherokees, June 26, 1794, 7 Stat. 43.

<sup>44</sup> James Madison, Jr. to James Madison, Sr., 28 July 1787, in *Papers of James Madison: Congressional Series*, 10:119; “A Journal of the Proceedings at a Council Held with the Indians of the Wabash and Illinois at Post Vincents, by Brigadier General Putnam,” October 1792, in *MRP*, 335-63.

than a contract. The text of the Treaty of Holston itself supported this interpretation: while Anglo-Americans fixated on the concrete boundary provisions, the document also made promises of “peace and friendship” as well as federal protection to the Cherokees. Because the Cherokees viewed consent as a process rather than a moment—an ongoing commitment to justice and fair-dealing—they sought to uphold those provisions just as firmly as Anglo-Americans insisted on the boundary lines.<sup>45</sup>

These expectations are apparent in the aftermath of Bloody Fellow’s visit to Philadelphia. Despite Knox’s hard-edged rhetoric, Bloody Fellow proclaimed himself satisfied: “[W]e rejoice in the prospect of our future welfare, under the protection of Congress.” But the federal government failed to meet these expectations. Reports from Indian country stated that the Cherokees waited six months for their grievances to be redressed, but received no relief. “The bloody Fellow then said,” this informant related, “Congress are Liars general washington is a Liar & governour Blount is a Liar.” Several months later, William Blount passed along intelligence to Henry Knox that Bloody Fellow was urging the Lower Cherokee towns to war against the United States. The fear that violation of Native consent norms would produce violence seemed to have been realized.<sup>46</sup>

In the wake of the American Revolution, consent became a critical foundation for Anglo-American law and political thought; relationships previously built on hierarchies

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<sup>45</sup> On Native interpretations of treaties in this period, see Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997).

<sup>46</sup> “Conference of the Chiefs of the Cherokee Nation with the Secretary of War,” January 3-11, 1792; William Blount to Secretary of War, December 26, 1793, Reel 2: Territory Southwest of the River Ohio, Senate Territorial Papers (microfilm), M200, U.S. National Archives.

became reconceived to require free assent. Relations between the United States and Native nations were part of this process. By the late eighteenth century, after centuries of contention over the scope and meaning of Native land rights, both Native leaders and their Anglo-American interlocutors largely shared a legal vocabulary and framework around property. Most in the territories agreed that Natives owned their lands, and nearly all—Natives, land speculators, and, after the disastrous failure of conquest theory, federal officials as well—agreed that Native consent was necessary to alienate Native land.<sup>47</sup>

But both in Indian affairs and in Anglo-American law more broadly, centering consent did not resolve the ambiguities of what consent required, and congruencies in language and law masked deeper disagreements. This existence of a shared framework merely channeled broader disputes into a legal arena, in which law defined the terms and scope of the debate. In this case, the early American law of property focused the struggle around the legal meaning of Native consent, about which claimants sharply diverged. Land speculators merely sought Native signatures on a formal deed, a formulation that readily facilitated fraud. Washington Administration officials believed Native consent required more. Free consent, Knox and Pickering concluded, mandated that purchases occur in public treaties held under federal auspices, and they at least aspired to ensure requisite authority, full understanding, and uncoerced assent. Native leaders required

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<sup>47</sup> On the rise of consent as a basis for governance and law in this period, see Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005); James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978). The focus on consent in Native land transactions helps reconcile a debate among historians. An older strand of scholarship, epitomized by the work of William Cronon, argued that the struggle over Native lands stemmed from the gap between Native and Euro-American conceptions of property. Cronon particularly stressed the contrast between Native usufructory rights and English emphasis on fee-simple absolute, with its emphasis on land as a commodity. William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983). More recent work, by contrast, has stressed the overlap between Native and Euro-American conceptions of land, but also tracked how this similarity often led to contestation. Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (New York: Oxford University Press, 2004); Allan Greer, “Commons and Enclosure in the Colonization of North America,” *The American Historical Review* 117, no. 2 (April 1, 2012): 365–86. But, as I describe above, the existence of shared legal norms rarely obviated conflict; it often facilitated it.

those elements, too, and vociferously pointed out the frequent instances when federal officials failed to satisfy them. But they also insisted that Anglo-Americans conform to Native understandings of authority and deliberation to conclude binding agreements. Native leaders recognized that even when they entered into treaties they well understood, they had not freely chosen them in any meaningful sense, as the threat of force always lurked behind federal negotiations with Native nations. “[W]e are strong enough to take land,” William Blount told the Cherokees at Holston, “but will not do it because we will not be guilty of injustice.” For their part, the Cherokees “objected to giving up so much land,” Bloody Fellow reported to Knox, “but, for the sake of peace and quietness, we did it.”<sup>48</sup>

Judged by this standard, most Native “consent,” notwithstanding its position as the foundation of Anglo-American land law, was a legal fiction that disguised an ever-more unequal reality. Justice, particularly as construed by people as self-dealing as Blount, proved to be a thin reed for Native peoples. But in the 1790s, Blount’s bluster concealed a deeper congruence between the two sides. As the retreat from conquest theory shows, both Natives and federal officials feared violence, and so both made concessions to the others’ legal norms, less from principle than for the sake of “peace.”

In the immediate term, the consequence of three different standards of Native consent was to produce three claims to ownership of the same land. Speculators asserted ownership based on dubious Indian deeds; the federal government claimed title based on Indian treaties; Native nations confused Anglo-Americans by sometimes accepted the legitimacy of these transactions but, in other instances, insisting that their original rights

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<sup>48</sup> “Conference of the Chiefs of the Cherokee Nation with the Secretary of War,” January 3-11, 1792.

persisted. Federal supremacy, through the assertion of preemption rights, was supposed to create unambiguous chains of title unmarred by fraud or abuse. Instead, these triplicate claims crisscrossed the Northwest and Southwest Territories, spawning confusion—and violence—in their wake.

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If Native ownership was one source of confusion about title, state ownership was another. This was paradoxical, as the territories were the only part of the United States not incorporated within state borders. But federal sovereignty did not itself ensure what was then called “right of soil,” or ownership. In their acts of cession, both North Carolina and Virginia had required that the federal government would continue to honor state land grants within the Southwest and Northwest Territories. North Carolina’s cession provided that all state land grants in the Tennessee Country would “have the same force and effect as if such cession had not been made,” while Virginia reserved a large tract of land north of the Ohio to satisfy the bounty claims of its war veterans, a region that became known as the Virginia Military District.<sup>49</sup>

These carve-outs bound large sections of the Southwest and Northwest Territories to state land-law systems. Thomas Jefferson calculated that 5.4 million acres (8,391 square miles) of the Southwest Territory had already been granted by North Carolina, which constituted 20% of the Territory’s entire landmass. Jefferson believed that every piece of land legally purchased from the Natives had already been alienated. In the Northwest Territory, the lands promised to Virginia amounted to 15% of the territory of

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<sup>49</sup> “Virginia: Cession of Western Land Claims,” March 1, 1784, in *TP: Vol. II*, 6-9; Act of April 2, 1790, 1 Stat. 106.

present-day Ohio, encompassing the valuable Scioto River Valley (another 11.7% of Ohio was reserved for Connecticut).<sup>50</sup>

Jefferson's tidy lists can make it seem that the federal government was merely honoring well-established, vested property rights. In fact, many of the lands were set aside to satisfy contingent future claims based on past governmental promises, while even those lands that had been "granted" were often in the midst of lengthy and highly contingent state processes for securing title. The resulting fever of speculation, as dubiously legal land claims proliferated and were litigated, meant that owning land in the territories offered both the prospect of tremendous wealth and constant uncertainty. Even smallholders who sought only self-sufficiency became participants, albeit unwillingly, in the tremendous scramble for legal ownership that characterized the territories.

The late-eighteenth-century property laws of Virginia and North Carolina were similar. Both states employed the system known as "indiscriminate location," enshrined in statute during and after the American Revolution. Claiming land under this system involved a number of steps in which individuals would select tracts, pay a modest fee, and receive state confirmation of title, with disputes sent to the courts through a process known as caveat.

North Carolina's Land Law of 1783 was typical. Claimants first appeared at the state-run land office with a written description of the land they wished to purchase based on nearby landmarks such as waterways and mountains. Upon payment of the cost of the

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<sup>50</sup> Walter Clark, ed., *The State Records of North Carolina: Vol XVIII---1786* (Goldsboro, N. C.: Nash Brothers, 1900), 456; "General Account of the Lands Granted or Appropriated by the State of North Carolina within the Territory Ceded by the Said State to the United States of America," July 30, 1791, M068, List of North Carolina Land Grants in Tennessee, 1778-1791, U.S. National Archives.



lands—ten pounds per hundred acres claimed—as well as required fees, the entry taker, a state official appointed by the legislature, would record the claim and assign a number. Three months would follow for competing claimants to come forward and make what was known as a caveat—a challenge to the claim’s validity.<sup>51</sup>

Barring a caveat, the entry taker would issue a land warrant—an order to the county surveyor, a local official paid by fees, to survey the land. The county surveyor would survey the tract and make plats describing the tract’s boundaries, and record the number and date of the entry as well as the number of acres. Completed plats were sent to the office of the state’s secretary, who would issue a land grant, authenticated by the governor and recorded in the secretary’s office, to the claimant. Challengers to the survey could also seek a caveat from the governor, who could suspend the execution of a grant. Otherwise, upon receipt of a grant, formal title to land vested in the claimant, who was obligated to record the grant in the local county.<sup>52</sup>

Viewed in hindsight, such a loosely regulated system to administer land seems an invitation to confusion and contention, a judgment that many contemporaries, as well as subsequent historians, did not hesitate to render. But the statute did try to police the system where it seemed most vulnerable to deception. In a world where title hinged so heavily on written evidence, the law was exacting in specifying just how claims were to be preserved, even stipulating the size of paper to be used and the margins and spacing in the entry book. Surveyors were to carefully record the date and number of entries because of the “many disputes [that] have, and may arise” from failures to do so. The

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<sup>51</sup> “An Act for Opening the Land Office for the Redemption of Specie and Other Certificates, and Discharging the Arrears due to the Army,” April 18, 1783, in Walter Clark, William Laurence Saunders, and Stephen Beaugard Weeks, eds., *The State Records of North Carolina*, vol. 24 (Goldsboro, N.C.: Nash Brothers, 1886), 478–82 [hereinafter “Land Law of 1783”].

<sup>52</sup> *Ibid.*

governor's authority to halt grants stemmed from the prospect of warrants being "secretly obtained on entries heretofore made by artful and designing men, for land to which they had no just title."<sup>53</sup>

Otherwise, though, the statute did nearly nothing to govern the process of actually locating land. But to many at the time, this minimal oversight was a virtue. From the perspective of government officials, it allowed them to open up land cheaply, with little administrative cost. The government's formal involvement was limited to an entry-taker and a couple of clerks, paid from fees, who ran the entire system from a single land office. Expense and risk fell largely on individual claimants. Yet the system's proponents also believed it would serve claimants well. Indiscriminate location comported with notions of justice and fairness current on the eighteenth-century frontier by rewarding first occupants, whose knowledge of the best land might translate into entries. Land's low cost and universal availability enabled even those with modest means to obtain their own property, which would quickly increase in value.<sup>54</sup>

Perhaps the most glaring deficiency of the system of indiscriminate location, both for contemporaries and historians, was the risk of conflicting claims. Indiscriminate location, one New Jersey congressman complained, simply "create[d] law-suits" that ended up costing more than "would have been necessary to purchase all the land of the State." But for some, this reliance on local courts comported with an ideology of

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<sup>53</sup> *Ibid.*

<sup>54</sup> The assessment of indiscriminate location in the scholarly literature is generally negative, usually condemning the system in contrast with the later rectangular grid. Paul Gates's verdict is typical: "Nothing contributed more to raising the cost of land to actual settlers and to litigation than the system of indiscriminate location and subsequent survey which had characterized Virginia from the beginning." Gates, *Public Land Laws*, 47. St. George Tucker offered a similar condemnation of the system when compared with the federal land system. St. George Tucker, "Note D: The Manner of Obtaining Grants of Land, Under the Commonwealth of Virginia; and from the United States," in *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* (Philadelphia: William Young Birch and Abraham Small, 1803), vol. 3, app'x, pp. 66–72.

ownership that valorized local knowledge in adjudicating property disputes. In his report on territorial lands, Jefferson noted the spotty records and incomplete maps marking ownership under this system. “[Y]et, on the Spot,” Jefferson argued, “these Difficulties exist but in a small Degree; the Individuals there employed in the Details of buying, selling, and locating, possess local Informations of the Parts which concern them, so as to be able to keep clear of each others Rights.” When disputes did come up, the caveat system ensured they benefitted from this local knowledge by referring them to the county courts for resolution. If a “Conflict of Claims should arise,” Jefferson observed, “a local Judge will doubtless be provided to decide them without Delay.” In fact, the statute stipulated that local juries—the institutional arbiter of communal norms and customs, largely populated by neighbors—would ultimately determine these highly local questions of ownership.<sup>55</sup>

The system of indiscriminate location, in short, rested on decentralization, localism, and close scrutiny of state officials—all features deeply rooted in the Anglo-American legal tradition. Despite a growing number of critics, the system had its defenders, too. It had, after all, functioned well enough, if somewhat creakily, for nearly

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<sup>55</sup> “Report of the Secretary of State to the President,” 85-100. On the caveat system in Virginia, see St. George Tucker, “Note B: Of the Proceedings upon Petitions for Lapsed Lands under the Former Government; and upon Caveats,” in *Blackstone’s Commentaries*, vol. 4, app’x, pp. 31-34. For an exploration of the early American vision of juries as expressions of localism, albeit in very different locales, see William Edward Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass: Harvard University Press, 1975), 19-31; Bruce H Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987), 68-79. Jefferson’s vision of the adjudication of property disputes bears some resemblance to the “localized law” described by Laura Edwards as operating in antebellum North Carolina, although Edwards herself exempts property law from this category. Laura F Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009), 6. Though this history superficially resembles Laura Edwards’s account of law in antebellum North Carolina, it also implicitly challenges her dichotomy between localized and state legal orders, a point Jessica Lowe has made in a different context. Jessica K. Lowe, “A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era,” *Law & Social Inquiry* 36, no. 3 (2011): 788–817. Although, as Edwards notes, property early became a topic of formalized appellate jurisprudence in North Carolina (and also Tennessee), North Carolina land law itself codified customary and localized understandings of ownership (as the following section explores more fully), even as the state property system from the beginning shaped the most local legal consciousness in the Southwest Territory.

two centuries under colonial rule. In extending this law westward, North Carolina's legislature was merely perpetuating earlier practice.

What followed, however, was not the continuation of earlier practice. It was a chaotic land rush, an orgy of greed and speculation that swept North Carolina throughout the 1780s. Within three years of the opening of the state land office, 4,393,945 acres of land had been entered. Rather than being distributed to smallholders, much of this land was concentrated in the hands of a few powerful individuals. As North Carolina's governor would lament in 1799 as the state investigated the abuses of this era, the "[m]ost atrocious frauds and scandals have taken place. . . scheming and capable men executed their plans and swallowed up the property of the state."<sup>56</sup>

This outcome was not accidental; it resulted from what the 1783 Land Law stated—or, more exactly, from what the law did not address. The limitations the law offered to prevent the massive engrossment of lands were feeble at best. The law did attempt to limit any one entry to 5,000 acres, and it set a reasonable price—ten pounds (equivalent to forty dollars) per acre—that would also have made it difficult for speculators to amass enough specie to buy such huge tracts. But speculators could easily circumvent such paper restrictions. They made multiple entries and obtained lands by using others' names; a subsequent investigation also revealed mysterious erasures, forgeries, and unauthorized duplicate warrants in the record books. As for price, the

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<sup>56</sup> *State Records of North Carolina*, 18: Thomas B. Jones, "The Public Lands of Tennessee," *Tennessee Historical Quarterly* 27, no. 1 (April 1, 1968): 17. As Jones notes, this result was hardly inadvertent; he describes the statute as a "shrewdly laid and masterful example of land speculation," and the statute became known as the "Land Grab Act of 1783." *Ibid.*, 15-17. On the discovery of land frauds and the resulting scandal, see Russell S. Koontz, "'An Angel Has Fallen!': The Glasgow Land Frauds and the Emergence of the North Carolina Supreme Court," *The North Carolina Historical Review* 72, no. 3 (July 1, 1995): 301-28; Albert Bruce Pruitt, *Glasgow Land Fraud Papers: 1783-1800: North Carolina Revolutionary War, Bounty Land in Tennessee* (Rocky Mount, N.C.: A.B. Pruitt, 1988).

statute ensured speculators' dominance by providing that land could be paid for using North Carolina's near-worthless debt certificates from the Revolution. Using their connections and capital to buy up certificates for as little as 10% of face value, speculators obtained land at a real price of less than five dollars per hundred acres. Other speculators took advantage of the military bounty lands that the statute set aside around Nashville for Revolutionary War veterans. Unable or unwilling to uproot eight hundred miles, most veterans sold their rights. As late as 1796, the "vast number of Milit[ary] Warrants in N. Carolina" sold for \$10-\$100; the land obtained could then be resold for as much as \$640. Others turned to fraud. Nashville resident Andrew Jackson reported a scene in a tavern in the 1790s in which a major and captain, after initially refusing to sign military certificates to anyone "who was not entitled to it," were plied with brandy, and "very much intoxicated," signed nearly 500 forged certificates quickly redeemed for land.<sup>57</sup>

The interconnection between title and government debt rewarded the well-connected, who turned the state machinery to their own purposes. No one proved more assiduous than the Blount family, especially the politically prominent William Blount. Soon after helping design the 1783 land law, Blount and his brothers John Gray and Thomas secured certificates, inveigled the entry taker, and served as brokers for others' claims for a fee of one-quarter of all lands obtained. The result was that the Blount

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<sup>57</sup> "Land Law of 1783"; "List of Certificates Paid to Wm Blount Esq.," 15 June 1785, Box 193.28, James Gray Blount Papers; "Abstract of Criminal Charges on Land Fraud," 1806, Tennessee Supreme Court Cases, Tennessee State Library and Archives; Thomas Dillon to James McHenry, 22 May 1796, Box 1, James McHenry Papers, Clements Library, University of Michigan, Ann Arbor, Mich.; Andrew Jackson, "Statement Regarding Land Frauds," December 6, 1797, in *PAJ*, 1:157-58. The exchange rate of four dollars to one pound derives from litigation of the time, where damages were expressed both in pounds and dollars. See Thomas Hampton v. John Boyd and James Foster, November 1791, p. 48, "Minutes of the Superior Court of Law & Equity of the Mero District" (typescript copy), Tennessee State Library and Archives. According to Richard Caswell, certificates sold for as little as 2 or 3 shillings for every nominal pound of worth. Richard Caswell to Brig. Gen. Caswell [his son], May 3, 1784, Folder 3, Caswell Papers, Southern Historical Collection, University of North Carolina Chapel Hill; William H. Masterson, *William Blount* (Baton Rouge: Louisiana State University Press, 1954), 65-70.

family came to own enormous tracts of the Tennessee Country. By 1793, the Blounts and their relations held 79 square-mile tracts in the Cumberland District and 129 grants ranging from 1,000 to 5,000 acres in the territory's western expanses--only a portion of the supposedly 2,760 entries made by Blount family members.<sup>58</sup>

A similar process unfolded in the Northwest Territory's Virginia Military District, where, as in North Carolina, the system of indiscriminate location was used to satisfy promises to veterans. There, the most important actors were the surveyors, a profession that many in the Northwest Territory recognized provided excellent opportunities to speculate in land. "I do not hesitate to confess that I have views of other advantages than those arising from the compensation," wrote one supplicant seeking a surveying position, "and I presume you will find few if any of the applicants but what have them likewise." The surveyors who relocated to the Virginia Military District from Virginia quickly seized these "advantages," engrossing large quantities of land. One observer described the District as "a Country where there is more Sharpers than any I have been in." Many surveyors charged for their services in land, requiring a quarter or even a half of the tracts surveyed, leading some to complain of "extortionate" rates. Just as in North Carolina, these surveyors also purchased heavily discounted military land warrants that they then patented themselves. Through these means, surveyors amassed enormous holdings: Nathaniel Massie held 75,285 acres; Thomas Worthington, 18,273; Lucas

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<sup>58</sup> "Land Warrants"; "An Estimate of the Lands Granted by the State of North Carolina within the Western Territory Ceded by the Said State of the United States," 30 July 1791, M068, List of North Carolina Land Grants in Tennessee, 1778-1791, U.S. National Archives; "Geo. Doherty's Certificate from the Entry Office Respecting Lands by William Blount Entered for Micajah Thomas &c &c," 1790, Box 193.28, John Gray Blount Papers, North Carolina State Archives; "Land Warrants" November 31, 1793, Box 193.28, John Gray Blount Papers, North Carolina State Archives; Masterson, 171.

Sullivant, 68,785. Taken together, the twenty-five largest acquisitions in the District amounted to over 1 million acres, 26% of the entire tract.<sup>59</sup>

This enormous land grab did not go unremarked. In 1794, a grand jury in Fayetteville, North Carolina, issued a presentment against William Blount's brother John Gray Blount and a number of other supposed "land Jobbers," who through "unsufferable monopoly" had "accumulated to themselves the vacant Lands of this State." They argued that the western lands, intended as an endowment for future generations, had gone to "establish an Imperious and unconstitutional Nobility."<sup>60</sup>

By that point, however, most of the Blounts' lands no longer lay within North Carolina. William Blount used his influence to pass North Carolina's 1790 cession of the Tennessee Country to the federal government, and then exploited his connections to secure appointment as the governor of the new Southwest Territory. Blount was thrilled at news of his new position. "[M]y Western Lands have become so great an object to me that it had become absolutely necessary that I should go to the Western Country to secure them," he wrote a confidant. He was sure that "my present Appointment" would "enhance[] their Value."<sup>61</sup>

Cession served the speculators well. The cessions that created the Southwest and Northwest Territories both contained grandiose language that the ceded land would be considered "a common fund for the use and benefit" of all the states. Yet, in both the Northwest Territory and the Tennessee Country, the system of indiscriminate location

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<sup>59</sup> John Mathews to Rufus Putnam, February 19, 1796, Box 2, Folder 5, Rufus Putnam Papers, Special Collections, Marietta College Library, Marietta, Ohio [hereinafter RPP]; William Starling to Lucas Sullivant, 28 Feb. 1796, Box 1, Sullivant-Starling Collection, MSS 459, Ohio Historical Society, Columbus, Ohio; David Jones to Lucas Sullivant, 14 Aug. 1796, Box 1, Sullivant-Starling Collection. On land holdings in the Virginia Military District, see Gates, 255–56.

<sup>60</sup> "Grand Jury Presentment, Fayetteville Dist. Superior Ct.," October 1794, Box 193.28, John Gray Blount Papers.

<sup>61</sup> William Blount to John Steele, July 10, 1790, p. 36, vol. 1, John Steele Papers, North Carolina State Archives.

funneled the public domain to private speculators, whose access to credit, government, and networks of agents allowed them full advantage of the free-for-all. By explicitly binding the federal government to earlier state land systems, the cessions made the federal government powerless to interfere. At the same time, by the time North Carolina began to realize the enormity of the swindle that had been committed, the lands were largely out of the state's control. In this sense, the creation of the federal territories was less a testament to a national commitment to federal ownership than to the power of speculators, who could forum shop by shifting territorial control from one sovereign to another, and, in the process, convert an ostensibly national patrimony to their own interest.<sup>62</sup>

If concentration of landed wealth was one consequence of the rapid and cheap sale of millions of ill-defined acres, confusion and uncertainty about title were another, even when the system was scrupulously administered. Here again, the problem was what the law failed to say: other than exempting Cherokee lands south of the French Broad River, there were no geographical restrictions on land claims. In other words, the statute threw open for ownership all of North Carolina's territory to the Mississippi River, an area that encompassed present-day western North Carolina and all of present-day Tennessee. North Carolina's own claim to these lands, grounded in the right of conquest, was extremely flimsy: Chickasaw and Cherokee title had never been purchased, and the 1785-86 Treaties of Hopewell subsequently enshrined Native ownership in federal law.

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<sup>62</sup> "Virginia: Cession of Western Claims," March 1, 1784; "North Carolina: Cession of Western Land Claims," December 22, 1789, in *TP: Vol. IV*, 309.



But setting aside the dubious title, the idea that a single land office hundreds of miles away could process claims to such an enormous region was a fantastical delusion. North Carolinians knew virtually nothing of the domain they purported to sell: it was nearly devoid of Anglo-American settlements, its topography barely known. The warrants they entered into the land office reflected this ignorance. Consider, for instance, warrant #1159, for 2000 acres of land in the western district of Tennessee, over 500 miles away from the land office. The statutorily required description stated that tract lay “between the river Tennessee & Mississippi [a roughly hundred mile distance] & upon a small river or Creek, lying on both sides inclosing a tree Mark M.B. standg among a parcel chopd & Deaded trees.”<sup>63</sup>

The 1783 statute permitted such entries for only a brief two-year window. In that time, bands of speculators frantically staked out similar claims across hundreds of thousands of acres of what they perceived as unmarked wilderness. Their goal was simply to enter as many as entries as possible as quickly as possible. In these circumstances, the checks that Jefferson and others believed would prevent indiscriminate location from devolving into a chaotic jumble—caveats, local knowledge and institutions—simply did not exist. As North Carolina’s entrybooks filled with vague and arbitrary descriptions of parcels of land, there was no way to determine whether land had already been claimed, and by whom.

The predictable result was myriad disputes, most of which only emerged years later. Many settlers in the Southwest Territory told similar stories. Having purchased

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<sup>63</sup> Land Warrants, November 31, 1793, Box 193.28, Business/Legal/Land/Miscellaneous Records, John Gray Blount Papers, North Carolina State Archives, Raleigh, N.C. On North Carolinians’ ignorance of western geography in this period, see Saunt, *West of the Revolution*, 23-28.

what they believed to be good title from speculators—often in the late 1780s when large numbers of settlers began to migrate into the Tennessee Country—these settlers had been happily living on their farms for several years when a stranger appeared at their door bearing a document that asserted ownership of the same land. Others, less dramatically, learned of competing claims from their neighbors, while still others discovered the existence of other claimants only when they were hauled into court. But the end result was usually the same: litigation. Land disputes tracing to the 1780s clogged territorial court dockets.

These lawsuits rarely conformed to the vision of expeditious justice advanced by Jefferson as well as the drafters of the 1783 statute. The ejectment suits that filled the county courts—filed under the fictitious names of Richard Fenn, claimant, and John Denn, lessee, the real purpose of which was to determine title to fee simple land—dealt with land grants from years earlier. Questions of title also predominated in many cases not explicitly about land; the delays in these cases were even longer. Probate cases in particular reopened long-standing questions about the validity of title after the death of a purported owner; many of these cases began not with the land itself, but with long-standing promissory notes and other debts that had paid for tracts of land, which then raised the question of the validity of title in a sale a decade earlier. The uncertainty of title, along with the vagaries of the land market, encouraged such litigation. Plaintiffs often hoped that they could secure more in damages than the land was worth on the open market; one defendant alleged that the plaintiff had stated that “bringing Suit [and

securing damages]. . . would be the best way to Sell his land” and so refused to accept an otherwise valid land title to settle a dispute.<sup>64</sup>

The wisdom of the local jury rarely resolved these disputes. Ejectment suits might begin in county courts, but many appealed to the superior courts. Even these decisions were not final: losers frequently challenged adverse judgments issued under the common law under a separate body of law known as equity, which allowed judges to set aside verdicts deemed inequitable. These opportunities for second or third chances at success encouraged continued struggle rather than settlement: one litigant, instead of negotiating with the prevailing party after an adverse outcome, insisted that “he must have a pull or twist in Equity.” Ostensibly, equity practice was less formal than actions at law, and admitted a wider range of evidence. In the territories, however, equity jurisdiction rested with the more technical superior courts, where judges, not juries, decided equity cases on the basis of lengthy written pleadings, which inevitably required counsel.<sup>65</sup>

The 1783 land law provided plenty of grist for the endless litigation that plagued the Southwest Territory and later, Tennessee. The law created constant conflict, in myriad permutations. One of the most straightforward, and common, occurred when there were two entries, and hence two land warrants, for the same tract. The law dealing with such controversies was well established: the older (known as the “elder”) entry prevailed, leaving later claimants without title. This bright line rule displeased the

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<sup>64</sup> Arthur Campbell to Archibald Stuart, October 31, 1785, Box 1, Folder 1, Campbell Family Papers, Rubenstein Library, Duke University, Durham, N.C.; Newman v. Jones & Haworth (Hamilton District Court of Equity 1800), in Historical Records Survey, Transcription Unit, Division of Women’s and Professional Projects, Works Progress Administration, *Records of Knox County, Superior Court Record Book “B”, 1797-1804* (Nashville: Historical Records Survey, 1939), 81-91.

<sup>65</sup> Newman v. Jones & Haworth. On early American equity practice, see Stanley N. Katz, “The Politics of Law: Controversies over Chancery Courts and Equity Law in the Eighteenth Century,” *Perspectives in American History* 5 (1971), 257.

residents of the Southwest Territory, where the problem was widespread. A number of inhabitants, including Andrew Jackson, appealed to the North Carolina legislature for relief, arguing that those holding later entries were “in justice” as entitled to “the benefit of their Warrant” as earlier entrants, as they had paid the state for their claims.<sup>66</sup>

Savvy purchasers thought they knew how to avoid the problem of multiple entries. One land speculator in the Southwest Territory insisted that the region’s “many disputes and litigations about Titles to land” could be avoided by relying on the “only sources that could be depended on,” copies of North Carolina’s entry books. Access to these books, manuscript copies of which circulated throughout the territory, allowed claimants to ensure they held the oldest entry. Still more common was to require that the seller of a parcel warrant that his claim to the land was the first and best entry. Often, though, such guarantees simply converted disputes over title into debt controversies, as the legal question became whether contractual nonperformance would excuse refusal or failure to pay a note. In *Cuthbert v. Dotson*, for instance, Cuthbert entered a 1794 contract to purchase land from Dotson; Dotson warranted that he had the best title to the land. Cuthbert discovered that an old entry covered much of the land, and so refused to honor the contract. Four years later, Dotson died, and his executors filed suit and recovered on the contract; Cuthbert accordingly sought equitable relief against the executors’ judgment. (The case ended in a settlement). Similar facts appeared in *Carney v. Dunlap*, where Anna Moore—the rare female landholder in the Southwest Territory—

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<sup>66</sup> “Petition from Inhabitants of TN, Miro District,” 1796, Petitions (Concerning Land), GASR Nov 1796-Dec 1796, Box 3, North Carolina State Archives. This conflict arose in court cases as well: *Ross v. Vance*, for instance, involved competing land patents from 1783 and 1790. Historical Records Survey, Transcription Unit, Division of Women’s and Professional Projects, Works Progress Administration, *Records of Washington County, Superior Court Minutes, Book B, 1791-1804* (Nashville: Copying Historical Records Project, Works Progress Administration, 1938), 205.

had sold her land in 1783, but then supposedly obtained a patent in her *own* name for the same tract before the purchaser could. The dispute again hinged on settling payments years later.<sup>67</sup>

Yet neither purchasing senior entries, nor securing title guarantees, necessarily protected purchasers, given both the haze of confusion and the informality of land practice in the 1780s. The 1799 case *King v. Daniel* demonstrated these risks.

According to the parties' pleadings, Thomas King and John Blair were part of a small group of men who, in 1781 or 1782, traveled up the Holston River in present-day eastern Tennessee. After the group informally subdivided a promising stretch of land along the river, King and Blair were assigned 700 acres, for which they then obtained a warrant from the North Carolina land office after the enactment of the 1783 law. They subsequently sold this land to the settler James Daniel for two hundred pounds' worth of horses.<sup>68</sup>

Here, the accounts diverged. According to Daniel, King and Blair told him that the land was labeled number twenty-one in the entry book. Because the warrants were numbered sequentially, the low number made it more valuable, as older claims were unlikely. King and Blair also allegedly guaranteed the warrant. King along with Blair's executor disputed this account. The men had used the number twenty-one only in their informal subdivision of the Holston lands—in other words, it was only the 21st lot, not

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<sup>67</sup> Dillon to McHenry, May 22, 1796; Cuthbert v. Dotson (Washington District Superior Court of Law and Equity Sept. 1799), in *Records of Washington County, Superior Court Minutes, Book B, 1791-1804*, 65, 103.

<sup>68</sup> King v. Daniel (Washington District Superior Court of Law and Equity 1799), in *Records of Washington County, Superior Court Minutes, Book B, 1791-1804*, 57-65.

entry 21. They did not know the warrant's entry number, nor did they guarantee the title. All King and Blair sold Daniel, they insisted, was the right to the warrant itself.<sup>69</sup>

The contract stipulated that King and Blair would survey the land and obtain the grant from the state. A few years after the contract was concluded, in 1785 or 1786, a surveyor appeared at the house Daniel had built on the land. Though the surveyor had a warrant for the land, he refused to show it to Daniel (it may not have mattered, as Daniel was illiterate). Daniel assumed the surveyor had come to confirm Daniel's title, per the contract. Only later did he learn that the survey had been for Nicholas Perkins, not Daniel, on a different Warrant. In a subsequent lawsuit, the court determined that Perkins's claim was "earlier and better" than the entry made by King and Blair, and so evicted Daniel from his land.<sup>70</sup>

As Daniel's story suggests, smallholders, even when illiterate, well understood North Carolina's land law, and sought to protect themselves from conflicting claims. But Daniel's efforts to guard his title could not stop what was at best confusion and at worst deception. Ultimately, Daniel prevailed at law in a suit against King and Blair in a suit on the contract brought after Blair's death years later, and he successfully defended that judgment against a suit in equity. Nonetheless, Daniel argued, the damages he received for the land were only a portion of the current value of the land. And Daniel doubtless spent considerable sums on attorneys in the multiple suits required to secure, and preserve, relief.<sup>71</sup>

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

Many landowners opted not to take Daniel's approach. To avoid the trouble and expense of a lengthy lawsuit, many simply bought out competing claimants, in essence paying for their land again. James Berry did that for 640 acres he owned in Powell's Valley, buying a competing entry for two hundred acres. James Miller purchased a rival claim from a man named Hutchings, not because he thought Hutchings had the stronger claim but because "it was the easiest mode of quieting the title and saving any difficulty either in law or equity respecting the title" to his land. Unsurprisingly, this practice only encouraged more claims, often founded on questionable rights: both Berry and Miller later confronted additional claimants to portions of their land.<sup>72</sup>

North Carolina offered its own solution to the problem of conflicting entries. Under the terms of the state's cession, those denied land rights by an earlier entry could obtain so-called "supernumerary" warrants, which could be entered on any vacant claims not included within another entry. But with no ready way to determine which lands were encompassed, the supernumerary warrants merely became another potential source of ownership that floating throughout the Southwest Territory.<sup>73</sup>

The case of *Criswell v. Donalson*, from 1800, demonstrates the confluence of the fraudulent possibilities of supernumerary warrants, North Carolina's meager record-keeping, and fruitless efforts to buy off adverse claims. In 1783, a man named Gawen Leeper located 400 acres on the south side of the Holston River, which Stockley Donalson, a prominent land speculator, purchased. Donalson resold Leeper's entry to the

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<sup>72</sup> James Miller v. James White, (Hamilton District Superior Court of Law and Equity 1804); James Berry v. Elisha Wallen (Hamilton District Superior Court of Equity 1801), in Historical Records Survey, Transcription Unit, Division of Women's and Professional Projects, Works Progress Administration, *Records of Knox County, Superior Court Record Book "B", 1797-1804* (Nashville: Historical Records Survey, 1939), 444-51, 186-202.

<sup>73</sup> On supernumerary warrants, see "Proclamation by the Governor of North Carolina," October 1, 1792, in *TP: Vol. IV*, 191-92.

plaintiff, James Criswell, in 1787, in return for a slave; Criswell moved onto the land.

After a delay in transferring the warrant occasioned by Leeper's death, Donalson reported sending in the required survey plat and certificate to the land office, but stated that it had been mislaid. In 1791, Criswell sent another plat, but heard nothing. In 1795, he journeyed to North Carolina himself, but could discover no grant or warrant. Hearing that the warrant was in the hands of a man named Mayberry—who had died—Criswell met Andrew Jackson, who held Mayberry's papers; still no warrant.<sup>74</sup>

Frustrated, Criswell applied to a man named Tyrell to assist him. According to Criswell's allegations, Tyrell, rather than helping, allegedly used a supernumerary warrant he held to claim 500 acres that included Criswell's grant, knowing that Criswell lacked any documents showing title. Criswell was forced to buy his land back from Tyrell in return for lands he held elsewhere. But in the interim, a man named Evans—who had purchased a portion of the land from Criswell, but engaged in some complicated negotiations with Tyrell—brought an ejectment suit in county court. Criswell, lacking “any grant or title which could be admitted to read as evidence in a court of common law,” lost. He filed an equity suit to overturn the judgment, but it was dismissed for insufficient notice.<sup>75</sup>

Many of the same problems plagued the Virginia Military District in the Northwest Territory. An especially pungent critique of the Virginian land warrant system, which encompassed the District, came from the state's foremost jurist St. George Tucker. “Patents for lands,” Tucker complained, “land-warrants, military rights to land,

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<sup>74</sup> James Criswell v. Stockley Donalson et al. (Hamilton District Court of Equity 1800), in *Records of Knox County, Superior Court Record Book “B,”* 72-78.

<sup>75</sup> *Ibid.*



certificates of survey, nay, even bonds to procure, survey, and patent lands, have . . . become a species of mercantile paper, passing from hand to hand”; Tucker likened this to the “vast influx of paper money, that has deluged the United States for some years past.” Virginia’s land system, Tucker argued, served only “[t]hose who wish only to deceive and defraud others, who buy, merely to sell; who regard not in what miseries or perplexities they may involve ignorant persons, and foreigners, will, until the bubble bursts, continue to traffic in parchment.” Tucker urged that a settler who wished “peaceable possession of his lands” and the ability to “transmit them to his posterity” should look elsewhere. Subsequent events bore out Tucker’s predictions. As the Ohio Supreme Court—which heard sixty-four disputes involving Virginia Military District titles over the nineteenth century—observed in 1825, “the uncertainty of title, in the Virginia military district, is proverbial, and that in many cases it is impossible to ascertain the existence of conflicting claims, till they are set up by the claimants.”<sup>76</sup>

Taken together, suits such as *King v. Daniel* and *Criswell v. Donalson* exemplify the factors that made bargaining in the shadow of the North Carolina’s land law so complicated. In both cases, the validity of title hinged on handwritten records held hundreds of miles away. And in both cases, disputes arose years after the initial transaction, highlighting the role of death in untangling webs of debt spun over a lifetime.

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<sup>76</sup> Tucker, “Note D: The Manner of Obtaining Grants of Land, Under the Commonwealth of Virginia”; *Wills v. Cowper*, 2 Ohio 124 (1825). The county court records from Ross and other Virginia Military District counties are incomplete, but the Ohio Supreme Court decisions from later in the nineteenth century demonstrate how many of the same issues that plagued Tennessee lands arose within the District: contradictory surveys, *Kerr v. Mack*, 1 Ohio 161 (1823); disputes between junior and senior entries, *McArthur v. Phoebus*, 2 Ohio 415 (1826); ambiguous boundaries, *McArthur v. Nevill*, 3 Ohio 178 (1827); lengthy delays of twenty-five years or more between survey and patent, which the court described as a “not very uncommon,” *Wallace’s Lessee*, 7 Ohio 249; overlapping entries due to original entries being withdrawn and applied to new lands, *Wallace v. Patten*, 14 Ohio 272 (1846). A statistical view appears in Gary D. Libecap and Dean Lueck, “The Demarcation of Land and the Role of Coordinating Property Institutions,” *Journal of Political Economy* 119, no. 3 (June 1, 2011): 426, 453. Libecap and Lueck find that 1.25% of parcels in the District resulted in litigation that reached the Ohio Supreme Court, the vast majority of which related to validity of title; cases disputing the validity of title in the District, they find, were over thirty times more frequent than cases in the rest of Ohio. *Ibid.* A compelling qualitative portrait appears in William Thomas Hutchinson, *The Bounty Lands of the American Revolution in Ohio* (New York: Arno Press, 1979).

But they also demonstrate the fundamental unfairness and unpredictability of the North Carolina land system. Both Daniel and Criswell sought scrupulously to comply with the law and guarantee their title; yet unreliable intermediaries, as well as the failure of the state itself, undermined their ownership.

Viewed from the present, it is easy to condemn the system of indiscriminate location for the confusion that it created. But the system was not designed to produce clarity and finality. It preserved, rather, the deep localism of early American understandings of property. And it ostensibly enabled land ownership to be cheap, decentralized, and democratic, aspects that would benefit marginal claimants such as Daniel and Criswell.<sup>77</sup>

These principles, however, had little meaning or coherence when extended to the vast unknown spaces of the Tennessee and Ohio Countries. For many early Americans, land stood for independence, as expressed by the Fayette County Grand Jury. Looking west, they anticipated that land would remain a valuable, secure, and stable asset. But localism and constancy bore no relation to the abstract tracts of tens of thousands of land, barely known even by the surveyor, with which speculators filled the entry books. Rather than supporting gradual accumulation, land became a source of possibly enormous wealth and equally rapid fall. Purchases made in expectation of value could suddenly become

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<sup>77</sup> Recent scholarship on the system of indiscriminate location emphasizes how it continues to undermine the certainty of title into the present. For instance, Libecap and Lueck find that metes and bounds surveying depressed land values in the Virginia Military District below neighboring lands surveyed using the federal rectangular grid. Libecap and Lueck, "The Demarcation of Land," 426–67. Metes and bounds and the system of indiscriminate location were usually, though not inevitably, linked: in 1777, North Carolina attempted to mandate a rectangular survey system of 640 acres that prefigured the federal survey. Amelia Clewley Ford, *Colonial Precedents of Our National Land System as It Existed in 1800* ([Madison]: University of Wisconsin Press, 1910), 26, 44. Though this work focuses on conflicts over boundaries under the system of metes and bounds surveying—of which there were many—fights over tract borders were only a small, and often belated, component of the confusion that seemed to permeate every part of the process of obtaining title under the system. Libecap and Lueck's own work demonstrates that disputes over entries and patents were in fact far more common than the disputes over boundaries that they focus on. Libecap and Lueck, "The Demarcation of Land," 453.

worthless. Yet for speculators, this uncertainty proved an advantage. Able to buy up warrants and certificates, with privileged access to state institutions, they tilted the system to their advantage.

Law played a critical role in this transformation of landed property. In the territories, physical ground became far less important than title—some sort of authoritative governmental document that conferred the abstract right of ownership. The endless litigation produced by state land law only furthered this process of abstraction. As litigants chased contrasting verdicts through appellate and equity courts, the idea that property exists only as far as the state acknowledged an individual's right against all comers was no theoretical concept, but rather lived experience shared by many territorial citizens.

This conversion of land into title had few benefits for the smallholders who were the intended beneficiaries of state land systems. Rather, even for men like James Daniel and James Criswell who bought primarily to settle and improve, western land became a speculative investment. The abstraction of title swept them into the maw of the hungry land market, where their fortunes were entangled with the grand speculators like William Blount or Stockely Donalson. And any purchaser, no matter how careful, could get dragged into prolonged, expensive legal disputes to protect their property rights. The resulting lawyers' paradise corresponded little with the localist ideal, with the result that men like Daniel and Criswell, notwithstanding their illiteracy, were forced to become experts in the intricacies of state land law.

There was a deep irony that these state land systems reached their full fluorescence outside the states, within the ostensibly federal jurisdiction and ownership of the territories. Federal territorial, not state, courts administered and adjudicated the disputes produced by North Carolina and Virginia's decision to run their land offices on the cheap. This frustrated distant federal officials like Jefferson, for whom such uncertainty was antithetical to the clear chains of title they wished to construct. But the acts of cession had entrenched state land law, keeping large swaths of these ostensibly federal domains under state jurisdiction and authority. State land law systems were embedded in an informal sense, as well, as the federal government had to contend with, and accommodate, the power of the local notables like William Blount whose prominence stemmed from their concentration of landed wealth.<sup>78</sup>

There was another irony, as well. As historians have stressed, the vision of surveyed and gridded lands enshrined in the Ordinance of 1785 did not lessen the conflation between land and title; if anything, it sought to remake the physical world to correspond with paper realities. But the supposedly localist state land schemes, with their squiggly boundaries, had proved just as adept at converting land into an abstract commodity that could be bought and sold. As these parallels suggest, how boundaries were drawn was less significant than the existence of land schemes that transformed ground into title.

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<sup>78</sup> On the role of the large landholders of the Virginia Military District in resisting federal territorial government, see Cayton, *Frontier Republic*, 68-80; Onuf, *Statehood and Union*, 67-87.

Though rarely served by state land grant schemes, smallholders did manage to eke out a property law doctrine that seemed to favor them: so-called “preemption rights.” “Preemption,” in this context, had a meaning different from its application in Indian affairs: it granted the first settlers of a particular tract of land, who had improved or modified it in some way, the first right to purchase it from the state, notwithstanding competing claims.

In their origins, preemption rights rested on legal conceptions of ownership derived from sources other than positive law. As an attorney argued in the 1794 Southwest Territory case *Blevins v. Shelby*, “first occupancy agreeable to the Laws of nature gave . . . an Equitable title to the land.” The principle that occupancy coupled with improvement—clearing, planting, or building on land—could yield title had deep roots in Anglo-American legal thought; it supported the earliest justifications of English colonization of North America in both theory and formal legal documents, and was enshrined in Locke’s labor theory of value. Though few on the late eighteenth-century frontier had read Locke or earlier theorists, they shared the vision of the frontier as “almost a State of Nature,” free for the taking. The discourse of improvement thus served as vernacular property law in the unsettled borderlands, especially as formal titling schemes were slow to catch up with rapid settlement.<sup>79</sup>

Struggles over preemption rights were nothing new. Colonial and imperial officials had long fought settlers they disdained as “intruders,” fruitlessly attempting to

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<sup>79</sup> *Minutes of Superior Court of Law & Equity of Washington County, 1791-1799*, 38-39; William Irvine to Josiah Harmar, 31 May 1785, #77, vol. 2, JHP. For discussions of the role of improvement in Anglo-American claims to land, see Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge [Eng.]: Cambridge University Press, 2010), 133–90; Joyce E Chaplin, *Subject Matter: Technology, the Body, and Science on the Anglo-American Frontier, 1500-1676* (Cambridge, Mass: Harvard University Press, 2001), 202-42; Patricia Seed, *Ceremonies of Possession in Europe’s Conquest of the New World, 1492-1640* (New York: Cambridge University Press, 1995), 18-39.

extract payment for their lands. Yet the late eighteenth century represented a moment of transition. As the American Revolution dismantled older barriers, a more populist vision of property rights gained ascendance. Impoverished first occupants consistently demanded, and largely received, low prices, generous payment terms, and explicit acknowledgment of their claims based on occupancy. Privileging rapid settlement and widespread access over revenue and stability, state officials began to award preemption rights formal statutory recognition. In 1777, North Carolina granted claimants who “possessed and actually improved” vacant lands the right to obtain 640 acres “in preference to all others.” Subsequent statutes, including the 1783 land law, reinforced and expanded this right. In 1779, the Virginia legislature granted first settlers who had “built any house or hut, or made other improvements” the first right to purchase 1,000 acres of land at the nominal state price of roughly two cents per acre.<sup>80</sup>

Would-be claimants quickly sought to extend preemption rights into the territories, even though, at least in the Northwest Territory, they enjoyed no statutory protection. This made little difference. As a federal official in the Territory reported, “These Men upon the frontiers have hitherto been accustomed to seat themselves on the best of the lands, making a tomahawk right or Improvement as they term it, supposing that to be a sufficient Title.” A federal surveyor in the Territory similarly observed that many settlers sought to “derive a Title to themselves by prior Occupancy according to the

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<sup>80</sup> “An Act for Establishing Offices,” Nov. 15, 1777, Ch. 1, *The Acts of Assembly of the State of North Carolina* (Newbern: Printed by James Davis, printer to the Honourable the General Assembly, 1778), 3-7; “An Act for Establishing a Land Office, and Ascertaining the Terms and Manner of Granting Waste and Unappropriated Lands,” May 3, 1779, William Waller Hening ed., *The Statutes at Large: Being a Collection of All the Laws of Virginia: Vol. 10: 1779* (New York: R & W & G. Bartow, 1823), 35-50. Historians have generally neglected prerevolutionary preemption rights, focusing instead on post-revolutionary struggles. For an dated but nonetheless helpful account, see Ford, *Colonial Precedents of Our National Land System*, 112-42.

Mode which has heretofore prevailed in Virginia & Pennsylvania.” “[F]rom this Idea,” he told a traveler, “you will find many Tracts of Land Survey'd & Mark'd.”<sup>81</sup>

But, though rooted in natural-law and customary practices, preemption rights soon became yet another source of ownership that freely floated throughout territorial land practice, particularly when formal law conferred them with legitimacy. This was especially apparent in the Tennessee Country. Preemption rights there were relatively formalized: like other land rights, they were recorded in local court records. And like other promises of future title, preemption rights soon became the subject of a vigorous market where they were bought and sold. As a result, like the mechanism of state land grants—of which they were a part—preemption rights purported to be about localism and protecting small claimants, but were often far more ambiguous. In the 1795 suit of *Tatum v. Winchester*, for instance, Howell Tatum managed to secure land rights based on a 1784 inchoate preemption claim over a formal North Carolinian grant obtained by James Winchester in 1792, notwithstanding Tatum’s failure to make a survey to take any other steps to secure an official title. Winchester was a prominent territorial citizen and land speculator, but Tatum was no smallholder either—he served as territorial treasurer and later as a state judge, and also speculated widely in lands. In these circumstances,

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<sup>81</sup> Josiah Harmar to Henry Knox, 4 August 1786, Volume 28, Letterbook A, JHP; Winthrop Sargent to Samuel Holden Parsons, June 26, 1786, Reel 2, WSP. Tomahawk right was a term of art in what might be termed the vernacular land law of the early American frontier. As one settler later recalled of western Pennsylvania in the late eighteenth century, tomahawk right was ‘an inferior kind of land title . . . made by deadening a few trees near the head of a spring, and marking the bar of some one, or more of them with the initials of the name of the person who made the improvement.’ This settler recalled that there was a vigorous market in these rights, which were often purchased to avoid conflict. Joseph Doddridge, *Notes on the Settlement and Indian Wars of the Western Parts of Virginia and Pennsylvania, from 1763 to 1783, Inclusive. Together with a View of the State of Society, and Manners of the First Settlers of the Western Country* (Albany, N.Y., 1876), 130.

preemption rights represented just another legal trump in the myriad contests to secure lands in the Southwest Territory.<sup>82</sup>

Yet at the same moment improvement prevailed in state statutes, the creation of the federal domain opened a new arena for contestation. Federal officials did not share the vision of ownership adopted by the states. In particular, from nearly the moment the American Revolution ended, the cash-strapped national government envisioned using the ceded lands to repay the enormous sums the United States had borrowed to finance the war. “The only adequate fund I can conceive for the payment of our debts,” a congressman wrote to John Adams, echoing the sentiments of many politicians, “are our western Lands.”<sup>83</sup>

Preemption rights, and the vision of freely available property they represented, threatened to undermine the promise of revenue. “[A]greeable to established customs in this Country, cutting down a few Trees planting three Hills Corn & fencing them gives a right of Soil to 400 acres & a preemption to 400 more,” Jonathan Heart, a captain in the U.S. army, wrote from his post in the Ohio Valley. If “holding under this Tenure” were permitted, he argued, “the whole Federal Territory will not raise One thousand Pounds,”

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<sup>82</sup> Howell Tatum v. James Winchester (Mero District Superior Court of Law & Equity 1795), in Mrs. Josie Smith et al., eds., *Minutes of the Superior Court of the Mero District, 1788-1803: Part I, 1788-1798* (Nashville: Tennessee Historical Records Survey, Works Progress Administration, 1938), 189. In the similar case of *Hays v. Harris*, there was a conflict between preemption rights founded on lawful improvement and a subsequent land grant. Such cases hinged on *when* the improvement occurred; if they were early enough, they could sustain an equitable claim to the land, as the jury found in *Hays*, granting the plaintiff title to lands carved out from the defendant’s grant. Tennessee Historical Records Survey, Division of Community Service Programs, Works Progress Administration, *Minutes of the Superior Court of Law & Equity of Washington County, 1791-1799* (Nashville: Tennessee Historical Records Survey, Works Progress Administration, 1941), 11, 25, 40-41. On Tatum’s governmental positions, see Willie Blount to John Gray Blount, October 25, 1794, in *JGBP*, 2:446-47; Andrew Jackson to William Blount, February 29, 1796, in *PAJ*, 1:82-83.

<sup>83</sup> Arthur Lee to John Adams, May 11, 1784, in Paul Hubert Smith, ed., *Letters of Delegates to Congress, 1774-1789* (Washington: U.S. Govt. Print. Off, 1976), 21:607-08. Such views were ubiquitous among the early American political elite. For a small sample, see William Ellery to Francis Dana, December 3, 1783, in *ibid.*, 21:173; David Howell to Jabez Bowen, March 23, 1784, in *ibid.*, 21:453-54; William Grayson to James Monroe, October 22, 1787, in *ibid.*, 24:489-90; James Madison to George Nicholas, May 17, 1788, Box 1, Folder 6, Durrett Collection, Special Collections, University of Chicago Library.



as “no Man would give 400 Dollars for a Farm which One Days work would serve.” The Northwest Territory’s governor, Arthur St. Clair, similarly observed that what were “commonly called improvements” in the region consisted of “marking or deadening a few trees, or throwing a few logs together in form of a cabin; in which way two or three persons, in a single week, would cover a large tract of country.”<sup>84</sup>

Preemption rights threatened the public treasury in another way, as well. Western lands were not in a state of nature; they were owned by Native nations. Yet granting preemption rights to the first occupants encouraged Anglo-Americans to intrude into Indian country, anticipating that, when the lands were purchased from Natives (an event the settlers regarded as inevitable), they would have the first claim. In 1784, shortly after Virginia’s cession, the Continental Congress forbade settlement in the Northwest Territory, north of the Ohio River, because it remained Indian territory. But when George Washington visited later that year, he found that the proclamation made little difference. The “rage” for what he termed “forestalling of Lands” meant that “scarce a valuable spot . . . is left without a claimant.” Washington’s proposed solution was to deem all steps to secure lands north of the Ohio as “null & void”—in other words, to negate settlers’ preemption rights. Senator Benjamin Hawkins made the connection between preemption rights and the flagrant violation of Indian ownership still more explicit. “[H]itherto all our acts of No. Carolina seem to favour intruders,” he observed. “[W]henever the land office was opened special provision was made for intruders under the appellation of occupants.” Thus it was, Hawkins lamented, “however strange it may

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<sup>84</sup> Jonathan Heart to William Judd, Jan. 8, 1786, William Judd Papers; Jonathan Heart to William Judd, 7 February 1786, in Jonathan Heart Papers; Arthur St. Clair to Robert Buntin, 19 September 1796, in *SCP*, 198.

seem . . . that by violating a solemn treaty these people could acquire this *right of occupancy*.”<sup>85</sup>

Officials’ anxiety for protecting Native lands was not particularly altruistic. Rather, they feared, as Washington did, that the blatant violation of Indian title “would inevitably produce a war.” Hawkins stated similarly of the Cherokees that the “encroachments on our part are the true cause of the hostilities on theirs, and as long as the first is suffered the latter may be expected.” Preemption, in other words, was not free. “[G]ratify[ing] a few intruders,” Thomas Jefferson bemoaned about the Southwest Territory, would “cost the other inhabitants of the U.S. a thousand times” the land’s value, in the form of an Indian war. It was cheaper and “more just,” Jefferson concluded, to “make war” against the intruders than the Indians.<sup>86</sup>

In the 1780s and early 1790s, then, the federal government and, to a lesser extent, North Carolina began anew earlier struggles against occupancy claims. This dispute focused on two separate regions within the territories. In the Northwest Territory, officials and settlers contested for the north bank of the Ohio River. Located just across from present-day Kentucky and West Virginia—then both part of Virginia, where preemption claims were legally recognized—these Ohio bottom lands were both fertile and well-located along the main riverine artery into the West. In what became the Southwest Territory, North Carolinians poured into the valleys west of the Great Smoky Mountains. This region, too, was defined by water: bounded by the Tennessee River to the west, the French Broad to the north, and the Big Pigeon to the east, it was usually

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<sup>85</sup> George Washington to Jacob Read, 3 November 1784, in *PGW:PS*, 2:119-20; Benjamin Hawkins to William Blount, March 10, 1791, Folder 3: 1791, WBP:LC

<sup>86</sup> Washington to Read, 3 November 1784; Hawkins to Blount, March 10, 1791; Secretary of State to David Campbell, March 27, 1792, in *TP: Vol. IV*, 130-31.

known simply as the “French Broad.” The traditional homeland of the Upper Cherokees, this area contained many of their most important towns.

Under formal law, white settlement in both regions was illegal. Congress had barred settling north of the Ohio, while North Carolina had specifically set aside the French Broad region for the Cherokees—the only portion of the entire state where white settlers could not stake a property claim. These prohibitions had little effect. In 1785, a federal army officer estimated that there were 2,100 white families settled on the north shore of the Ohio River, while in 1788 North Carolina’s governor placed the number of white families south of the French Broad at 1500. Officials, especially federal officials, had only contempt for these purported criminals, decrying them as “banditti” who “wish to live under no government.” Their standard description for these “intruders” was “lawless.”<sup>87</sup>

Yet settlers disagreed with this characterization both of themselves and the law. They insisted that they were “faithful subjects of the common wealth of America” in the words of one memorial. Government officers were surprised to find many of them submissive and obedient. “We do not pretend Claim Right or title to Land till we obtain in a Constitutional Manner,” one group of settlers along the Ohio assured a federal official. Inhabitants south of the French Broad loyally committed their “lives and fortunes to support [North Carolina’s] laws and Constitution.”<sup>88</sup>

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<sup>87</sup> John Armstrong to Josiah Harmar, 13 April 1785, #56, Vol. 2, JHP; Gov. Johnston to Dr. Williamson, 22 September 1788, in Walter Clark, ed., *The State Records of North Carolina, Vol. XXI:1788-’90*, 500-01 (Goldsboro, N.C.: Nash Brothers, 1903); Josiah Harmar to Henry Knox, May 14, 1787, in *SCP*, 2:19-22. For a sample of the many instances when “intruders” were described as “lawless,” see Henry Knox to Josiah Harmar, May 12, 1786, #38, Vol. 3, JHP; Richard Butler, “Journal,” September 9, 1785, p. 189, Codex 33, Durrett Collection, Special Collections, University of Chicago Library.

<sup>88</sup> Harmar to Knox, May 14, 1787; “Memorial of the Inhabitants on the West Side of the Ohio,” 5 April 1785, Vol. 2, JHP; “Petition of the Inhabitants on the Western Side of the Ohio, Aug. 30, 1785, vol. 2, Harmar Papers; John Armstrong to Josiah Harmar, 12 April

In adopting these invocations of lawfulness, settlers were embracing a strategy that sought to enlist the government to acknowledge their rights. Their claims to obedience appeared in what seemed an endless stream of petitions, in which their desire to obey the law served as prelude to pleas for indulgence, cooperation, and legalization. Sometimes settlers pleaded ignorance and argued that they were just following well-established custom. “Thos prohibatory Laws [banning their settlement] are Nevar sufficiently promulgated and have never hitherto been put in Execution,” one group of French Broad settlers complained. “[W]e did not transgress your laws from a refractory disposition, but only followed the practice of the different states who had unapropriated lands to settled, who from time immemorial confirmed the actual settlers in their settlements upon their paying the price settled by Law.” Every petition the French Broad settlers sent concluded by appealing for the opening of a land office and honoring the settlers’ preemption rights “at a moderate price.” Other times they appealed to officials’ mercy, using moral suasion to make quasi-legal claims. They had placed their lives and property at risk and suffered the brunt of Indian attacks, rhetorically parading widowed mothers and fatherless children before the legislators. They were desperate and had nowhere else to go: if expelled, we “must take up with hunger for [a] companion and familiarly shake hands with the cold hand of poverty,” as a group of North Carolinian petitioners stated.<sup>89</sup>

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1785, vol. 2, JHP; “Petition from the Inhabitants of the Indian Territory,” Petitions—Rejected or Not Acted On, Box 1, GASR Nov-Dec 1789, North Carolina State Archives, Raleigh, N.C.

<sup>89</sup> “Report on the Petition of Persons Settled on the Lands of the Cherokee Indians,” November 25, 1788, Committee of Propositions & Grievances, GASR Nov-Dec 1788, Box 2, North Carolina State Archives; “Petition of Sundry Inhabitants South of the French Broad River” November 14, 1788, Committee on Ind Affairs Folder, GASR Nov-Dec 1788, Box 1, North Carolina State Archives.

And they asked, always, for more time—to bring in their crops, to appeal to yet another official or legislature who might offer relief. The settlers “generally promise compliance” with orders for removal, one federal officer along the Ohio wrote, “but I observe it is with a degree of reluctance, and that they are fond of construing every indulgence, in the most favorable and extensive manner for themselves.” Unless forced off, “there will be no end to their craving for future indulgence.”<sup>90</sup>

When these appeals to officials were unavailing, as they were both along the Ohio and the French Broad, the intruders opted for another approach. Employing the rhetoric of the American Revolution, they would assert rights to what historians have termed self-sovereignty—the right of the people to form their own governments. If the state would not honor their claims, they would constitute a new state.<sup>91</sup>

This language of self-governance and autonomy appeared in both the Northwest and Southwest Territories. In nearly every settlement north of the Ohio, federal officials discovered an advertisement penned by a settler named John Emerson. Emerson proposed meetings to frame a constitution for the settlements. “I do certify that all mankind,” Emerson wrote, “agreeable to every constitution formed in America, have an undoubted right to pass into every vacant country, and there to form their constitution.” The settlers manifested these rights to self-sovereignty by electing their own justices of

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<sup>90</sup> “Report on the Petition of Persons Settled on the Lands of the Cherokee Indians”; “Petition of Inhabitants of Greene Co. & south of French Broad River,” 20 November 1788, Committee on Indian Affairs, Box 1, GASR Nov-Dec 1788, North Carolina State Archives, Raleigh, N.C.; “Petition of Sundry Inhabitants South of the French Broad River,”; Obediah Robins to Josiah Harmar, October 4, 1785, #127, vol. 2, JHP.

<sup>91</sup> On self-sovereignty, see Griffin, *American Leviathan*, ch. 5; Fritz, *American Sovereigns*, 11-47.

the peace who issued writs and decided cases without any sanction from state or federal governments.<sup>92</sup>

Paired with this claim to self-governance was a rejection of federal authority over their lands. An anonymous writer echoed Emerson's assertions about the right to create new settlements; unlike Emerson, he cited authorities—the pursuit of happiness in the Declaration of Independence, the guarantees of possessing property in the Massachusetts and Pennsylvania Declarations of Rights, and, in particular, the fifteenth article of the Pennsylvania Bill of Rights, which promised, in the author's paraphrase, that all men had a "right to form a new State in Vacant Countrys." This author went further, however, by carefully scrutinizing the Articles of Confederation for any provision that might grant the federal government the power to "determine on the destruction of any Man or his property." Congress had a right to conclude treaties with the Indians, he argued, but not to prevent immigration; the right to levy war, but not against its own loyal citizens; the authority to resolve disputes involving "territory, Jurisdiction, or Boundary lines," but not to determine the right of property. In short, this author concluded, federal officials who attempted to deprive the settlers of their lands could be held jointly and severally liable for their actions.<sup>93</sup>

South of the French Broad, settlers proved equally defiant of North Carolinian authority. North Carolina's hold on its western possessions had always been tenuous, the region's inhabitants dissatisfied with a government they believed favored coastal

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<sup>92</sup> John Emerson, Advertisement, 12 March 1785, in *SCP*, 5; Armstrong to Harmar, April 12, 1785.

<sup>93</sup> [Northwest Territory. Land Laws], n.d., Northwest Territory Collection, Clements Library, University of Michigan, Ann Arbor, Mich. Although the provenance of this document is unknown, the archive indicates that the item probably originates in the Josiah Harmar Papers. The references to the Articles of Confederation demonstrate that the document predates 1788. The provision from the Pennsylvania Bill of Rights actually read, "That all men have a natural inherent right . . . to form a new state in vacant countries." Penn. Const., Art. XV.

interests. In the mid-1780s, these disgruntled settlers seceded to form what hostile observers decried as the “pretend State of Franklin.” The Franklinites, as they were called, enacted their own constitution, elected their own legislature and governor—a prominent frontiersman named John Sevier—and created their own court system.<sup>94</sup>

They also crafted their own land policy. Under their own authority, the Franklinites entered a dubious agreement known as the Treaty of Dumplin Creek with the Cherokees. As reported by the Cherokee leader Old Tassel, only a handful of young Cherokee men had attended the treaty session, all the while insisting to the Franklinites that they lacked the authority to negotiate a land sale. The Cherokees had promised only to consult with the nation’s leaders. Nonetheless, on the basis of the purported treaty, the Franklinites now “call[ed]” the disputed territory “their Ground.” Flouting North Carolina’s restrictions, the Franklin legislature opened a land office for all the territory between the French Broad and Tennessee Rivers. Whites began to settle throughout Cherokee country, even within a few miles of Chota, a “Belovd Town” and one of the most important locations within the Cherokee Nation. The panicked Cherokees appealed to state and federal officials for help. “[W]e look upon the white people that Lives in the new State very deceitfull,” a group of Cherokees told a federal representative. “[W]e have Experienced them, and are much affraid of them.” North Carolina’s Indian agent predicted a war.<sup>95</sup>

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<sup>94</sup> Joseph Martin to Edmund Randolph, March 16, 1787, Cherokee Collection. For additional background on Franklin and its history, see Kevin T. Barksdale, *The Lost State of Franklin: America’s First Secession* (Lexington: University Press of Kentucky, 2008); Samuel Cole Williams, *History of the Lost State of Franklin* (Philadelphia: Porcupine Press, 1974).

<sup>95</sup> “Talk Delivered to Col. Joseph Martin by Old Corn Tassel,” September 19, 1785, Cherokee Collection; Joseph Martin to [William] Russell, August 1, 1785, 2XX5, Reel 116, Draper Manuscripts, Wisconsin Historical Society, Madison, Wis.; “A Talk from the Head Men Warriors of the Cherokee Nation at a Meeting Held at Ustinare,” November 20, 1788, Ayer MS 157, Ayer Collection, Newberry Library.

For their part, the Franklinites promised to “Hold [the land] in Defiance of Every power.” Indeed, both North Carolinian and federal proclamations ordering the Franklinites off the Cherokee land proved fruitless, as the settlers refused to acknowledge either state or federal authority. “[T]hey Had Knowledge Enough to Judge for themselves,” one group of settlers informed a North Carolinian official trying to expel them from the land, “that they should not ask North Carolina Nor no other person how they ware to B. Governd.”<sup>96</sup>

In 1788, after intense factionalism and a brief battle, Franklin imploded, and North Carolina resumed control over the region. But the defiance of the French Broad settlers persisted. Excluded from civil government because their settlement remained illegal under North Carolina law, they, like the settlers north of the Ohio, established their own “social compact,” drafting articles of association that adopted the laws and constitution of North Carolina but kept the civil and military officers appointed by Franklin in office. And they insisted on the continued validity of the Treaty of Dumplin Creek, arguing that it was authorized by North Carolina’s governor as well as the state of Franklin.<sup>97</sup>

In sum, the supposedly lawless banditti who defied statutes and executive proclamations were, in their minds, neither. Though divided by hundreds of miles, settlers violating state and federal law by settling north of the Ohio and south of the French Broad adopted similar arguments and rhetoric. They did not wish to live under

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<sup>96</sup> Martin to Russell, August 1, 1785; Joseph Martin to Edmund Randolph, March 25, 1787, Cherokee Collection.

<sup>97</sup> “Articles of Association [of French Broad Settlers],” c. 1788, in J. G. M. Ramsey, *The Annals of Tennessee to the End of the Eighteenth Century* (Charleston [S.C.]: J. Russell, 1853), 435-36. These articles were the product of an ad hoc exercise of self-sovereignty: “[S]ome designing men on the Indian lands have assembled themselves to the number of fifteen, and call themselves a convention of the people, , and have entered into several resolves, which they say they will lay before Congress.” Joseph Martin to Henry Knox, January 15, 1789, in *ASP:IA*, 48. On the treaty of Dumplin Creek, see “Memorial of John Sevier” November 20, 1789, Joint Standing Comm., Committee on Indian Affairs, GASR Nov-Dec 1789, Box 1, North Carolina State Archives.



“no government”; what they wanted was a government that would honor the claims to land they asserted. They sought to achieve this through petitions that cast them, and not distant political elites, as the lawful actors. Failing that, they sought to build their own states that would validate their claims.

Officials who sought to prevent occupancy claims faced limited options. Law, a possibility in theory, proved deeply inadequate in practice. “[A]s to the intruders [on Native and public lands],” wrote Arthur St. Clair, governor of the Northwest Territory, in response to a suggestion to use the courts to constrain them, “the United States had best at once throw open this Country to every person who pleases to take possession of it, and give up all hopes of their Land ever being of use in discharging the public debt, for not one of them, I am certain, will ever be removed of civil process.” Instead of courts, federal officials seeking to protect federal as well as Native title could select between two options: harshly punitive measures on the one hand, or negotiation and accommodation on the other.<sup>98</sup>

North of the Ohio, officials largely adopted force. The federal Commissioners of Indian Affairs authorized the commander of the few hundred federal soldiers along the river, Colonel Josiah Harmar, to evict illegal settlers forcibly. Secretary at War Henry Knox reiterated to Harmar that the removal of “all intruders” from federal lands was “the first object” for his forces: “the payment of the public debt . . . dictate[s] that you make use of the force under your command, to expel from the public lands, those lawless men who have acted in defiance of the orders and interest of the United States.” Harmar was

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<sup>98</sup> Arthur St. Clair to Henry Knox, August 17, 1791, Arthur St. Clair Papers, Burton Historical Collection, Detroit Public Library.

only too pleased to “give . . . *federal Law*” at gunpoint. Throughout 1785 and 1786, detachments of federal soldiers ranged the Ohio, ordering settlers to leave their cabins and burning the homes and crops they left behind.<sup>99</sup>

Given the settlers’ unwillingness to acknowledge federal authority, the contest over the Ohio lands threatened violence. As Major John Armstrong traveled up and down the river, ordering settlers to leave, he frequently encountered defiance. Some gatherings of men simply “laugh[ed]” when Armstrong read them his orders. One man named Ross, after “cast[ing] many reflections on the Honorable the Congress the [Indian] Commissioners & the commanding Officer,” stated that he “was determined to hold his possession” no matter where the instructions came from. If Armstrong destroyed his house, “he would build six more in the course of a week.” Armstrong arrested Ross and sent him off in chains. Others armed themselves and promised to resist violently, backing down only when Armstrong proclaimed that he would fire on any armed party. When Armstrong entered their homes, he discovered loopholes and barricades.<sup>100</sup>

North Carolina officials dealing with settlers south of the French Broad dearly wished to follow a similar course. The state’s Indian agent, Joseph Martin, was certain that only “an armed Force” could remove the settlers. In fact, in 1784, North Carolina’s governor instructed Martin to call on local leaders and militia to “drive off those evelminded persons who have intruded, and still continue on the Indian Lands, beyond

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<sup>99</sup> Josiah Harmar to Henry Knox, June 1, 1785, in *SCP*, 6-7; Henry Knox to Josiah Harmar, May 12, 1786, #38, Vol. 3, JHP; Josiah Harmar to Henry Knox, August 4, 1786, Harmar Papers, pp. 144-45, Letterbook A, Vol. 28, JHP.

<sup>100</sup> John Armstrong to Josiah Harmar, April 12, 1785, Vol. 2, Harmar Papers; John Armstrong to Josiah Harmar, April 13, 1785, Vol. 2, JHP.

[the] French Broad River.” But since the local militia was far more likely to endorse attacking the Cherokees than removing intruders, force was largely unavailable.<sup>101</sup>

The experience in the Northwest Territory also suggested that force was often unavailing. Despite repeated evictions, settlers returned, sometimes two or three times. The lure was simply too great. “While men who wish to act orderly and under good Government anxiously wait for arrangements being made,” one observer presciently wrote in 1785, “others of speculative & interpresing genius step forward . . . A few may be dislodged, but they will soon become too numerous for this to be easily effected.”<sup>102</sup>

That left accommodation. In North Carolina, the repeated appeals of the French Broad settlers had an effect. Though a number of bills legalizing the intruders’ status never passed—too many legislators deemed the claims “impolitic”—the French Broad settlers secured a key concession in North Carolina’s 1789 cession to the federal government. The cession, the law provided, “shall not prevent the people now residing south of French Broad . . . from entering their pre-emptions in that tract, should an office be opened for that purpose, under an act of the present General Assembly.”<sup>103</sup>

This provision complicated an already confusing situation for federal officials attempting to clarify ownership in the newly ceded Southwest Territory. In a territory already marked by a tangle of ownership claims, the French Broad region presented an especially thorny challenge, beset by three distinct sets of claimants, all of whom could point to positive law to justify their ownership.

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<sup>101</sup> Alexander Martin to Joseph Martin, February 11, 1784, 1XX69, Reel 116, Draper Manuscripts. One of the militia commanders that Gov. Martin had hoped to rely on was John Sevier, whose hostility toward Natives was notorious. He not only later became Franklin’s governor, but also led an illegal and brutal expedition into Cherokee territory in 1788. See Carl Samuel Driver, *John Sevier, Pioneer of the Old Southwest* (Chapel Hill: University of North Carolina Press, 1932), 79-116.

<sup>102</sup> William Irvine to Josiah Harmar, May 31, 1785, #77, Vol. 2, JHP.

<sup>103</sup> “Report on the Petition of Persons Settled on the Lands of the Cherokee Indians”; Act of Apr. 2, 1790, Ch. 6, 1 Stat. 106, 108.

The first claimants were the settlers actually occupying the territory. The cession only protected their rights contingently: their right to preemption depended on North Carolina's creation of a land office. But the state's assembly failed to open an office, in part because the cession complicated its own right to govern territorial lands, especially south of the French Broad. The settlers remained, the status of their occupancy rights uncertain.

The second claimant came to be the federal government. Until 1791, under both the Treaty of Hopewell and North Carolina law, the Cherokees legally owned the French Broad land. But at the Treaty of Holston, Governor Blount purchased the Cherokee rights to the region. By virtue of the government's position as sole purchaser of Native title, ownership of roughly 300,000 acres passed to the federal government. As Jefferson noted in his report, because North Carolina had legally barred settlement in the area, it was the only parcel of land that the federal government owned free of prior claims under North Carolina law, and so constituted "the only Lands open to [federal] Disposal" in the entire territory—setting aside, Jefferson noted, the large number of settlers already present on the land.<sup>104</sup>

This struggle, between intruders citing preemptive rights and the federal government seeking to preserve its own title, strongly resembled the contests north of the Ohio, though complicated by the cession's protection of preemption rights. But what muddied the situation still further was the existence of a third set of claimants, asserting ownership on still murkier legal grounds. In autumn 1790, soon after he arrived in the

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<sup>104</sup> "Report of the Secretary of State to the President," November 8, 1791. North Carolina was willingly to concede this right, at least in abstract: the state's governor stated he was "well satisfied with the claim the United States have to these lands [south of French Broad] since the treaty of Holston." Governor of North Carolina to Secretary of State, October 4, 1792, *TP: Vol. IV*, 192-93.

Southwest Territory, William Blount discovered a North Carolina grant for lands south of the French Broad, even though such grants would be, in Blount's estimation, "directly against both the Words and Spirit . . . of the laws of No. Carolina." Blount soon learned that settlers were using so-called supernumerary warrants—the warrants issued under North Carolina's 1783 land law for duplicate land claims—to obtain title to the French Broad lands. Blount duly informed Secretary of State Jefferson of the practice.<sup>105</sup>

The claimants under the warrants were untroubled that the lands ostensibly belonged to the United States. Under their interpretation of the act of cession, the federal government's obligation to honor North Carolina's law encompassed the supernumerary warrants, even though North Carolina foreclosed their application to the French Broad lands. North Carolina Governor Alexander Martin seemed to agree. Though Martin issued a proclamation against the practice at Jefferson's urging, he also observed that the grants that had been issued, as well as any future grants, were still legally valid, as the act of cession granted North Carolina "full authority" over vacant lands.<sup>106</sup>

The French Broad settlers, then, differed from claimants north of the Ohio in the diverse array of statutory law they could invoke to support their claims. Their situation also differed from the struggles north of the Ohio in the remarkably solicitous response of federal officials. Attorney General Edmund Randolph argued for leaving the matter in Blount's discretion rather than issuing indictments, and Jefferson urged Blount to require only a vague acknowledgment of the federal government's title from the settlers: that

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<sup>105</sup> William Blount to Alexander Martin, January 22, 1791, in *John Gray Blount Papers*, 2:163-64; William Blount to Secretary of State, April 23, 1792, in *TP: Vol. IV*, 142-43.

<sup>106</sup> Secretary of State to Governor of North Carolina, June 6, 1792, *TP: Vol. IV*, 156-57; Governor of North Carolina to Secretary of State, August 24, 1792, *TP: Vol. IV*, 164-66. Blount observed that the settlers "found[ed] their right" for settling the French Broad lands "on the latter part of the second condition of the Act of Cession." Blount to Secretary of State, April 23, 1792.

way, he suggested, “you will secure the right of the U.S. with as little trouble and injury to the intruders and grantees as you can.”<sup>107</sup>

This preference for accommodation, rather than confrontation, had several causes. Unlike Henry Knox and Col. Harmar, Jefferson and Randolph were not military men, accustomed to issuing orders and expecting obedience. Echoing the settlers’ quasi-legal arguments, Jefferson even acknowledged that “equitable circumstances” might justify the settlers’ land claims. But they may also have recognized that federal authority in the Southwest Territory remained tenuous, dependent on the local goodwill. With few soldiers in the region, federal policy depended on William Blount and his handful of lieutenants—all former North Carolinians, selected by dint of their local prominence and influence rather than nationalist commitments. Blount was in fact even less reliable than Jefferson or Randolph realized. Before he wrote to his superiors warning of the French Broad frauds, Blount had written to his business associates to buy up supernumerary warrants to invest in the “scheme”—“my name never to appear,” he cautioned.<sup>108</sup>

Yet the shift toward accommodation also reflected a change in the political mood away from earlier iron-fisted approaches. At the first U.S. Congress, western representatives pushed for a federal land system that would acknowledge the right of occupancy for unauthorized settlers on federal lands. “Will you then raise a force to drive them off?” Representative Scott, from western Pennsylvania, asked on the floor of the House of Representatives in May 1789. “That has been tried; troops were raised and

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<sup>107</sup> Attorney General to Secretary of State, November 12, 1792, in *TP: Vol. IV*, 217; Secretary of State to William Blount, November 14, 1792, in *TP: Vol. IV*, 218.

<sup>108</sup> Secretary of State to Blount, November 14, 1792; William Blount to John Gray Blount, November 10, 1790, in *JGP*, 2:135-40. On the role of local influence in the selection of territorial officials in the Southwest Territory, see “Recommendations for Federal Offices in North Carolina and the Southwestern Government,” in *PTJ:MS*, 16:476-78.

sent under Harmer [sic] to effect that purpose . . . but three hours after the troops were gone, these people returned again, repaired the damage, and are now settled upon the lands in open defiance of the authority of the Union.” Scott argued that these settlers “be indulged with a pre-emption to the purchase,” and the House agreed. The House passed a bill that would grant “preference” to “actual settlers,” even though dissenters grumbled that a speculator could simply “spend a few days on his land, and call himself an actual settler.” But after the House’s bill died from slow neglect in the Senate, the ambiguous status of preemption rights in the territories persisted.<sup>109</sup>

In one sense, such ambiguity served the settlers well; it suggested at least grudging acknowledgment of their informal claims. With territorial officials unwilling or unable to evict them, the purported intruders remained on their lands, their continued occupation making mass removal more difficult and costly.

But casting the unauthorized settlers as simply defending a customary legal order against the state—as wishing merely to be left alone—ignores how fully the settlers were invested in recognition of their title under formal law. This is especially clear south of the French Broad, where the settlers’ rhetoric demonstrated that many still craved legalization, even though their occupancy had acquired quasi-legal status. They continued, for instance, to petition Congress. In 1794, assisted by a committee from the first sitting of the territorial legislature, they asked that their “right of pre-emption to their hard-earned improvements and possessions” be recognized when a federal land office opened. Even more significant than the settlers’ language, however, was their actions. After asking Congress to honor preemption rights, they related that many had purchased

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<sup>109</sup> 1 Annals of Cong. 411–16, 1829–42 (1789).

North Carolina land warrants and “laid them on their lands,” in the expectation that Congress would confirm them. They audaciously asked that Congress honor their warrants—while also preventing “stranger[s]” from using those same warrants to seize title “from the holder and improver of the land.” In other words, many of the French Broad settlers were not content to assert preemption rights alone. They grasped at any available source for ownership that would bolster their claims to the lands they lived on.<sup>110</sup>

A similar reliance on multiple sources of ownership to protect title to French Broad lands appears in the Superior Court case *King v. Wilson*. Around the time the settlers were petitioning Congress, Robert Wilson, who lived in the disputed region, fell into conversation with Robert King, a prominent land speculator. King asked Wilson whether he wished to obtain a supernumerary warrant for the lands on which he lived. Wilson declined, though not because he thought his occupancy right sufficient. Rather, he “did not wish to risque his money for a Grant because he conceived the grants Obtained in that tract of Country would be illegal and void.” King in response “insisted that grants in that manner obtained would be good and valid in law.”<sup>111</sup>

Wilson finally reached an agreement with King that would purportedly protect his title against the legal uncertainty surrounding the French Broad lands. As the parties orally contracted, King would obtain a warrant from North Carolina in his own name from Wilson’s land, but he would also provide a bond for Wilson to obtain his tract “in fee simple . . . derived from the United States whenever the federal Office for the sale of

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<sup>110</sup> “Memorial of the French Broad Settlers,” September 12, 1794, in Ramsey, *The Annals of Tennessee*, 631.

<sup>111</sup> Robert King v. Robert Wilson (Hamilton District Superior Court of Law and Equity 1803), in *Records of Knox County, Superior Court Record Book “B,” 1797-1804*, at 316-27.



said land should be opened (provided the title and conveyance from North Carolina . . . should be found insufficient).” It would take many years before this contract in the alternate could finally be settled.<sup>112</sup>

As *King v. Wilson* suggests, notwithstanding federal acquiescence in the presence of the “intruders,” the French Broad region in the early 1790s was not a squatters’ paradise. It was a place where three forms of ownership—occupancy, state warrants, and federal grants—comingled as much as they clashed, and where “actual settlers” sought above all official recognition of their ownership claims. The settlers understood that there were threats to ownership other than federal bayonets; they recognized that, in the litigious free-for-all of Southwest Territory land practice, other claimants often represented the greatest challenge for land ownership.

At its most extreme, the confrontation between settlers asserting occupancy rights—“intruders”—and the federal government took the form of a physical, and ideological, standoff: settlers asserting natural-law claims that denied federal authority against soldiers evicting them at gunpoint, acting on the orders of officials who despised such defiance of federal directives as “lawlessness.” Following the perspective of the officials themselves, most histories of the period have fixated on such dramatic showdowns. But this narrative risks misunderstanding the aims of both the government and the settlers. The federal government itself oscillated, sometimes tolerating intruders, and nearly legalizing their claims. Even more significantly, casting the anti-statist as defenders of customary norms, as many histories have done, flattens their objectives.

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<sup>112</sup> *Ibid.*

The order they sought to defend—preemption rights—was grounded in statute. And, although based on rights of occupancy and improvement, preemption rights were not an unvarnished acknowledgment of vernacular claims; they still depended on state recognition, recordation, and often payment, to secure legally protected title. These rights were but one source of ownership that these settlers strategically, and pragmatically, advanced to try to protect their rights.

In the end, what these “lawless” settlers craved above all was law—law that would protect their lands in the midst of the tremendous scramble for ownership throughout the territories. But as the French Broad region suggests, law did not always provide a solution. Just as with the state land system, preemption rights did not guarantee security of title. They merely cast settlers into the territories’ litigious sea of land claims.

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In May 1789, two months into its first sitting, the House of Representatives returned to the question of the federal land system in the U.S. territories. All the members agreed that the issue was “deserving of the earliest attention,” in the words of James Madison. When the House sidetracked to discuss the amendments that would become the Bill of Rights, Representative Vining of Delaware urged the congressmen to return to the land issue. “[I]n point of importance,” he argued, “every candid mind would acknowledge its preference.”<sup>113</sup>

This sense of urgency concerning federal title reflected both the typicality and uniqueness of the controversies over ownership in the Northwest and Southwest Territories. Federal officials and lawmakers were not alone in grappling with the sources

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<sup>113</sup> 1 Annals of Cong. 411-16, 703-04 (1789).

and definition of property in the 1780s and early 1790s. Throughout the United States, confusion and contention over title occurred wherever jurisdiction and ownership were unsettled. In what Anglo-American maps labeled as upstate New York, the Haudenosaunee (Iroquois), the federal government, state officials, and land speculators all contended over the scope and meaning of Native title and consent. In Kentucky—a Virginia county sandwiched between the two federal territories until its statehood in 1792—Virginia’s system of indiscriminate location, which closely resembled North Carolina’s 1783 land law, produced notorious amounts of litigation. “The Titles to the landed Estates in Kentucky are so very uncertain,” one observer wrote, that “the Chance is at least three to One, that a Man who purchases there must defend his Title by a Lawsuit.” And on Massachusetts’s eastern frontier (present-day Maine), speculators embracing positivist conceptions of ownership contended with settlers who used quasi-legal arguments to assert occupancy rights to land.<sup>114</sup>

But Congress’s hurry to create a land system stemmed from more than a sense of general crisis; it derived from a view that the territories held especial significance in recrafting ownership in early America. In part, the territories’ distinctiveness stemmed from the intensity of property pluralism there: issues of Native ownership, state land law systems, and occupancy rights all overlapped simultaneously, creating an especially

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<sup>114</sup> Samuel Holden Parsons to His Children, January 7, 1786, Folder 6, Samuel Holden Parsons Papers, Connecticut Historical Society, Hartford, Conn. Struggles over property in many of these locales—though not the U.S. territories—have been comprehensively explored in the works of Alan Taylor. See, e.g., Alan Taylor, *Liberty Men and Great Proprietors: The Revolutionary Settlement on the Maine Frontier, 1760-1820* (Chapel Hill: Published for the Institute of Early American History and Culture, Williamsburg, Virginia, by University of North Carolina Press, 1990); Alan Taylor, *William Cooper’s Town: Power and Persuasion on the Frontier of the Early American Republic* (New York: Alfred A. Knopf, 1995), Taylor, *The Divided Ground*. For further background on upstate New York, see Laurence M Hauptman, *Conspiracy of Interests Iroquois Dispossession and the Rise of New York State* (Syracuse, N.Y.: Syracuse University Press, 1999). On the notorious confusion over land in Kentucky, see Frederika Teute, “Land, Liberty, and Labor in the Post-Revolutionary Era: Kentucky as the Promised Land” (Ph.D. Dissertation, The Johns Hopkins University, 1988); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789-1816* (Princeton: Princeton University Press, 1978), 167-90; Stephen Aron, *How the West Was Lost: The Transformation of Kentucky from Daniel Boone to Henry Clay* (Baltimore: Johns Hopkins University Press, 1996), 58-123.

complex ownership tangle. For Congress, though, the territories' salience came from the fact that they represented the future of land ownership. Already by the early 1790s, by dint of the North Carolina and Virginia cessions, most western lands were under federal jurisdiction. Because of the federal government's sole right to purchase Native title, this concentration would only increase. At the same time, state-controlled "vacant" lands were quickly disappearing; in 1789, one congressman declared Kentucky "already full." Congress accordingly viewed the Northwest and Southwest Territories as a laboratory for the creation of federal precedents that would, they anticipated, ultimately govern property over much of the continent.<sup>115</sup>

Yet the congressional push to quickly define federal title in the territories, and thereby make land available for western settlement, failed. It failed because the shadows of past land systems doubly haunted the federal government, both in the territories and in the halls of Congress.

As Jefferson's report underscored, and federal officials quickly discovered, the federal territories were not a blank canvas for crafting federal policy. They were, rather, a crazy quilt of the ideas and laws that other people had created about ownership. Pluralism resulted because the territories were a place of collision: most obviously, between Native and Anglo-American concepts of property, but also between settlers from different states with their own land laws; between distant federal administrators, state governors and legislatures, and local officials; and between smallholders and grandees.

These encounters concentrated and intensified the debates about ownership already swirling throughout early America. Though these controversies involved broad,

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<sup>115</sup> 1 Annals of Cong. 411-16 (1789).

abstract ideas—questions of land and democracy, the individual and the state, natural and positive law—in the territories they were the stuff of everyday legal practice, made manifest through formal deeds, grants, warrants, as well as quasi-legal claims that appeared through petitions and even violence. This proliferation of paper also made concepts about property sticky: the persistence of a parcel of land, and the centrality of a chain of title, meant that long-vanished ideas about ownership remained relevant, and contentious, for decades afterward. Ideas about how to grant land were, in this sense, immortal.

The result of all this pluralism was confusion, which even those who profited handsomely from the disorder claimed to abhor. But if everyone professed agreement about the problem, not all agreed about the cure. The solution proposed by the Land Ordinance of 1785—prior survey and the rectangular grid—was controversial in the territories. For one, it was immensely expensive; many suggested it would cost more than it would bring in. For another, many insisted the rectangular grid made confusion worse, not better. Rectangular lines would arbitrarily and unpredictably divide valuable natural features, while surveyors could be notoriously inaccurate. Far better to have tracts “so well described with natural Bounderies as to leave no grounds or possibility of dispute.” Even Arthur St. Clair, the governor of the Northwest Territory charged with implementing federal law, expressed doubt. Like most at the time, he advocated for adopting what was most familiar and well-known to him—in his case, given his central

Pennsylvania roots, the Pennsylvania land system. He often rode this favorite hobbyhorse in letters to cabinet officials.<sup>116</sup>

The disagreement in the territories found its echo in the capital, where Congress was also arguing vehemently about which elements of the past to accept, and which to reject. Though histories of the federal land system, written with the benefit of hindsight, often read as if the 1785 land ordinance foreordained later outcomes, the law may as well have never existed for all the attention Congress paid it. Its debates in the late 1780s and early 1790s demonstrate, rather, how unformed and unsettled federal land policy remained. The only principle that seemed to secure universal agreement was that lands could only be sold after they had been purchased from Native nations. Otherwise, members disagreed over prior survey, the rectangular grid, the location of federal land offices, occupancy rights, and the price per acre; they fought over whether federal land policy should serve large moneyed purchasers or smallholders.<sup>117</sup>

Though earlier land practice was the primary touchstone for this wide-ranging debate, the congressmen fiercely disagreed about prior systems' merits. When one congressman praised New York's land practice, another sought to make sure it was well understood "in order that the United States may avoid it." When one congressman lauded indiscriminate location, others attacked the confusion and litigation the system produced. For his part, North Carolina representative Hugh Williamson observed that his

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<sup>116</sup> Gov. Arthur St. Clair to John Jay, 13 December 1788, in *SCP*, 2:101-05; Jonathan Heart to William Judd, January 6, 1790, Jonathan Heart Papers; William Turnbull to Josiah Harmar, July 7, 1786, #22, vol. 3, JHP. Army officer Jonathan Heart estimated that surveying would cost between \$4,000 and \$5,000, observing, "five townships will not raise that sum in Specie." Heart to Judd, January 6, 1790.

<sup>117</sup> 1 *Annals of Cong.* 1067-72, 1829-42 (1790). The apparent obscurity of the Land Ordinance of 1785 in these congressional debates is that it was mentioned only once, in an offhand remark by New Jersey congressman Elias Boudinot: "The late Congress, he was informed, had adopted a method to obviate the inconveniences of the former mode [of indiscriminate location]." *Ibid.*

state's land system, as established under the 1783 land law, had allowed "persons rich in securities and cash" to seize the best lands.<sup>118</sup>

After two years of debate, the House largely punted. The bill it ultimately enacted contained concrete provisions guaranteeing the right of preemption (as discussed above) and, after much disagreement, setting a tentative low price of twenty-five cents per acre. But it left the hotly contested questions of the "form, time, and manner" of how lands would be located and patents issued entirely to the Attorney General, who would serve as superintendent of the general land office. But even this nominal agreement failed in the Senate, which opted instead to secure more information about the land in the territories—which produced Jefferson's report. The apparently overwhelmed Congress abandoned the land office project, not to be revived for several years.<sup>119</sup>

One of the bill's strongest backers, Thomas Scott of western Pennsylvania, blamed its failure not on ignorance, but on well-placed opposition from federally backed land companies.<sup>120</sup> These land companies were the product of a federal policy adopted a few years earlier in the waning days of the Continental Congress. By sheer number of acres distributed, they had a far stronger claim to be the first federal land system than the ineffectual 1785 ordinance. Its backers and proponents hoped they would offer a solution to the territories' property muddle. Events played out differently.

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<sup>118</sup> *Ibid.*

<sup>119</sup> Land Office Bill [HR-114], February 16, 1791, in Linda Grant De Pauw et al., eds., *Documentary History of the First Federal Congress of the United States of America* (Baltimore: Johns Hopkins University Press, 1972), 5:1239-42; Resolution on Unclaimed Western Lands, March 3, 1791, in *ibid.*, 6:2127-28.

<sup>120</sup> George Beckwith, "Notes of Conversations with Different Persons," April 30, 1790, in *ibid.*, 19:1377-88.

## Chapter 2: Land Companies and the First Federal Land System

In 1787, as the Constitutional Convention met in Philadelphia and the Continental Congress drafted the Northwest Ordinance in New York, Manasseh Cutler, a Massachusetts minister little known to the congressmen and delegates, visited both. Cutler traveled on behalf of the Ohio Company of Associates, a group of New Englanders, many of them veterans of the Continental Army, who had subscribed to shares in a proposed purchase of western lands. The Company had charged Cutler with negotiating a contract for federal lands in the Northwest Territory. Ultimately, Cutler, aided by another company representative, Winthrop Sargent, secured an agreement for 1.5 million acres along the Ohio River, in return for a promised payment of one million dollars in federal securities. The deal Cutler struck “far exceeded any private contract ever made before in the United States,” one congressional delegate opined; he told Cutler he had never known “so much attention” paid to a proposal, nor “more pressing to bring it to a close.”<sup>1</sup>

Cutler’s purchase represented the beginning of what, in hindsight, can be denominated the first federal land system—a moment in the late 1780s when the federal government sold large tracts of territorial land to speculative land companies. In most histories of public lands, federal sales to the companies represent a brief aberration from the otherwise steady march from the 1785 Land Ordinance to the federal land office system of 1800.<sup>2</sup> In fact, in empowering non-state actors to pursue important

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<sup>1</sup> “An Account of Dr. Cutler’s Work for the Ordinance of 1787,” July 13, 1787, Vol. 63, Manasseh Cutler Papers, Special Collections, Northwestern University Library.

<sup>2</sup> Few of the broad-scale histories of the federal land system spend considerable time on the sales to the land companies: Paul Gates, for instance, discusses them in two pages, Gates, *History of Public Land Law Development*, 70-72, while Malcolm Rohrborough devotes a page and a half, Rohrborough, *The Land Office Business*, 11-12.



governmental ends, the large-scale sales were far more characteristic of eighteenth-century governance than the abortive federal surveys and sales of the 1780s. These transactions resembled the state land systems in that purchasers, not the government, would bear the administrative costs and reap the potential profits. The land companies themselves harkened to prerevolutionary predecessors such as the Vandalia, Indiana, and (identically named) Ohio Company.<sup>3</sup>

But the Ohio Company and its primary imitator, the Miami Company, also diverged from these earlier precedents. Unlike prerevolutionary land companies, which often existed in uneasy tension and often outright conflict with government, the Ohio and Miami Companies would not be unsanctioned, autonomous efforts to craft statelets in the wilderness on the strength of Indian purchases. Rather, at least in aspiration, they more closely resembled quasi-public corporate entities like the East India Company long used to subsidize and support imperial ventures. The Companies, in fact, sold themselves based on their commitment to federal state-building. Purchasing lands directly from the federal government itself, the companies, especially the Ohio Company, envisioned themselves as forerunners and participants in the national political project of extending federal authority and law onto the seemingly ungovernable frontier. As historians have persuasively traced, the land companies represented a projection of federal power—

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<sup>3</sup> On prerevolutionary land companies, see Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York: Hill and Wang, 2007), 73-123; Woody Holton, *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia* (Chapel Hill: Published for the Omohundro Institute of Early American History and Culture by the University of North Carolina Press, 1999), 5-38; Thomas Perkins Abernethy, *Western Lands and the American Revolution* (New York, London: D. Appleton-Century Company, 1937); Peter Rhoads Silver, *Our Savage Neighbors: How Indian War Transformed Early America*, 1st ed (New York: W.W. Norton, 2008), 283-88. On the East India Company as a form of quasi-public governance, see Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundation of the British Empire in India* (New York: Oxford University Press, 2011); Philip J. Stern, “‘Bundles of Hyphens’: Corporations as Legal Communities in the Early Modern British Empire,” Lauren Benton and Richard J. Ross, eds., *Legal Pluralism and Empires, 1500-1850* (NYU Press, 2013).

through governance, demographics, finance, and military capacity—along the Ohio Valley.<sup>4</sup>

Existing literature has captured less well *how* the land companies would achieve these aims. Recent scholarship has emphasized the growth and expansion of corporations in the early republic, stressing their role as sources of economic and political power and as polities within the broader polity. What distinguished the land companies from the era's wider mushrooming of corporate governance was that they possessed and controlled territory through ownership. In this sense, the Ohio and Miami Companies were less forward-looking, toward an age of business corporations, than backward-looking: the Companies were eighteenth-century municipal corporations writ large, where power and authority to pursue governmental goals derived precisely from title to property. Controlling land, and especially how it was distributed, was not only the companies' core business but also their promise as an implement of policy, in the eyes of both proponents and federal officials. The diverse and extravagant promises Cutler and others insisted settlement would accomplish underscored how central title was to ideas about governance during this period.<sup>5</sup>

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<sup>4</sup> For previous histories of the Ohio and Miami Companies, particularly stressing their status as an investment in federal authority, see Andrew R. L. Cayton, *The Frontier Republic: Ideology and Politics in the Ohio Country, 1780-1825* (Kent, Ohio: Kent State University Press, 1986), 12–67; Bethel Saler, *The Settlers' Empire: Colonialism and State Formation in America's Old Northwest* (Philadelphia: University of Pennsylvania Press, 2014), 52–57; Timothy J. Shannon, "The Ohio Company and the Meaning of Opportunity in the American West, 1786-1795," *The New England Quarterly* 64, no. 3 (September 1, 1991): 393–413;

<sup>5</sup> The key work in this context is Hendrick Hartog's insightful study of New York City. Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Chapel Hill: University of North Carolina Press, 1983). As Hartog argues, especially in the eighteenth century, the corporation's "management of [its] corporate estate [w]as a mode of public planning and governance"; he especially stresses the importance of the corporation's exercise of authority by controlling grants of waterfront lots. *Ibid.*, 43-68.

None of the three companies discussed here ever formally incorporated, although the Ohio Company's charter contained a provision, never fulfilled, that called for incorporation either through Congress or one of the states. *Articles of an Association by the Name of the Ohio Company* (Worcester, Mass.: Printed by Isaiah Thomas, 1786), 6. Nonetheless, they fit within a model of corporate governance, drawn from pre-revolutionary practice, in which governments "engag[ed] private entities to finance, construct, and manage civic instructions and ostensibly public assets"—including, in this instance, the public domain. Brian Phillips Murphy, *Building the Empire State: Political Economy in the Early Republic* (Philadelphia: University of Pennsylvania Press, 2015), 7. In fact, as Pauline Maier suggests, incorporation in Massachusetts in the 1780s often focused on land management. The Ohio Company's elaborate system for

One aspect of the companies' landholding was especially important in recrafting the territories: the promise of "system." Though historians have generally interpreted this commitment as symbolic of a broader Federalist embrace of order and hierarchy, the land companies emphasized system in a quite literal sense: lands would surveyed and distributed through a well-defined and explicit process that the companies crafted deliberately, in contrast to the unplanned and haphazard land practices that had produced the territories' property chaos. This methodical approach to selling land would facilitate other goals—paying down the federal debt, crafting peaceful Indian relations, and, more broadly, curbing and channeling the seeming anarchic impulses of land speculation. The companies' landownership would allow them to regulate settlement and avoid "the monopoly of lands," which, undemocratically, "placed much power in the hands of a few." In other words, paradoxically, empowering a handful of private land companies seemed to offer a solution to private enrichment at public expense by creating a form of governance over much of the territories. Title, in this sense, served as a form of sovereignty.<sup>6</sup>

That, at least, was the ideology that underlay the first federal land system. But in practice, the "system" that the companies promised was largely self-serving rhetoric. Like William Blount and other predecessors, the land companies succumbed to the speculative lure of title: visions of millions of acres of lands seduced them into gambling

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subdividing its domain in fact resembled the smaller-scale divisions of property within Massachusetts town corporations. Pauline Maier, "The Revolutionary Origins of the American Corporation," *The William and Mary Quarterly* 50, no. 1 (1993): 51, 53-55. For additional works considering corporations and their implications for governance during this period, see Andrew M. Schocket, *Founding Corporate Power in Early National Philadelphia* (DeKalb, Ill.: Northern Illinois University Press, 2007); Hannah Atlee Farber, "Underwritten States: Marine Insurance and the Making of Bodies Politic in America, 1622-1815" (Ph.D., University of California, Berkeley, 2014); Sarah Barringer Gordon, "The African Supplement: Religion, Race, and Corporate Law in Early National America," *The William and Mary Quarterly* 72, no. 3 (2015): 385-422.

<sup>6</sup> Rufus Putnam to George Washington, June 16, 1783, in *MRP*, 216. For an example of this discussion of system, see Cayton, *The Frontier Republic*, 24-26.

on inchoate and uncertain ownership. The clearest example of this process was a third land company, the Tennessee Company, a creation of Georgia's so-called Yazoo sales that became deeply entangled with politics and finance in the Southwest Territory. Federal officials interpreted the Tennessee Company's vision of quasi-sovereignty as a threat rather than a boon to national authority. But in time, it became clear that the federally endorsed Ohio and Miami Companies were far more similar to the Tennessee Company than their supporters' rhetoric suggested.

In the end, corporate control of land by all three companies proved antithetical, rather than complementary, to federal interests. When their speculative gambles failed dramatically, all parties came away disillusioned. The companies felt that the federal government had opportunistically taken advantage of their hazarding of both financial and personal risk, without providing the support they believed implicit in the partnership. From the perspective of federal officials, the land companies left property messes that fell to Congress and the federal government to resolve, exacerbating rather than clarifying the tangle of title in the territories. "System" proved illusory. After the first federal land system produced results very similar to the chaotic jumble of ownership produced by the state land schemes, it was soon abandoned.

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The Ohio Company began with a 1783 petition by a group of continental army officers for land in the Ohio country, which they already anticipated would become a "Colloney of the United States" and ultimately a state. The petition's drafter and prime mover was Brigadier General Rufus Putnam, an engineer from a middling family in

central Massachusetts who had worked as a surveyor before the Revolution. Though the petition languished, three years later Putnam convened interested parties at the Bunch of Grapes Tavern in Boston to draft the articles of association for a land company.<sup>7</sup>

At the core of the Ohio Company's plan was federal debt. "The design of this association," read the articles' first line, "is to raise a fund in Continental Certificates for the sole purpose . . . of purchasing Lands in the Western territory (belonging to the United States)." Continental certificates were paper promises of future repayment issued by a cash-starved Continental Congress to pay for the creation and supply of a national military. By war's end, these certificates had been issued to soldiers, officers, tradesmen—anyone with outstanding financial claims against the United States. The lack of confidence in the new national government's financial security meant that these certificates traded at a heavy discount; in 1784, Putnam found them selling for as little as 18-20% of their face value.<sup>8</sup>

The Ohio Company proposed to raise \$1,000,000 in Continental Specie Certificates, which would then be redeemed for western lands. Rather than purchasing land outright, investors would purchase a "share" in the Company that would entitle them to a portion of the lands. There would be a thousand shares in the company, which could be purchased for \$1,000 in certificates and \$10 in gold or silver; the hard currency would

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<sup>7</sup> "Petition for the Ohio Country," May 7, 1783, in *MRP*, 215; "Information," January 25, 1786, in *The Records of the Original Proceedings of the Ohio Company: Ohio Company Series* (Marietta, Ohio: Marietta Historical Commission, 1917), 1:1-4. On Putnam's life, see his autobiography, "Rufus Putnam's Memorandum Book of Family Concerns," in *MRP*, 39-126.

<sup>8</sup> *Articles of an Association by the Name of the Ohio Company*, 3; Rufus Putnam to George Washington, April 5, 1784, in *MRP*, 223. On federal finance and the Revolutionary War debt during this period, see Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford: Oxford University Press, 2003), 164-216; Max M. Edling, *A Hercules in the Cradle: War, Money, and the American State, 1783-1867* (Chicago: University of Chicago Press, 2014), 81-107.

be used to pay the Company's operating expenses. Individuals were limited to a total of five shares; multiple purchasers could also pool their resources and obtain a share.<sup>9</sup>

The Ohio Company met again a year later, after agents had already begun soliciting subscribers across New England. At this meeting, Putnam was unanimously appointed as one of three directors of the Company. The other two were Samuel Holden Parsons, a Connecticut native and Revolutionary War general who had served as congressional treaty commissioner at the 1785 Treaty of Fort Finney with the Shawnees, and Manasseh Cutler, former army chaplain and a clergyman in Ipswich, Massachusetts, with a particular interest in natural science. A fourth man, Winthrop Sargent, was appointed as the Company's Secretary. Also from Massachusetts, Sargent had served as an artilleryman during the war, and a surveyor in the Ohio Country for the Continental Congress. Later that year, they would be joined by James Varnum, a former general from Rhode Island, as director, and Richard Platt as treasurer. The Company charged the newly appointed directors to "immediately" apply to Congress to purchase lands. "We are in Serious earnest," Parsons wrote a Connecticut delegate.<sup>10</sup>

In summer 1787, Manasseh Cutler journeyed to New York to reach an agreement with the Continental Congress. A political neophyte, Cutler nonetheless quickly insinuated himself into the nation's political elite, dining with James Madison and Elbridge Gerry at the constitutional convention, and with Arthur St. Clair (then President of Congress), and Henry Knox, the Secretary at War, in New York. There, Cutler found Congress in the midst of drafting the Northwest Ordinance for the governance of the new

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<sup>9</sup> *Articles of an Association by the Name of the Ohio Company*, 3-6.

<sup>10</sup> "Second General Meeting of the Ohio Company," March 8, 1787, in *Records of the Original Proceedings of the Ohio Company*, 12-13; Samuel Holden Parsons to William Samuel Johnson, April 23, 1787, Folder 6: Correspondence, 1786-87, Samuel Holden Parsons Papers, Connecticut Historical Society

federal territory, including the Ohio Country; he proposed a number of (unspecified) amendments, which, he was happy to note, “have all been made.”<sup>11</sup>

The actual contract proved harder to secure. To be sure, Congress salivated at the prospect of retiring large chunks of the national debt, and the “mode of Sale” that Cutler proposed would also “exempt the United States from the greatest part of the expence” of surveying and selling the land under the 1785 Land Ordinance. But, as one congressional delegate complained, Congress found it impossible “to get anything done,” even the “plainest propositions” like Cutler’s proposed purchase. The largest obstacle was price. While Congress sought \$1 per acre, Cutler insisted on \$.33 an acre, which Congress refused.<sup>12</sup>

A breakthrough occurred on the evening of July 20, when William Duer called on Cutler. Duer was the secretary of the Board of Treasury, the congressional committee charged with negotiating the contract with Cutler. He was also an influential New York financier. He came to Cutler on behalf of a group of the city’s “principal characters” who proposed expanding the Ohio Company’s proposal to “take in another Company but that it should be a kept a profound secret.” Cutler, they urged, would negotiate for a much larger purchase than originally planned, and this new company—later dubbed the Scioto

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<sup>11</sup> “An Account of Dr. Cutler’s Work for the Ordinance of 1787.” Jeffrey Pasley convincingly argues that Cutler’s outlook was substantially shaped by notions of gentility, which also explained his success in securing political access. “Private Access and Public Power: Gentility and Lobbying in the Early Congress,” in Kenneth R. Bowling and Donald R. Kennon, eds., *The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development* (Athens, Ohio: Published for the United States Capitol Historical Society by Ohio University Press, 2002), 57-99.

<sup>12</sup> Virginia Delegates to Edmund Randolph, November 3, 1787, in Paul Hubert Smith, ed., *Letters of Delegates to Congress, 1774-1789* (Washington: U.S. Govt. Print. Off, 1976), 24:535-39; Richard Henry Lee to Francis Lightfoot Lee, July 14, 1787, in *ibid.*, 24:353-54; “Proposals for the Purchase of Lands on the North West of the Ohio Belonging to the United States by the Associated Ohio Company,” July 27, 1787, Folder 10: Ohio Lands, Samuel Holden Parsons Papers; “An Account of Dr. Cutler’s Work for the Ordinance of 1787.”

Company, after its location—would pay for the additional land. “The plan struck me agreeably,” Cutler recorded, and “*Sargent* insisted on my undertaking [it].”<sup>13</sup>

Encompassing Duer’s proposed purchase made Congress much more receptive, since they were now discussing retiring millions of the public debt. The parties agreed that, although the nominal price would remain a dollar per acre, the actual price would be reduced to \$.66 per acre on account of “bad lands.” But another obstacle remained, due to intense regional horse-trading over who would fill the newly created positions in the territorial government created by the Northwest Ordinance. Over dinner with some southern congressmen, Cutler negotiated that Parsons and Varnum would serve as territorial judges, while Sargent would serve as the territorial secretary.<sup>14</sup>

With the deals struck, “matters went on much better,” and three months later, Cutler signed a formal contract. The Ohio Company would pay \$1,000,000 in two installments: \$500,000 up front with a right of immediate entry, with an additional \$500,000 due after the surveying of the tract within seven years, at which point the government would legally transfer title. The one and a half million acres purchased would be located along the Ohio River, to be surveyed following the Ordinance of 1785, with tracts reserved for future sale and to support education and ministers. The actual price in specie worked out to eight cents per acre.<sup>15</sup>

The same day, Cutler and Sargent signed another indenture for the “Scioto” speculation crafted by Duer. It encompassed what Cutler guessed to be 3.5 million acres

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<sup>13</sup> “An Account of Dr. Cutler’s Work for the Ordinance of 1787.” On Duer—who had a complicated hand in many land speculations of the era—see Robert Francis Jones, *“The King of the Alley”: William Duer: Politician, Entrepreneur, and Speculator, 1768-1799* (Philadelphia: American Philosophical Society, 1992); Robert F. Jones, “William Duer and the Business of Government in the Era of the American Revolution,” *The William and Mary Quarterly* 32, no. 3 (1975): 393–416.

<sup>14</sup> “An Account of Dr. Cutler’s Work for the Ordinance of 1787.”

<sup>15</sup> *Ibid.*; “Indenture Between the Board of Treasury and the Agents of the Ohio Company” October 27, 1787, in *TP: Vol. II*, 80-84; Gates, *Public Land Law Development*, 70.



(actually roughly five million) west of the Ohio Company's purchase to the Scioto River. There was no immediate payment, but the associates would pay six installments, every six months, at the same rate of 2/3rds of a dollar per acre. At Putnam's urging, Cutler and Sargent had separated the Ohio from the Scioto contracts, entering the second in their names alone to avoid the appearance of impropriety. But despite this separation, the two projects remained entangled. The Ohio Company had on hand only \$356,000 in certificates. The remaining \$143,000 needed for its required down payment came from the "Scioto Tract Associates"—Duer's cabal of financiers. "Without connecting this Speculation," Cutler wrote somewhat defensively, "similar terms & advantages could not have been obtained for the Ohio Company."<sup>16</sup>

Cutler's negotiations proved remarkably successful. Much of the project's appeal was financial: Cutler tempted congressional delegates with the promise that the sale would ultimately retire nearly four million dollars in federal debt. But the purchase's fiscal attractions were inseparable from its promise to channel the era's speculative impulses to serve the public interest. Rather than undermining or co-opting the state, as most land speculations of the time did, the Company's boosters claimed to bolster the authority of the national state, by creating a "*large & immediate settlement*," consisting of "the most robust & industrious people in Amer[ic]a" who were "strongly attached to the federal Government." In other words, the federal government would entrust the survey and sale of the public lands to the Ohio Company, which would also enjoy *de facto* control over the territory's governance, thanks to the overlap between Company and

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<sup>16</sup> "Indenture Between the Board of Treasury and Manasseh Cutler and Winthrop Sargent," October 27, 1787, in *TP: Vol. II*, 85-88; Rufus Putnam to Winthrop Sargent, October 8, 1787, Reel 2, WSP; "Securities Received from the Agents," October 27, 1787, Reel 2, WSP; "An Account of Dr. Cutler's Work for the Ordinance of 1787."

federal officials. Cutler particularly stressed that the new settlement would be “Systematic,” an argument that found a receptive audience in Samuel Osgood, president of the Board of Treasury and charged with negotiating the contract. Osgood lamented to Cutler that “System had never before been attempted” in settling western lands, notwithstanding “the advantages of *System* in a new Settlement.” This vision of harmony between federal and corporate interests led Osgood to proclaim the Ohio Company’s “plan . . . the best ever formed in Amer[ic]a.”<sup>17</sup>

On April 7, 1788, Rufus Putnam, elected as the superintendent of the new settlement, brought forty-eight selected men to the confluence of the Ohio and Muskingum Rivers, the center of the Company’s settlement, after struggling through the winter snows of Pennsylvania. The first task that confronted Putnam and his men was surveying. The Company had charged Putnam with implementing its elaborate plan for dividing the Company’s 1.5 million acres among its 1,000 shareholders. As crafted in the Company’s first meeting after the purchase agreement, the plan called for a city and commons centered at the rivers’ confluence, which was ultimately named Marietta. The town would be carefully laid out into “oblong squares,” in which each shareholder would receive a houselot. Individual plots of increasing size would then radiate outward: one thousand eight-acre lots surrounding the city; one thousand 116.48-acre lots along the Ohio; one thousand 320-acre lots along the navigable rivers stretching north into the purchase; and one thousand 992-acre lots in the “inland towns” away from the rivers.

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<sup>17</sup> “An Account of Dr. Cutler’s Work for the Ordinance of 1787.” A fuller account of the motivations for the agreement between Congress and the Ohio Company appears in Michael Blaakman, “Speculation Nation: Land and Mania in the Revolutionary American Republic, 1776-1803” (Ph.D. Dissertation, Yale University, expected 2016).

Parcels would be assigned to individual shares by lot. “By this mode of Division,” one investor wrote, “the Proprietors will be enabled to make Settlement by preveously forming a Sistem by which they will bind themselves to adhere to fixed Principals for that purpose.”<sup>18</sup>

As Putnam toiled, “Ohio fever” struck New England, where inhabitants anxiously awaited reports of the new settlement. “No property commands money like the Ohio Lands,” Cutler gleefully reported from Ipswich. One man reported that his home was “thronged with Characters” seeking to invest in the Company, a craze that extended to Nova Scotia and even to the Caribbean island of St. Croix. Many of the subscribers were veterans, but they ranged widely. Some were wealthy and influential, such as Governor Bowdoin of Massachusetts; others, relatively humble, put down what they could, even if it was only a few dollars cash. By May 1788, all shares had been subscribed, and now traded at double their initial cost. “The spark for emigrating to the Western world is kindled into a blaze,” Cutler told Putnam.<sup>19</sup>

Not all shared this enthusiasm. Manasseh Cutler satirized the opposition as a “new disorder” he dubbed “Ohio-Phobia,” the symptoms of which appeared whenever “the excellences of the Ohio Country” were discussed. Cutler diagnosed the root of this ailment as venality, since the Ohiophobe bewailed that emigration caused the value of his New England to fall by half. By contrast, Cutler positioned himself and his allies as

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<sup>18</sup> “Rufus Putnam’s Memorandum Book of Family Concerns,” 103-05; “Meeting of the Ohio Company” November 10, 1787, in *Records of the Original Proceedings of the Ohio Company*, 19-21; Griffin Greene to “Peter”, c. 1791, Northwest Territory Collection, Clements Library, Univ. of Michigan, Ann Arbor, Mich.

<sup>19</sup> Solomon Drown to Rufus Putnam, September 3, 1790, Box 1, Folder 10, RPP; Manasseh Cutler to Rufus Putnam, April 21, 1788, Series II, Box 1, Folder 1, Manuscripts and Documents of the Ohio Company of Associates, Special Collections, Marietta College Library, Marietta, Ohio; Peter Heyliger to Samuel Holden Parsons, May 20, 1788, Folder 7: Correspondence, 1788, Samuel Holden Parsons Papers; Manasseh Cutler to Rufus Putnam, May 15, 1788, Box 1, Folder 8, RPP. For examples of the diverse subscribers to the Ohio Company, see Ledger “A” & Ledger “B,” Vols. 59-60, Manasseh Cutler Papers.

nationalists: the Company, he stressed, would sink the national debt, “extend the American Empire--increase our internal wealth--& render us more respectable abroad.”<sup>20</sup>

Cutler’s vision of harmony between corporate and national authority seemed to be playing out in Marietta. The Company set about using the asset it had—land—to attach those federal officers not yet linked to it. It donated houselots to soldiers stationed at Fort Harmar, the headquarters of the federal soldiers of the First American Regiment that lay directly across the Muskingum River from Marietta, and inveigled the Regiment’s commander, officers, and even Secretary of War Henry Knox to become shareholders. The Company was particularly anxious to attach Arthur St. Clair, the Territory’s governor, who became a shareholder and was also gifted a number of additional lots in Marietta. As Ohio Company proprietor John May candidly acknowledged, such gestures were “a little selfish,” as the Company “wish[ed] [St. Clair] to make the Muskingum the seat of government, and place of his residence.” This proximity to power would, they anticipated, make the Company’s lands more valuable.<sup>21</sup>

When St. Clair finally arrived in Marietta on July 9, 1788, “[a]ll rejoiced at his coming,” as the governor was greeted with a fourteen-cannon salute and St. Clair gave a brief speech praising the leaders of the Ohio Company for their commitment to “order.” “This is the birth-day of this Western World,” May wrote. May’s hyperbole expressed a

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<sup>20</sup> “Treatise on the Ohio Phobia,” vol. 74, Manasseh Cutler Papers.

<sup>21</sup> “Meeting of the Agents of the Ohio Company,” March 2-July 6, 1789, in *Records of the Original Proceedings of the Ohio Company*, 100-06; “Meeting of Ohio Company [in Marietta],” July 2-Aug. 14, 1788, in *ibid.*, 44-58; “Lands in the Ohio Company Purchas Drawn in the Name of Arthur St. Clair Esq.,” September 10, 1790, Reel 7, Arthur St. Clair Papers (microfilm), MIC 96, Ohio Historical Society, Columbus, Ohio [hereinafter ASCP]; “Journal of a Journey from Boston, Mass. to the Mouth of Muskingum, Ohio, kept by John May,” p. 19, Box 4, Marietta, Ohio Collection, MS 210, Ohio Historical Society, Columbus, Ohio.

sense that the Territory's origins lay in the union of the Company's settlement with constituted federal authority, as represented by St. Clair.<sup>22</sup>

St. Clair's speech to Marietta's inhabitants particularly recommended treating the "Numbers of Savage and, too often, hostile Nations" that surrounded the town with "kindness & the strictest Regard to Justice." In reply, Rufus Putnam reassured St. Clair that "[w]e have treated [the Natives] like friends, like brothers."<sup>23</sup>

This exchange emphasizes the centrality of recasting Indian affairs for the Ohio Company's project—an aspect of governance that dovetailed neatly with the Washington Administration's goals. The Company fervently hoped to replace the violence that had previously characterized the frontier with a warmer cross-cultural relationship. Even before he arrived in Marietta, Rufus Putnam had written to John Heckewelder, a Moravian missionary among the Delawares, to reassure him of the Ohio Company's good will toward Natives. "*I want to embrace them in the arms of Friendship,*" Putnam told the minister, "*I want to be made acquainted with them, I want to have them Introduced to our Settlement in a friendly manner I want them to live by us and with us if they please I want (if I may be permitted to speak it) I want that we should do them good and not evil.*"<sup>24</sup>

The key to cross-cultural peace was land. Putnam and other Ohio Company leaders diagnosed the violence that plagued the Ohio Valley as, at base, a land use problem. The "Big Knives"—the Natives' term for the refractory Virginians who had

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<sup>22</sup> "Governor St. Clair's Address at Marietta," July 15, 1788, in *The SCP*, 2:54-55; "Journal of a Journey," p. 36.

<sup>23</sup> "Governor St. Clair's Address at Marietta"; "Inhabitants on the Muskingum to Governor St. Clair," July 16, 1788, in *TP: Vol. II*, 132-33.

<sup>24</sup> Rufus Putnam to [John Heckewelder], February 29, 1788, Box 1, Folder 9, RPP.

settled along the Ohio River—had ranged all over Indian lands, competing with tribes for game and illegally settling Native land. The “New England Mode of Settlement” was different. “Being Farmers or Mecannicks and not Hunters,” the settlers had little interest in overrunning Native lands. Putnam also embraced the language of consent only recently adopted by Henry Knox and other federal leaders. “I wish the land may be purchased from them [the Indians] on the principle of Bargain and Sale,” he wrote, repudiating the doctrine of conquest, “and not wrested from them as a condition of giveing them Peace.”<sup>25</sup>

Indian relations and Company land were intertwined in another sense, as well. Bloodstained lands had little value. Company officials well understood how specters of Indian attacks, exaggerated by a constant torrent of newspaper reports of Native atrocities, haunted the minds of New Englanders. “The greatest present discouragement [to the Company] is the fear of Indians,” Cutler wrote; he urged Putnam to censor the first letters back to New England to ensure that the “first impressions” of Indians were positive. Rumors proliferated anyway. “Terreble Stories” circulated that Putnam’s entire party had been killed en route to the Ohio. Recently arrived Marietta settlers had to reassure their families that they had been spared from the “savages.” Samuel Parsons reported that more than one hundred settlers had halted in Pennsylvania, and some turned back, on account of “unfounded Reports of Danger industriously spread to alarm the fears of people.” New Englanders’ hazy grasp of western geography exacerbated the problem. Reports of attacks anywhere along the frontier—Illinois, Kentucky, or even Georgia—

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<sup>25</sup> Jonathan Heart to William Judd, July 8, 1787, Jonathan Heart Papers; Rufus Putnam to Heckinwilder [sic], February 27, 1788, Box 1, Folder 9, RPP.

occasioned alarms, since in the minds of New England readers “all goes for Western Country.” Such vague reports of Indians, “magnified . . . a thousand fold,” constituted “our Principal Obstruction to Settlement.”<sup>26</sup>

For the Company, then, perceived amity with Natives was a critical business decision vital to its economic success in attracting settlers and investors. In countering rumors of Indian terrors, the Ohio Company settlers deployed the alternate trope—that of “friendly” Indians, a term settlers repeatedly used to describe the Delawares and Wyandots they encountered around Marietta to correspondents back home. In a letter sent back to Massachusetts for publication, Putnam reported on his very first meal at Marietta, a banquet at Fort Harmar with the Delaware chief Captain Pipe and twenty other Natives who had come to the fort to trade. When Putnam told Pipe of the Company’s “business,” Pipe reportedly proclaimed that the Natives “should be happy to live by us.” Samuel Parsons similarly reported that the Delawares “profess a great Friendship for the *Yankees* who they distinguish from the Settlers on the Virginia Shore.”<sup>27</sup>

Such tidy correspondence between Native views and the New Englanders’ self-conceptions suggests a certain amount of ventriloquism, but the strong relations between the two groups were not just propaganda. The Delawares and Wyandots who lived in the area had long experience with Anglo-Americans, and “Pipe”—the Delaware chief Konieschquanoheel, the most important local Native leader—had pursued a close

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<sup>26</sup> Manasseh Cutler to Rufus Putnam, December 19, 1787, Box 1, Folder 7, RPP; Manasseh Cutler to Rufus Putnam, April 21, 1788, Series II, Box 1, Folder 1, Manuscripts and Documents of the Ohio Company of Associates; Minerva Nye to Mrs. Stone, Sept. 19, 1788, Box 2, Marietta, Ohio Collection; Elnathan Haskell to Winthrop Sargent, May 9, 1788, Reel 2, WSP; Samuel H Parsons to Unknown, July 16, 1788, Vol. 69, Manasseh Cutler Papers.

<sup>27</sup> Rufus Putnam to Thomas May, May 17, 1788, Series II, Box 1, Folder 1, Manuscripts and Documents of the Ohio Company of Associates; Samuel H Parsons to Unknown, July 16, 1788.

relationship with the United States for the past several years. Winthrop Sargent had befriended Pipe during previous visits, while Fort Harmar's commander described him as a "manly old fellow" and "Gentleman." Such alliances served Native purposes. Given the blurred lines between the Company and federal authority, there were good reasons for the Delawares to embrace the Ohio Company settlers; these links furthered their connections to the United States and secured access to trade goods.<sup>28</sup>

This seeming harmony between Native and Ohio Company goals made early Marietta something of a mixed settlement characterized by cross-cultural curiosity, exchange, and even seeming friendship. After their initial "acquaintance" with the New Englanders, Wyandots and Delawares—"our Indian friends," as Putnam dubbed them—came to Marietta "almost every day." Manasseh Cutler, who traveled to Marietta in the summer of 1788 (ultimately his only trip to the Ohio Country), dined with Natives nearly every night of his visit. A particularly strong bond formed around Marietta's public celebrations, as the New Englanders' love of ceremony and performance found its analog in Native diplomatic culture, where feasting and ritual served to forge ties. Thus, when General Varnum died in January 1789, local Native leaders marched in his funeral cortege. Other Native leaders picnicked in Marietta, where they listened to the declaiming of verse and then competed against the New Englanders in a foot race. Local Delawares also attended Marietta's first July 4 celebration, where toasts were raised to Captain Pipe as well as Governor St. Clair and the new constitution. Ohio Company proprietor John May, heading one of the tables, was bemused when one of the Delaware

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<sup>28</sup> Winthrop Sargent to Samuel Holden Parsons, June 26, 1786, Reel 2, WSP; Josiah Harmar to Henry Knox, March 9, 1788, p. 25, Letterbook C, Vol. 28, JHP.



chiefs greeted him, “How do you do, brother Yankee.” He seated the Delaware next to him and watched as he ate freely and tried to join in the toasts. “He labored with all his might to speak them,” May recorded, “but made very poor work of it.” May noted that he had shaken hands with most of the local Delawares since his arrival.<sup>29</sup>

Underneath these avowals of good will, however, ran an undercurrent of suspicion. Despite his amusement with the Indians, John May thought them “a set of creatures not to be trusted.” “[N]otwithstanding [the Indians’] professed friendship,” one Marietta settler wrote, “there is a guard placed every night.” The Ohio Company settlers knew that the situation further down the Ohio was very different, as bands of Natives ambushed barges travelling down the river. Governor St. Clair thought war with these western tribes “inevitable.” Local Natives had their own misgivings about the Company’s settlement. Captain Pipe, for one, told Putnam that he “did not expect any people would come on to settle before the treaty [of Fort Harmar],” suggesting discontent about the federal government’s presumptuous appropriation of Delaware lands.<sup>30</sup>

The New Englanders displayed little anxiety about living in what threatened to become a war zone, however, because they believed their land policies mitigated the Indian threat. In particular, by creating well-organized towns rather than isolated huts in the woods, the Company’s centralized regulation of land practices had ensured the settlers’ “safety and wellbeing,” which “depend[ed] upon their establishing themselves in the most compact possible manner.” This approach, they argued, also improved the value

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<sup>29</sup> Putnam to May, May 17, 1788; Rufus Putnam to Manasseh Cutler, May 16, 1788, Box 1, Folder 9, RPP; “*Extracts from the Journal of Manasseh Cutler*,” pp. 22-23, Box 2, Marietta, Ohio Collection; “Copy From a Manuscript in the Hand Writing of Major Horace Nye (son of Ichabod) of Putnam Ohio prepared about 1847 for Dr. Hildreth,” Marietta, Ohio Collection; “Journal of a Journey,” 23, 25, 34.

<sup>30</sup> “Journal of a Journey,” 22; Rowena Tupper to Mrs Stone, Nov. 11, 1788, Box 2, Marietta, Ohio Collection; Arthur St. Clair to Secretary at War, Sept. 14, 1788, in *TP: Vol. II*, 156-59; Putnam to May, May 17, 1788.

of lands, which the Indian threat would otherwise make worthless. Repeatedly, Ohio Company settlers praised the virtue of “compact” settlement, which they were confident guarded them well against attack. “[T]he Indians themselves remark in their Towns, that we settle compactly & not in the scatterd manner in which the Frontiers have been generally Settled,” wrote Samuel Parsons, “& no Attempt [to attack] can be made without meeting the whole force in the Settlement.”<sup>31</sup>

Just as the Company’s land policy promised to remake Indian affairs, its elaborate system of land distribution would, its backers hoped, tamp down on the excesses of land speculation. All shareholders would receive the same number of acres and kinds of parcels. And because assignments were made by lot, no investors could engross the particularly valuable large tracts next to the town, nor would in-the-know speculators be able to select the best tracts or gerrymander their lots. There was a structured and egalitarian vision of land distribution, in opposition to the frantic grab for riches that generally characterized land speculation of the era.

That, at least, was the plan. As Captain Jonathan Heart of the American Regiment observed, it soon suffered the fate of many designs crafted in the abstract. “The Division of the land into Cities Towns . . . was a well digested System to read within the Town of Boston,” he reported, “but . . . on putting the System into execution there were innumerable embarrassments.” In particular, system proved inadequate to restrain the

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<sup>31</sup> Meeting of Ohio Company [in Marietta], July 2-Aug. 14, 1788; Samuel H Parsons to Unknown, July 16, 1788. For additional discussion of the defensive advantages of the Ohio Company’s compact settlement, see John Cleves Symmes to Jonathan Dayton, May 18, 1789, in Beverley Waugh Bond, ed., *The Correspondence of John Cleves Symmes: Founder of the Miami Purchase, Chiefly from the Collection of Peter G. Thomson* (New York: Pub. for the Historical and Philosophical Society of Ohio by the Macmillan Co, 1926), 53-95 [hereinafter CJCS].

greed that seemed to afflict anyone involved in western lands. As one investor complained of the Company, “Speculation was ushered in to their System at an early period.”<sup>32</sup>

The first struggle was over the eight-acre lots that were to surround Marietta. When Putnam arrived, he discovered the land around Marietta hilly and wooded; the land would be poor and require expensive roads. He opted to lay the lots along the Ohio and Muskingum instead. The lots were then distributed by a lottery held in New England, but, when many of the proprietors—particularly the agents and directors—arrived, they discovered their lots were too far from Marietta to be safely farmed, given the Indian threat. Putnam’s innovations became the target of their ire. “I am told my opinion was not to govern me,” Putnam complained, “but the Vote of the Company.” Disgruntled claimants, led by Varnum, “very much disturbed the peace of the Society.” Finally, a compromise was reached in which the commons would be divided up into three-acre lots, though, Putnam later recorded, most fared no better in this second lottery either. A particularly angry contingent of Rhode Islanders was unmollified—Putnam saw “flying Clouds which indicate another Storm gathering.”<sup>33</sup>

Concern over the Native threat prompted another significant shift from the original plan. Anxious for settlers capable of bearing arms, the Company created so-called “donation lands,” withdrawing 100 acres from each share to be granted to actual settlers gratis as long as they met the Company’s stringent requirements: constructing a

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<sup>32</sup> Jonathan Heart to William Judd, September 9, 1790, Jonathan Heart Papers; Benjamin Gilman to Josiah Harmar, Dec. 27, 1789, #125, Vol. 11, JHP.

<sup>33</sup> Rufus Putnam to [Dwight Foster], June 30, 1788, Box 1, Folder 1, Manuscripts and Documents of the Ohio Company of Associates. From Massachusetts, Manasseh Cutler feared that the dysfunctional politics that had long characterized Rhode Island were infecting the Company; these anxieties, he stressed, were deterring would-be investors. Manasseh Cutler to Rufus Putnam, November 18, 1788, Box 1, Folder 1, Manuscripts and Documents of the Ohio Company of Associates.

house (“at least 24 feet by 18 . . . with a Chimney of Stone or Brick”), planting fruit trees, clearing fifteen acres of pasture. Most importantly, the settlers had to carry arms and ammunition, obey the militia law, and construct proper defenses. These stipulations ensured these donations would “protect the inhabitants on the Lands to be allotted to proprietors.”<sup>34</sup>

Despite the effort to maintain order and system, the new policy “opened such doors for . . . speculation on speculation,” in Captain Heart’s words. Few claimants actually settled; most, “more anxious to fill their purses than increase the Settlement,” resold the lands to “real settlers” for \$50-\$100. Meanwhile, the donation committees created to enforce the system became, in the eyes of some, arbitrary and self-dealing. Proprietor Ichabod Nye bitterly recalled being stripped of his lot when a self-interested party lied to the local donation committee. In his small settlement of Bellpre, the committee’s “tyranny became so notorious that they were Called the Damnation Committee.” As for those who actually settled on the lots, most arrived entirely destitute, without animals, farm tools, or furniture; “not one half . . . had a pot or a Cattle [Kettle]” to cook their food.<sup>35</sup>

Even surveying provided a source for controversy. The first lines, hastily drawn, contained “gross” and “scandalous errors.” Many lots were located on lands reserved for Congress, and so had to be voided, laying the groundwork for future litigation. One

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<sup>34</sup> “Meeting of the Agents of the Ohio Company,” December 3, 1788, in *Records of the Original Proceedings of the Ohio Company*, 1:70-89.

<sup>35</sup> Jonathan Heart to William Judd, September 9, 1790, Jonathan Heart Papers; Benjamin Haywood to Rufus Putnam, December 23, 1790, Vol. 69, Manasseh Cutler Papers; ““A Biographical Sketch of the Origen & Descent of Gen'l Benjamin Tupper Connected with his Military Life,” Folder 2, Box 3, Marietta, Ohio Collection.

investor read this as confirmation of the Company's ineptitude. "The business . . . perfectly coincides with most of the transactions of the Ohio Company," he complained, which "has generally been conducted in a mode that reflects little Credit on the abilities or intentions of the various Managers."<sup>36</sup>

In fact, the challenges that confronted the Ohio Company were structural as well personal; they stemmed from its hybrid status as both a company intended to produce value for investors *and* an actual settlement. The interests of the Marietta settlers and the so-called "non-resident proprietors"—shareholders who remained in New England—fundamentally diverged. Those in New England sought returns, not stability or flexibility. Fearful of being short-changed, they were "monstrously suspicious" of any land proposals emanating from Marietta.<sup>37</sup>

Structural tensions also appeared in the Company's linkage between land and debt, by virtue of a deep irony at the heart of the Company's finances. Though the Company was both reliant on, and an investment in, federal state-building, its financial success depended on public perception of federal fiscal weakness, as manifested by the low price of federal certificates. The ratification of the Constitution—an event the Ohio Company settlers celebrated—undermined their financial stability: as public confidence in the nation's financial health rose, federal certificates' value also rose. With this shift, "people . . . began to look upon securities better than western Land." The value of the Ohio Company shares accordingly fell. By early 1789, they were selling for "much less

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<sup>36</sup> Gilman to Harmar, Dec. 27, 1789. For an example of litigation resulting from surveying confusion, see Solomon Sibley, "D6: Docket Book," 1797-99, pp. 8-13, Box 58, Solomon Sibley Papers, Barton Historical Collection, Detroit, Mich.

<sup>37</sup> Richard Platt to Rufus Putnam, October 8, 1788, Folder 9, RPP.

than the first cost”; many would-be sellers could not find buyers. Some shareholders wrote demanding back their certificates that had not yet been paid to Congress.<sup>38</sup>

The small-scale speculations that dominated Marietta’s land divisions found their echo in the much grander dealings of the Ohio Company’s directors. In the eyes of many shareholders, Cutler and Sargent, for all their talk of public-spiritedness and disinterestedness, were the largest and riskiest speculators of all, having conjoined the Ohio Company with the Scioto Company. The “very great impropriety” of Cutler and Sargent’s gamble was the “daily . . . subject of Conversation” back in New England. Seen as a “dirty speculation,” the Scioto investment caused “*general* . . . dissatisfaction” among the shareholders. “I cannot allow myself to suppose,” one incredulous shareholder wrote Sargent, that the Company’s directors “would be concerned in so disreputable a Thing as speculating upon [the Company’s] Property and at their Expence for the Benefit of a few Individuals.” Rumors spread that both Cutler and the Ohio Company’s treasurer had spent “every farthing” of the Company’s money on the Scioto Company instead. When Cutler visited Ohio, he was much “injured” by the constant criticism he encountered on the subject.<sup>39</sup>

Much of this criticism was well-founded: the grasping and unstable Scioto Company represented precisely the sort of risky and ill-conceived land speculation that the Ohio Company had sought to displace, one reliant on boosterism, questionable title,

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<sup>38</sup> Manasseh Cutler to Rufus Putnam, Nov. 18, 1788, Series II, Box 1, Folder 1, Manuscripts and Documents of the Ohio Company of Associates; Manasseh Cutler to Rufus Putnam, April 9, 1789, Vol. 70, Manasseh Cutler Papers.

<sup>39</sup> Heart to Judd, Sept. 9, 1790; Richard Platt to Winthrop Sargent, November 13, 1788, Reel 2, WSP; Cutler to Putnam, Nov. 18, 1788; Joseph May to Winthrop Sargent, April 29, 1789, Reel 3, WSP; Ebenezer Hazard to Winthrop Sargent, August 19, 1788, Reel 2, WSP; Manasseh Cutler to Rufus Putnam, Aug. 23, 1791, Vol. 70, Manasseh Cutler Papers; Manasseh Cutler, “Journal of a Tour to the Ohio and Muskingum,” July 21, 1788, Vol. 64, Manasseh Cutler Papers.

and paper promises to create overnight wealth from hoodwinked investors. The Scioto Company owned nothing; it held only a contract to purchase lands from the federal government in the future at a fixed price, “the naked preemption.” To secure the money for these future payments, the Company’s investors had to sell this contingent promise of title for immediate cash. The Company’s proprietors opted to market the lands in Europe, hoping to profit from the disorder of the early days of the French Revolution. “Now is our Time,” Winthrop Sargent proclaimed as word of chaos reached him, “& the peaceful Acres of the West, are worth their Weight in Gold.” Apart from this initial burst of starry-eyed enthusiasm, though, Cutler and Sargent contributed little to the venture, which quickly escaped their control even as it entangled them in a complicated web of debt and land companies created by William Duer and his agents. The Company’s agent in France, Joel Barlow, decided on his own accord that the promise of future title was “too light and dangerous a ground to attempt retailing upon,” and so created a shell company that contracted with the Scioto Company for lands, which Barlow then began selling in 100-acre fee simple parcels. As with the Ohio Company in New England, the promise of western lands caused something of a cultural sensation, and the would-be French settlers drafted a constitution for the “Society of the 24 Associates” for their proposed city along the Ohio.<sup>40</sup>

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<sup>40</sup> Winthrop Sargent to Richard Platt, December 17, 1787, Reel 2, WSP; Joel Barlow to Benjamin Walker, December 21, 1790, Vol. 69, Manasseh Cutler Papers; “Constitution of the Society of the 24 Associates,” January 24, 1790, Scioto Land Company Papers, 1789-1792, Historical Society of Penn., Phila., Penn. For acreage and sale price, see “Land Grant,” February 18, 1790, Box 1, Folder 1, Claude Coupin Collection, Indiana Historical Society, Indianapolis, Ind. The history of the Scioto Company’s machinations is too complex to fully recount here. For a history of the sensation it prompted in France, see François Furstenberg, *When the United States Spoke French: Five Refugees Who Shaped a Nation* (New York: Penguin Press, 2014), 247-52; Suzanne Desan, “Transatlantic Spaces of Revolution: The French Revolution, Sciotomanie, and American Lands,” *Journal of Early Modern History* 12, no. 6 (December 2008): 467–505; Jocelyne Moreau-Zanelli, *Gallipolis: Histoire D’un Mirage Américain Au Xviiiè Siècle* (Paris : l’Harmattan, 2000.). On Barlow and his role in the company, see Richard Buel, Jr., *Joel Barlow: American Citizen in a Revolutionary World* (Baltimore: Johns Hopkins University Press, 2011), 96-119. On Scioto’s financial machinations, see Shannon, “The Ohio Company and the Meaning of Opportunity in the American West, 1786-1795”;

Cutler and Sargent, “totally ignorant” of all these machinations in Europe, were in over their heads. As the same rise in securities that challenged the Ohio Company made the Scioto Company’s planned purchase entirely unaffordable—Cutler estimated it would cost nearly one million in specie—Cutler and Sargent sought to cut their losses. “I would be very glad to find a person that would take what I hold,” Cutler wrote, “& free me from my obligation.” But the plan proceeded, notwithstanding its organizers’ doubts. In late 1790, 400 French settlers arrived to a settlement, grandly named “Gallipolis in their honor, along the Ohio downriver from Marietta. The “town” in fact consisted of a few crude huts that Rufus Putnam had hastily constructed.

But the French settlers’ greatest shock was the discovery that “all the apparently legal Documents” shewn to “Seduc[e]” them with the “Solidity of the Titles” of their lands were frauds. Though the settlers had purchased land in fee simple, the Scioto Company held only the “preemption right”—the option to purchase the federal lands. And, even had Scioto owned land outright, it turned out that Gallipolis was located within the tract owned by the Ohio, not the Scioto, Company. When Governor St. Clair passed through Gallipolis shortly after the settlers’ arrival, he found the residents “very discontented and mutinous.” Without catching the irony in the face of Cutler’s repeated assertions of serving the national interest, St. Clair lamented how the quest for private gain had undermined the position of the United States. The “interested speculation of a few men,

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Archer Butler Hulbert, “The Methods and Operations of the Scioto Group of Speculators,” *The Mississippi Valley Historical Review* 1, no. 4 (1915): 502–15.



pursued with too great avidity,” he feared, had placed the French settlers “in absolute ruin” and “would destroy American character abroad.”<sup>41</sup>

In February 1791, William Duer met with Manasseh Cutler and Winthrop Sargent in New York to resolve the Gallipolis mess. With it clear that the Company would fail, the Scioto proprietors now vied to shed themselves of any responsibility for the French settlers. They finally agreed that Duer would pay for 148 Ohio Company shares that had been forfeited for lack of payment and that the French would be granted lands from the Ohio Company’s purchase. Though Cutler and Sargent’s risky gamble had failed to pay off, they would manage, it seemed, to extricate themselves with little loss to themselves or the Ohio Company.<sup>42</sup>

A month before the New York meeting, at sunset on Sunday, January 2, 1791, a group of Wyandots and Delawares stopped in at Big Bottom, a collection of a little over twenty settlers up Muskingum Creek from Marietta. Friendly with the local Company settlers, the Natives conversed and dined with two of them, Francis and Isaac Choate. In the midst of talking, the Choates heard gunfire. The Natives told the alarmed Choates they were now their prisoners. Three other men from the settlement were also taken prisoner; two escaped to seek help.<sup>43</sup>

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<sup>41</sup> Manasseh Cutler to Winthrop Sargent, March 8, 1793, Reel 3, WSP; Cutler to Putnam, Nov. 18, 1788.; Jonathan Heart to William Judd, December 3, 1790, in Heart Papers; Petition of the French Inhabitants of Gallipolis,” Dec. 22, 1792, in *TP: Vol. II*, 422-28; Gov. Arthur St. Clair to Secretary of War, November 26, 1790, in *SCP*, 2:192-97. Sargent felt similarly: “[W]ith men of much Property extensive Speculation may be proper enough,” he observed, but his modest government salary did not permit him such wild speculations as Duer pursued. Winthrop Sargent to Royal Flint, April 14, 1791, Reel 3, WSP. For additional background on the history of Gallipolis, George Henry Allen, Joseph Edward Harry, and Theodore Thomas Belote, *The Scioto Speculation and the French Settlement at Gallipolis: A Study in Ohio Valley History* (Cincinnati: University of Cincinnati Press, 1907).

<sup>42</sup> “Rufus Putnam’s Memorandum Book,” p. 116.

<sup>43</sup> Samuel P. Hildreth, *Pioneer History: Being an Account of the First Examinations of the Ohio Valley, and the Early Settlement of the Northwest Territory. Chiefly from Original Manuscripts* (Cincinnati: H. & W. Derby & Co., 1848), 430-34.

When a relief party of Ohio Company settlers arrived the next day, it discovered a grisly scene. The settlement's other twelve settlers, confined in the blockhouse, had all been killed and the building burnt. Only charred, unidentifiable bodies remained, which the horrified settlers buried in the blockhouse.<sup>44</sup>

“Our prospects are much changed,” wrote an alarmed Rufus Putnam on learning of the attack, which became known as the “Big Bottom Massacre.” “[I]n stead of peace and friendship with our Indian neighbours a horrid Savage war Stairs us in the face.” In attempting to understand this sudden reversal, the Ohio Company settlers viewed themselves as the victims of others' misdeeds. One placed responsibility on the “Big Knife Virginians,” who had roamed across the river committing a litany of attacks and violations against the Indians, who, he argued, were “perfectly contented with their new allies,” the Ohio settlers. For his part, Putnam, consistent with his earlier diagnosis, blamed a failure of land policy. He had been told by federal officials that the Ohio Company's land had been “fairly obtained from the natives.” But when Putnam examined federal treaties, he discovered that the lands “were rather wrested then fairly purchased.” Even at the Treaty of Fort Harmar, when the government had agreed to pay

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<sup>44</sup> For accounts of the Big Bottom Massacre, see “Narrative of the captivity of Daniel Converse & massacre at Big Bottom block house,” Vol. 1, p. 316, Hildreth Papers; “Rufus Putnam's Memorandum Book,” p. 112.

Patrick Griffin suggests that the Big Bottom “Massacre” represents a critical shift in the move toward a federal Indian policy that embraced the anti-Indian policies of the “westerners,” as previously idealistic New Englanders shed their humanitarian sentiments and “had become Kentuckians.” Patrick Griffin, “Reconsidering the Ideological Origins of Indian Removal: The Case of the Big Bottom ‘Massacre,’” in *The Center of a Great Empire: The Ohio Country in the Early American Republic*, ed. Andrew R. L. Cayton and Stuart D. Hobbs (Athens: Ohio University Press, 2005), 11–31. Though Griffin is right to note the significance of Big Bottom in changing the attitudes of the Ohio Company's leaders, his argument perhaps overstates the broader transformative effect of the attack. Even before the attack, Ohio Company settlers seemed to have little affection for Natives—John May deemed Indians “frightfully ugly, and a pack of thieves and beggars,” and, when one chief died, proclaimed himself “thankful another is just a going to his black master.” “*Journal of a Journey from Boston, Mass. to the Mouth of Muskingum, Ohio, Kept by John May*,” 13-14. Moreover, federal officials had begun the campaigns of the Northwest Indian War before the attack, and federal Indian policy remained remarkably consistent throughout the 1790s, dictated by a paternalist, humanitarian vision that subordinated rather than the exterminatory rhetoric advocated by those whom Griffin deems “westerners.” As David Nichols convincingly argues, federal officials' differential treatment of Natives groups often traced primarily to policymakers' perceptions of the relative power of both Natives and non-Natives in a region. David Andrew Nichols, *Red Gentlemen & White Savages: Indians, Federalists, and the Search for Order on the American Frontier* (Charlottesville: University of Virginia Press, 2008).

for Native lands rather than claim by conquest, the tribal representation was “very partial” and many tribes “never consented to what was don.” In Putnam’s view, the Ohio Company settlers were sacrifices to this failure to follow the land policy of “fair dealing,” and secure true Native consent.<sup>45</sup>

The panicked Putnam was certain that the attack presaged more assaults. He had heard reports that the Indians, “[m]uch elated with there success,” had “threatened there should not a remain a Smoak [Smoke] on the ohio by the time the Leaves put out.” Rumors abounded that an Indian army of two or three thousand would soon attack Marietta. But, with nearly all the federal soldiers stationed downriver, the Ohio Company’s settlement was “defenceless.” Putnam appealed to Henry Knox and even President Washington for assistance. He insisted that, not only was the federal government responsible for the conflict, but the interests of “united States in General” as well as the Ohio Company were at stake. If the federal government effectively protected settlements established “under [its] authority,” then the public lands would “rapid[ly]” sell, “Sink[ing] many millions of . . . National Debt.” But if the protection was not forthcoming, “the consequence” was clear. Instead of orderly purchases, the lands would be “Seized on by privit adventurers who will pay little or no regard to the laws of the United States or the rights of the natives.”<sup>46</sup>

Putnam’s appeals for federal support based on the Ohio Company’s commitment to and investment in the national interest were unavailing. Concentrating their forces downriver for an expedition, federal officers lamely offered Putnam a single cannon for

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<sup>45</sup> Rufus Putnam to Unknown, January 6, 1791, Folder 10, RPP; “A Biographical Sketch of the Origen & Descent of Gen'l Benjamin Tupper Connected with his Military Life,” 65.

<sup>46</sup> Rufus Putnam’s Memorandum Book,” 113; Rufus Putnam to President Washington, February 28, 1791, in *TP: Vol. II*, 337; Rufus Putnam to Unknown, Jan. 6, 1791; Rufus Putnam to Henry Knox, March 8, 1791, Box 1, Folder 10, RPP.

defense. The message was clear: the Ohio Company would have to rely on its own resources to survive the war. Meeting days after the attack at Big Bottom, the Company agreed to call out the militia on its authority. It would pay all expenses from its own pocket, with the “highest confidence” that Congress would later “reimburse the necessary expense we shall be at in defending ourselves against the Common Enemy.” Abandoning their remote settlements, Ohio Company settlers retreated to defensible stockades, while Native war parties destroyed their houses and stole their cattle. Many began abandoning the settlement in droves, even the settlers on the donation lands, who had promised to defend the Ohio Company. Nearly half of the original forty-eight settlers fled. Those who remained saw the value of their investments plummet, as shares’ value fell even lower. "Our Settlement does not encrease," one Marietta resident complained, “we are circumscribed within narrow Limits & are heartily tired of the Indian War, & with its present Management see no End to it.”<sup>47</sup>

War also destroyed the apparent trust that had existed between the local Natives and the Ohio Company settlers. Familiarity led to a particularly brutal and personal warfare. When a Native killed a “mulatto” boy in the middle of the Ohio River, in plain view of Marietta, one of the Ohio Company settlers thought he “recognize[d] the Indian, as one whom he had known aforetime.” Later in 1791, a scouting party—led by a man whose father had been killed by the Indians—shot a Native man. The party decapitated the Native and mounted his head on a pole, which was displayed in front of the garrison, while the body was brought to the river, “where it was literalley Cutt up, & Boiled.”

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<sup>47</sup> “At a Special Meeting of the Agents & Proprietors of the Ohio Company on the 7th Day of January,” January 7, 1791, Reel 6, ASCP; “Names of the Men Hireed [sic] by the Ohio Company . . . & Arrived at Marietta 7th of April 1788,” Box 1, Folder 9, RPP; Return Jonathan Meigs, Jr. to Nehemiah Hubbard, Jr., August 30, 1792, NWTTC; David Zeigler to Directors of the Ohio Company, January 8, 1791, Series II, Box 1, Folder 2, Manuscripts and Documents of the Ohio Company of Associates.

News of this brutality spread through Indian country; one Native remarked, "*Oh white Man boil Indian.—No. Good.*"<sup>48</sup>

With Big Bottom and the ensuing war, the supposed harmony of interests between the federal government and the Ohio Company proved illusory. Earlier confident that Marietta would be the headquarters for federal soldiers, Putnam was dismayed to discover that the rival downriver settlement of Cincinnati was selected instead. Thus, even though the Company was, in Putnam's view, acting as the federal government's land agent, the War Department's neglect meant that the Company had to fulfill the fundamental governmental responsibility of protection from its own revenues. Moreover, the horrors of a war the Company blamed on federal mismanagement and Virginian Indian hatred destroyed the hopes for an alternative Native diplomacy founded on friendship. The consequences were financially as well as morally disastrous; few wanted to buy land in a war zone. From the vantage of Marietta in 1792, the Company's investment in federal authority seemed a poor one.<sup>49</sup>

The Big Bottom Massacre could not have occurred at a worse time for the Ohio Company. The second installment of \$500,000 for its lands, due in 1792, loomed, but the Company entirely lacked the funds to comply. Under the contract terms, if the Company failed to pay, it would forfeit the entire tract. "In a High Flame," the Connecticut and Rhode Island proprietors sought to cut their losses. The Company, they insisted, should negotiate with Congress to purchase whatever lands their earlier payment would secure,

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<sup>48</sup> "A Biographical Sketch of the Origen & Descent of Gen'l Benjamin Tupper Connected with his Military Life," pp. 65-76, 98.

<sup>49</sup> Putnam had told Cutler in 1788 that, "should there be a genl. Indian War this [Marietta] will be a place of general Rendezvous for an army." Putnam to Cutler, May 16, 1788.

disburse the remainder of the Company's funds as a dividend, and then issue deeds. If need be, they urged giving up the entire contract. Cutler initially resisted—arguing he would rather “suffer death” than turn over the books to the proprietors—but finally relented.<sup>50</sup>

In spring 1792, Cutler and Rufus Putnam traveled to Philadelphia to petition Congress. The claim they advanced rested on the service they had performed the nation. The war, they insisted, had heavily taxed the Company's funds—\$9,000 out of pocket in the previous year alone—as well as requiring the creation of the donation lands. Surely Congress's goal could not have been “to raise the value of their Land at the expence exertions and risk of others but to make an actual Settlement.” Yet, under the current contract, they lacked “a clear title”: if they failed to pay, all their lands and improvements would “be liable to forfeiture.” They concluded with a threat: unless Congress relieved settlers “from that state of suspence and uncertainty respecting their title,” they would no longer defend their lands but “immediately retreat to some place of greater security.”<sup>51</sup>

The Ohio Company's request passed through Congress nearly unopposed, an act Putnam attributed to “Providence” but that likely owed much to the federal government's desperate need for settlers in the midst of the Indian War. Congress granted 750,000 acres based on the payment already made, as well as an additional tract of 215,285 acres based on military bounty warrants the Company collected (the original contract had significantly limited the number of warrants that could be redeemed). The only controversial provision was a grant of an additional 100,000 acres as compensation for

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<sup>50</sup> Cutler to Putnam, Aug. 23, 1791. [More sources]

<sup>51</sup> “Petition of the Directors of the Ohio Company to Congress,” March 2, 1792, Series I, Manuscripts and Documents of the Ohio Company of Associates.

the donation lands, provided that the lands would be conveyed in fee simple to the lands' actual settlers. The Senate evenly split in a vote that divided almost entirely along regional lines, pitting the New Englanders against others; John Adams broke the tie in the Company's favor.<sup>52</sup>

At the very moment of this triumph, however, came news of further disaster. Throughout 1791, William Duer and the Scioto Company had failed to pay for 148 shares he had agreed to purchase, and Richard Platt, the Ohio Company's treasurer, finally moved toward legal action. But even as Putnam and Cutler were negotiating in Philadelphia, Duer's financial web of credit collapsed in spectacular fashion, destroying private fortunes "from Georgia to New Hampshire inclusive" and depressing "even the public Debt & Credit of the United States" as securities' value tumbled. Duer was imprisoned, where he largely remained until his death seven years' later, his debts unsatisfied.<sup>53</sup>

Duer's collapse suddenly constricted the ties of debt that bound together the Ohio and Scioto Companies. In Philadelphia, Putnam was arrested, and had to pay off over \$2,000 in Scioto debts to obtain release. The crash was even worse for Richard Platt, who had extensive dealings with Duer. "I am ruined my dear friend," Platt wrote Winthrop Sargent, "& know not how soon, I shall exchange a palace which I now live in, for a Jail." When the Ohio Company's directors came to demand that Platt turn over all

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<sup>52</sup> "Rufus Putnam's Memorandum Book," 117; Act of April 21, 1792, Ch. 25, 1 Stat. 257. For the history of the bill's passage in the House and Senate, see 3 *Annals of Congress* 123-26, 433, 486, 494, 540, 558. With two exceptions, every senator from New England, regardless of ideology, voted for the donation land provision, and every senator from outside New England voted against: the exceptions were Senator Izard of South Carolina (for) and Senator Ellsworth of Connecticut (against). *Ibid*, 124. The Senate did, however, strip an even more favorable provision from the House bill that would have allowed the Company to purchase the remainder of its lands for the bargain price of twenty-five cents per acre. *Ibid*, 125.

<sup>53</sup> Rufus Putnam to Richard Platt, August 22, 1791, Series II, Box 1, Folder 2, Manuscripts and Documents of the Ohio Company of Associates; Richard Platt to Directors of the Ohio Company, October 8, 1791, Series II, Box 1, Folder 2, Manuscripts and Documents of the Ohio Company of Associates; Richard Platt to Winthrop Sargent, March 25, 1792, Reel 3, WSP; Jones, "*The King of the Alley*,"

cash on hand, they found his accounts at least \$80,000 short. As he had predicted, Platt soon followed Duer into debtors' prison.<sup>54</sup>

Duer's collapse also left the Gallipolis settlers abandoned. Appeals to territorial authorities produced a vague promise of "justice" from Governor St. Clair; Winthrop Sargent expressed sympathy with the settlers' "very embarrassed situation" but a denial of being "in any degree accessory to your misfortunes" either as a territorial official or a Scioto investor. The settlers appealed, in the final instance, to Congress. Their accusations against the Ohio Company were particularly blistering, as they pointed out the clear overlap in leadership.<sup>55</sup>

Referred to his consideration, the Attorney General suggested that, although the settlers *might* have an equitable claim against the Ohio Company, the jurisdictional and practical hurdles to filing suit made recovery unlikely. An angry Senate instead passed a bill demanding that the Ohio Company directors appear before it, threatening to rescind portions of the Company's grant; the directors ignored the directive. Finally, in 1795, Congress resolved the mess by granting the Gallipolis settlers 24,000 acres of federal land elsewhere in the Northwest Territory. Though the law did not impair suit against the Ohio Company, in the end the Gallipolis settlers were forced to purchase their town site from the Ohio Company for \$1.25 per acre—nearly twice what the Ohio Company had paid Congress for the land.<sup>56</sup>

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<sup>54</sup> Richard Platt to Winthrop Sargent, May 10, 1792, Reel 3, WSP; J. Gilman to Winthrop Sargent, April 20, 1792, Reel 3, WSP.

<sup>55</sup> Gov. Arthur St. Clair to Inhabitants of Gallipolis, Nov. 21, 1790, in *TP: Vol. II*, 311-12; Winthrop Sargent to Inhabitants of Gallipolis, Nov. 23, 1792, in *TP: Vol. II*, 417-20; "Petition of the French Inhabitants of Gallipolis," Dec. 22, 1792; John Rome to Attorney General, April 14, 1793, in *TP: Vol. II*, 450-51.

<sup>56</sup> No. 15: French Settlers at Gallipolis," March 24, 1794, in *ASP:PL*, 23-24; "Extract from the Journal of the Senate of the United States," May 13, 1794, Box 2, Folder 6, RPP; Act of March 3, 1795, Ch. 49, 1 Stat. 442; *Records of the Original Proceedings of the Ohio Company*, 2:171, 191, 231-32.



With its title secured by Congress, the business affairs of the Ohio Company wound to a slow conclusion. After four years of surveying, the final division was made in 1796: each settler received 1173 acres dispersed in six lots. Shareholders even received a modest dividend of the funds the Company managed to rescue from the bankrupt Platt, and Putnam's pressing of the Company's debtors secured another in 1800. With that, the Ohio Company largely dissolved.<sup>57</sup>

Measured against other land speculations, and compared with earlier abortive federal efforts to distribute land, the Ohio Company was a success. Marietta, of course, never became the booming center its boosters had anticipated. By the middle of the nineteenth century, it was a small country town sustained by antiquarian recollections of its glorious beginnings. But the Company had purchased and conveyed clear title, secured a modest return for its investors, and created a stable settlement—a notable achievement in a landscape littered with failed land schemes.<sup>58</sup>

For those at the time, however, the Ohio Company felt like a failure. The Company was more than yet another land company; it was an experiment in a federal land system that could channel the rampant land speculation of the late eighteenth century to productive ends. The Company had promised much. In the mind of Putnam, Cutler, and others, title was a critical tool of governance and sovereignty that they could leverage to simultaneously bolster federal authority, repay the federal debt, recraft Indian affairs, and establish egalitarian land ownership in the Northwest Territory, all while securing returns for investors.

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<sup>57</sup> For land distributions, see "Ohio Company Land Records," 1787-1796, pp. 182-222, Series I, Box 2, Folder 1, Manuscripts and Documents of the Ohio Company of Associates. On the dividends, see Benjamin Tallmadge to Rufus Putnam, October 1, 1796, Vol. 69, Manasseh Cutler Papers; "Ledger 'A' of the Ohio Company" n.d., Vol. 59, Manasseh Cutler Papers.

<sup>58</sup> For an example of Mariettan antiquarianism, see Hildreth, *Pioneer History*.

Measured against these goals, the Company came up short, as all the participants came away disillusioned. Putnam never forgave the federal government's abandonment of the settlement at its moment of crisis, when the repercussions of earlier federal Indian policy, especially the coerced treaties, had undermined the Company's successes in recrafting Indian affairs. It was the Company that had ultimately paid for federal failure: Putnam would later recall, embittered, that, although the Ohio Company had expended nearly \$15,000 on the Indian war, Congress only repaid about \$2,600. For its part, the federal government felt the same way about the Ohio Company, especially in the disastrous aftermath of the Scioto speculation. Scioto's failure meant that the promised enormous payments on the federal debt never arrived. Instead, resentful federal officials found themselves giving land away for free as they had to resolve, at public expense, the tangled knot created by private avarice. "[P]rejudices . . . against the Ohio Company" were felt "very strongly," one visitor to Congress reported, because the Company was so "deeply implicated" in the betrayal of the Gallipolis settlers. As for the investors, even those who never left New England and had even secured dividends were still angry. They had bargained away valuable securities, and they were frustrated by the endless complications and machinations of Company governance. "I should be glad to have done with the business," one wrote, "And if wishing was not vanity; I should wish I had not never heard of the Ohio Company."<sup>59</sup>

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<sup>59</sup> "Rufus Putnam's Memorandum Book," 117; "Ohio Company, War Expense," Vol. 74, Mannaseh Cutler Papers; Benjamin Tallmadge to Rufus Putnam, February 27, 1796, Series II, Box 1, Folder 4, Manuscripts and Documents of the Ohio Company of Associates; Edward Harris to William Parker, October 23, 1795, Box 1, Folder 7, Paul Fearing Papers, Marietta College Library.

In 1787, all this disillusionment and recrimination surrounding the Ohio Company lay in the future. By the end of that year, buoyed by the promise of cheap federal land, three more companies proposed purchasing enormous tracts of land in the Northwest Territory; all three proposals were explicitly modeled on the Scioto Company's contract. For its part, Congress eagerly pursued these deals, enthusiastic at the prospect of distributing federal land systematically at private expense. In the end, though, only one of the schemes ultimately came to fruition, a purchase by an entity known as the Miami Company.<sup>60</sup>

Unlike the Ohio Company, with its elaborate governance structure, the Miami Company was largely the project of one man, John Cleves Symmes. A prominent New Jersey politician, Symmes was elected to the Continental Congress in 1786, a position that piqued his interest in western lands. After reconnoitering the Northwest Territory in spring 1787, Symmes asked Congress on August 29, 1787 to permit him to purchase one million acres between the Great Miami and Little Miami Rivers, just west of the Virginia Military District, on the same terms Congress had granted Cutler and Sargent in the Scioto Purchase. Agreement was finally reached in the summer of 1788; like the Ohio Company directors, Symmes also received a territorial office, in his case as a territorial judge.<sup>61</sup>

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<sup>60</sup> Congress authorized the Board of Treasury to enter into contracts for the sale of lands to private companies, as long as the contracts were in excess of 1,000,000 acres. "Resolution of Congress: The Sale of Lands," October 23, 1787, in *TP: Vol. II*, p. 78. In addition to Symmes's proposal, Congress received proposals to purchase lands from Royal Flint and George Morgan, neither of which reached fulfillment. "Proposal of Royal Flint and Associates for a Purchase of Land," Oct. 18, 1787, in *TP: Vol. II*, pp. 74-76; "Report of Committee: Memorial of George Morgan," June 20, 1788, pp. 112-15.

<sup>61</sup> "John Cleves Symmes to the People of Kentucky," May 29, 1787, in *CJCS*, 278; "Petition of John Cleves Symmes," August 29, 1787, Reel 7, ASCP; John Cleves Symmes to Board of Treasury, July 14, 1788, in *CJCS*, pp. 33-34. For more of Symmes's biography, see R. Douglas Hurt, "John Cleves Symmes and the Miami Purchase," in *Builders of Ohio: A Biographical History*, eds. Warren R. Van Tine and Michael Dale Pierce (Columbus: Ohio State University Press, 2003), 14-25; Beverley Bond, Introduction, in *CJCS*, 1-24; Charles H. Winfield, "Life and Public Services of John Cleves Symmes," *New Jersey Historical Society Proceedings*, ser. 2, 5 (1879): 22-43

Symmes began marketing his lands to purchasers from New Jersey through pamphlets and newspapers even before the agreement was reached. Symmes's plan bore some similarities to that of the Ohio Company. The surveying would be based even more strictly on the rectangular grid of the 1785 Land Ordinance, and payment would also be in liquidated federal securities. But Symmes did not issue shares nor assign lands. Instead, purchasers could select quarter sections (160 acres), full sections (640 acres), or even entire townships (six square miles; over 19,000 acres), from anywhere within the Company's purchase. An initial price of 2/3 of a dollar per acre would, Symmes warned his readers, rise to a dollar per acre by May 1, 1788, and would later increase above a dollar per acre. Symmes's own profit would come largely from his ownership of a "reserved township" he anticipated becoming the site of a town. In essence, Symmes was betting on the rise of land values to increase the worth of his own holdings.<sup>62</sup>

From the outset, Symmes never claimed quite the same public-mindedness constantly invoked by the Ohio Company settlers. He focused unabashedly on the land's promise for his settlers—and for himself. But Symmes's commitment to self-interest did not make him equivalent to the reckless land speculators who blithely ignored the good of the public. In its own way, the Miami Company represented an even bolder experiment than the Ohio Company: the promise that even a businessman prioritizing profit would, for reasons of enlightened business practice, still pursue policies that would channel land speculation toward order and system.

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<sup>62</sup> "Miami Lands for Sale [Advertisement, Brunswick Gazette and Weekly Monitor]," January 8, 1788, in *CJCS*, p. 281; John Cleves Symmes, *To the Respectable Public* (Trenton, N.J.: Isaac Collins, 1787).

This approach was clear from how Symmes advertised his lands. To attract settlers, he sought to differentiate his settlement from other lands, particular those in Kentucky, which lay across the Ohio River from his purchase. System, and its promise of clarity, proved one powerful selling point. Symmes reassured potential purchasers that, unlike in Kentucky, where “titles of land are not easily ascertained [and] frequently very doubtful[,] . . . title to the Miami lands will be clear and certain, and no possible doubt thereto can arise.” Symmes similarly crafted rules to avoid absentee landholders, who had proved “greatly detrimental” in Kentucky. Purchasers of his lands must have actual settlers and improvements on their parcels within two years, Symmes decreed. The ostensible motivation of this policy was security: “[I]t is reasonable,” Symmes argued, “that all who become purchasers should in some way contribute to the defence of the country.” But Symmes’s rule was egalitarian in effect, if not in purpose. Symmes would seize one-sixth of the land of purchasers who failed to meet this obligation and then redistribute it, free of charge, to “volunteer settlers,” who could obtain title after seven years by making actual improvements. In short, for reasons of pragmatism rather than principle, Symmes adopted concepts of order and democracy at odds with the chaotic scramble for riches that marked earlier land grabs.<sup>63</sup>

This was especially true with respect to relations with local tribes. Like the Ohio Company, the Miami Company discovered that responsibility over federal lands carried the burden of serving as a quasi-official representative of the United States to Native nations. And like the Ohio settlers, Symmes came to conclude that his land business

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<sup>63</sup> Symmes, *To the Respectable Public*, 19; “Miami Lands for Sale.”

would benefit from a new model of Indian affairs. Events in Symmes's town of "North Bend" consequently echoed Marietta's experience.

Established in a half-hearted manner in 1788, North Bend—named for its location along a curve in the Ohio River—was an Anglo-American island in a Native sea; the initial settlement consisted only of "one family . . . and a few stragling hunters." The isolation troubled the town's settlers, steeped as they were in stories of Indian terror. In spring 1789, three surveyors marking boundaries of Symmes's lands encountered a group of local Shawnees. The terrified surveyors tried to flee, but, unable to escape, prepared to fight. One of the surveyors was training his rifle on a Shawnee when he was startled to see the Native lift his hat, put down his gun, and raised his right hand in greeting. The surveyors were even more shocked to hear one of the Shawnees call out, in English, that they were friends. The surveyors led the Shawnees to a nearby blockhouse. This "unexpected . . . visit" initially panicked the settlers, but assurances of friendship soon calmed the matter.<sup>64</sup>

Shawnee efforts at establishing solid relations with the Miami Company settlers were calculated and deliberate. The Shawnees in the area had long experience with Anglo-Americans, particularly the fractious settlers from Kentucky. When they learned that "new white brother's" were "coming live to live in the Miami country," the Shawnees would later inform Symmes, they had held a council and resolved to "introduce themselves to our acquaintance rather as friends than as enemies." They specifically selected George, an Anglo-American they had taken prisoner a decade

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<sup>64</sup> William Kersey to Josiah Harmar, April 17, 1789, # 20, Vol. 10, JHP; Symmes to Dayton, May 18, 1789. For other accounts of North Bend's settlement, see "Journal of a Tour to the Ohio and Muskingum," July 21, 1788; Josiah Harmar to John Cleves Symmes, Nov. 28, 1788, Letterbook D, Volume 28, JHP.

earlier, to lead the party to meet the new settlers. It was George who had called out to the surveyors; even after years in captivity, he still “spoke the english tongue very well.”<sup>65</sup>

As in Marietta, this initial meeting, with reassurances of friendly intentions on both sides, created space for cultural mixing and exchange. “[T]he white and red people began to form a sociable neighborhood,” Symmes reported after this initial encounter, “our hunters frequently taking shelter for the night at the Indians camps; and the Indians with their squaws spending whole days and nights at the blockhouse regaling themselves with whisky.” Symmes found thereafter that the Indians “frequently make me visits from their towns.”<sup>66</sup>

The Shawnees were quite explicit in their goals for their relationship with the new settlers: they sought access to trade as well as federal authority. When Symmes formally met a Shawnee chief he called “Capt. Blackbeard,” the Native leader “signif[ied] that it would be very much to their advantage to have free intercourse with us, and exchange their peltrys for the articles which they much wanted.” After Symmes agreed, the Shawnee pressed him on “how far I was supported by the United States, and whether the thirteen fires had sent me hither.” “I answered them in the affirmative,” Symmes reported, “and spread before them the thirteen stripes which I had in a flag then in my camps”; Symmes also pointed to the federal troops on parade and the seal of his commission, which Blackbeard examined with great interest. These symbols, paired with Symmes’s proclamations, evidently persuaded Blackbeard of Symmes’s authority and intentions; the chief “appeared entirely satisfied of the friendship of Congelis (for so

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*; John Cleves Symmes to Winthrop Sargent, September 27, 1789, Reel 3, WSP.

they pronounce Congress) towards the red people.” The Shawnees then took advantage of the trade goods promised by their new alliance. For the next four weeks, Blackbeard and his fellow Shawnees “lived chiefly at [Symmes’s] expense (nor was it a very small one, as they had whisky at their pleasure gratis),” before departing “in a most friendly manner.”<sup>67</sup>

Symmes understood this hospitable approach to Indian relations as a sharp contrast to the practices of the Kentuckians across the river. “Our living hitherto in the friendly manner we have with the Indians,” he reported, “has excited the jealousy & ill will of many of our neighbours on the Kentucky side of the Ohio: and some even threaten to cross the river and put every Indian to death which they find on the Miami purchase.” But “perhaps,” he slyly suggested, if the Kentuckians “would act as moderately towards [the Natives], they might live in as much safety as the people of this purchase.”<sup>68</sup>

Yet, like the Ohio Company settlers, Symmes similarly confronted the challenge of recasting Indian relations in an atmosphere of suspicion and ill-defined fear. Symmes himself did not trust the Natives. “They are a subtil enemy,” he wrote, “& all their boasted friendship may be only to learn our numbers, and what state of defence we are in.” (In fact, it was Symmes who sent envoys to Native towns so that, in the event of war, the army would have a guide into Indian country). This mistrust made both actual and would-be settlers uneasy, easily frightened by the vague rumors that proliferated on the frontier. Symmes alleged that the Kentuckians spread false accounts that all his settlers had been tomahawked. The handful of federal troops in the settlement—whom

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<sup>67</sup> Symmes to Dayton, May 18, 1788.

<sup>68</sup> *Ibid.*



Symmes fed from his own pocket, only to have them trade his food for liquor—were insufficient. "I have indeed lost sight of any succour from the United States," he complained. The settlers felt that the federal government "abandoned [them] to destruction, and whether the danger they apprehend is real or imaginary tis the same thing to them." Symmes wrote to Jonathan Dayton, "I fear I shall be nearly stripped of settlers and left with one dozen soldiers only."<sup>69</sup>

Focused on selling land rather than remaking Indian affairs, Symmes had discovered that the two could not be separated. Due to federal weakness, his settlement had become a privatized Indian agency, as Symmes fed and clothed Indians and soldiers alike from his own pocket. And, like the Ohio Company, Symmes quickly learned that land sales hinged on Native actions (or rumors about them) as much as his own efforts.

Symmes's embrace of system and actual settlement also struggled to tame more speculative approaches to land. When he first arrived, Symmes had been thronged by Kentuckians eager to settle. Yet, not only were these would-be settlers "very ungovernable and seditious," they lacked both the means and the intent to pay. They "had no other views than speculation," Symmes complained, and quickly returned to Kentucky to resell their (still unpurchased) land rights to their neighbors. When they inevitably defaulted, the Kentuckians "vented their spleen in abuses & calumnies" of Symmes. The Kentuckians were only some of the would-be purchasers whose appetites exceeded their means. Speculators constantly contracted with Symmes for hundreds of

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<sup>69</sup> *Ibid*; John Cleves Symmes to Jonathan Dayton, July 17, 1789, in *CJCS*, 100-07; John Cleves Symmes to Jonathan Dayton, May 22, 1789, in *CJCS*, 96-97. U.S. army officers similarly reported that Symmes's settlement suffered because of reports of Native threats. See Joseph Asheton to Josiah Harmar, June 26, 1789, #90, Vol. 10, JHP.

thousands of acres, yet rarely paid. Large or smallholders, few viewed land as a source of steady and reliable gains; the possibility of reselling bare promises of future title at a tidy profit excited far more interest.<sup>70</sup>

Symmes's questionable management exacerbated the problem. "[W]ith reluctance," Symmes's agent Jonathan Dayton passed along the "injurious and unpleasant reports" circulating about Symmes in New Jersey. "[T]here is scarcely a single one of all the Jerseymen who have as yet returned from the Miamis, who does not complain of you or speak of you with disapprobation." They accused Symmes of promising lands to one person one day, then selling them to another the next. With so many defaulting on their payments, and so much calumny surrounding the settlement, Dayton and Symmes grew anxious. Their first payment of \$80,000 was due once the survey was complete, yet they lacked the required funds.<sup>71</sup>

There was one bright spot in Symmes's general gloom. The town of Losantiville, which soon changed its name to Cincinnati (or Cincinnata—the spelling was contested) in honor of the fraternal society of revolutionary military officers, was thriving. Located around the U.S. military post of Fort Washington at the confluence of the Ohio and Little Miami Rivers, the town became the seat of the newly created county of Hamilton (a name selected in honor of the Secretary of the Treasury). Moreover, when full-fledged war broke out against the Northwest Native nations in 1790, Cincinnati ended up prospering, as Fort Washington became the center of federal military operations, and Governor Arthur St. Clair moved his residence there. "Judge Sims's Settlement it is apprehend by

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<sup>70</sup> Symmes to Dayton, May 18, 1789; John Cleves Symmes to Jonathan Dayton, Nov. 25, 1788, in *CJCS*, 48-53.

<sup>71</sup> Jonathan Dayton to John Cleves Symmes, May 16, 1789, in *CJCS*, 213-18; Jonathan Dayton to John Cleves Symmes, August 15, 1789, in *CJCS*, 218-34.

many is building up at our expense,” complained one Marietta resident. “[T]he principal part of the Troops are withdrawn from this place & sent to that . . . & we have discovered that some of our Great Men are going to move down.”<sup>72</sup>

Yet the apparent harmony between federal interests and Symmes’s land investments unraveled in controversy in spring 1791. Symmes, it turned out, was as grasping and heedless in his land sales as his would-be purchasers: though he had happily sold the land under Cincinnati on the ground that his application to Congress included all the land between the Great and Little Miami Rivers, his formal contract with the Board of Treasury in fact stopped twenty miles west of the Little Miami—thereby excluding Cincinnati. All of Symmes’s purported sales in the town rested on invalid title.

The clash between Symmes and St. Clair laid bare the challenge that the land companies’ independent power over ownership posed to federal authority and governance. The discovery of the illegitimacy of Symmes’s sales deeply angered Territorial Governor Arthur St. Clair, who responded, Symmes complained, “as though he had lately made a notable discovery of a conspiracy against the United States.” But from St. Clair’s perspective, Symmes’s actions threatened the fragile efforts to predicate ownership on proper purchase from constituted authorities. The federal government, St. Clair wrote angrily, permitted settlement based only on “a regular and proper authority . . . founded on an actual purchase or previous contract.” In this regard, Symmes and his settlers were identical to the intruders whom federal “Troops have repeatedly been employed in dispossessing . . . and destroying [the intruders’] Habitations.” As St. Clair

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<sup>72</sup> Griffin Greene to “Peter”, [1791]; Arthur St. Clair to John Cleves Symmes, Dec. 7, 1790, Reel 3, ASCP. On the naming of Losantiville, Cincinnati, and Hamilton County, see “Winthrop Sargent Diary,” Sept. 1, 1789-May 13, 1790, Reel 1, WSP; John Cleves Symmes to Jonathan Dayton, Jan. 9, 1790, in *CJCS*, 114-25; John Cleves Symmes to Jonathan Dayton, June 19, 1791, in *CJCS*, 141-46.

observed, if a hope or proposal for a contract were enough to claim federal land, “who is that would not be justified?” Yet Symmes, as Miami Company proprietor and federal official, was markedly different from the impoverished intruders who defied federal law to settle public lands. This only shocked St. Clair the more. “I could not conceive,” the incredulous St. Clair wrote, that “considerable Settlements . . . had been made, not only without authority, but directly in the face of it, and by a Person invested with high Office of a Judge of the Territory.”<sup>73</sup>

Symmes proceeded to demonstrate just how different he was from the intruders, by dint of both his position and the rights he claimed based on his self-proclaimed ownership of the disputed lands. Much of the power struggle that followed encompassed federal Fort Washington, the center of the war effort, which lay on land that Symmes purportedly owned. Attempting to shield “innocent” and “unwary” purchasers but also guard federal title, St. Clair issued an official proclamation warning against further settlement and subjecting the settlers around Fort Washington to martial law. Symmes’s response, as “proprietor of the purchase,” was to observe that he had purchased the land before the fort was built, and to insist that he would accept only the “justice of the supreme authority of the United States”—Congress—in determining the question of the boundary. “[U]njustly wounded” by St. Clair’s “harsh sentences,” Symmes further questioned whether St. Clair in fact enjoyed the authority he asserting, alleging that

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<sup>73</sup> Arthur St. Clair to John Cleves Symmes, July 14, 1791, Reel 3, ASCP; Arthur St. Clair to John Cleves Symmes, July 12, 1791, Reel 3, ASCP; Arthur St. Clair to John Cleves Symmes, May 23, 1791, in *TP: Vol. II*, 342-43; John Cleves Symmes to Arthur St. Clair, May 23, 1791, in *TP: Vol. II*, 343-47; Secretary of State to John Cleves Symmes, August 6, 1791, in *TP: Vol. II*, 349-50.

governor's actions "border[ed] hard" on "acts of tyranny." The proclamations, Symmes told Jonathan Dayton, "have convulsed these settlements beyond your conception."<sup>74</sup>

Unlike the petitions of intruders claiming preemption rights, Symmes's petition, which came just as Congress was resolving the Ohio Company's financial implosion, did not languish. Citing Congress's generous treatment of the Ohioans as they appealed for expanded boundaries and a grant of the land he already paid for, Symmes's agents managed to secure what they sought. In early 1792, Congress, with no discussion or apparent opposition, enacted two statutes that granted Symmes relief for both his boundaries and his finances. The first redrew the borders of Symmes's purchase to include Cincinnati; the second authorized the President to grant Symmes as much land as he had paid for, as well as an additional 106,857 acres, to be paid for with army bounty warrants. In September 1794 President Washington issued Symmes a patent for 311,682 acres within this survey, including Cincinnati but specifically excluding the land around Fort Washington. Symmes's success likely owed to the impossible position that his land sales had forced upon the federal government. Willing to defend federal title by expelling intruders who knowingly flouted federal authority, the federal government was apparently less anxious to dispossess an entire town of innocent purchasers. Symmes's ability to create an entire town of intruders forced Congress to ratify his actions retroactively.<sup>75</sup>

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<sup>74</sup> Arthur St. Clair to Secretary of Treasury, May 25, 1791, in *TP: Vol. II*, 347-48; "Proclamation by His Excellency, Arthur St. Clair," August 23, 1791, in *SCP*, 2:211-12; John Cleves Symmes to Arthur St. Clair, August 24, 1791, Reel 3, ASCP; John Cleves Symmes to Jonathan Dayton, August 15, 1791, in *CJCS*, 146-54.

<sup>75</sup> John Cleves Symmes to Arthur St. Clair, July 12, 1791, Reel 3, ASCP; Jonathan Dayton to John Cleves Symmes, May 6, 1792, in *CJCS*, 267-74. Act of April 12, 1792, Ch. 19, 6 Stat. 7; Act of May 5, 1792, Ch. 30, 1 Stat. 266; "Request for Alteration of Patent to John Cleves Symmes," September 29, 1794; "John C Symmes Patent," September 30, 1794, Folder 2, Short-Harrison-Symmes Papers, Manuscript Division, Library of Congress; Jonathan Dayton to John Cleves Symmes, May 6, 1792; "No. 33: Contract with John Cleves Symmes," February 9, 1797, in *ASP:PL*, 67-68. The entirely procedural discussions on the bills to relieve Symmes

That might have been that. Yet Symmes's tangle with federal law, rather than dissuading him, evidently encouraged him to undertake still riskier speculation on bare promises of federal land. The 1792 statute had established clear boundaries for Symmes's tract; when surveyed the following year, it turned out these borders contained a little over 500,000 acres, much less than the one million Symmes had contracted for back in 1788. Symmes nonetheless self-servingly interpreted the statute to entitle him to still purchase the promised one million acres, notwithstanding that most of that land fell outside the statutory boundaries of his tract. Moreover, apart from the 300,000 acres already granted, none of the land had been paid for.<sup>76</sup>

In Symmes's view, all he had to do to obtain these lands was comply with the terms of the original agreement. He accordingly set out to amass \$82,000 to make another payment. "[T]here are many who envy the lands to us, and [who] will attempt by means not the Most honorable to induce Congress to withhold them," Symmes wrote his son-in-law Peyton Short, appealing to him for funds, "but justice and contract are on our Side." Everything hinged on making payment. "Money will be the best argument that can be r[a]ised," Symmes stated, "though I had the logic and oratory of a Cicero, and the right of Adam to the soil." Yet the same rise in securities that had doomed the Ohio Company hamstrung Symmes. As 1796 stretched into 1797, there was still no prospect of payment. Yet Symmes remained convinced that if he could just gather the money, he

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appears in 3 *Annals of Cong.* 113-18, 121-22, 131-34, 175-76, 479-84, 577-84, 589-92 (1792). Jeffrey Pasley also plausibly attributes Symmes's success in Congress to the lobbying efforts of Jonathan Dayton, who was a member of Congress who would later serve as Speaker of the House. Pasley, "Private Access and Public Power," 69-72.

<sup>76</sup>"No. 33: Contract with John Cleves Symmes," February 9, 1797; "No. 72: Contract with John Cleves Symmes," January 28, 1803, in *ASP: PL*, 115-19.

could force Congress's acquiescence. "I have read so many cases in point," Symmes stated, that "if we tender the Money, it is not in the power of Congress, constitutionally to take [the land] from us." Desperate for capital and confident of ultimate success, Symmes continued selling title outside of his bounds of his patent—lands, in other words, he did not own, and could not reasonably claim—based only on the expectation that he would eventually receive them from Congress once he made payment.<sup>77</sup>

Seemingly overwhelmed by the complicated tangle of documents, representatives in Congress reacted only slowly against Symmes's freewheeling gambling with the public domain. Albert Gallatin, a representative from western Pennsylvania with growing expertise on the public lands, took on the responsibility of mastering and explaining Symmes's contract to Congress. He headed committees that in 1796 and again in 1797 investigated Symmes's contract and concluded that he had no right to the lands he claimed. In 1798 Symmes watched in horror as Gallatin proposed declaring the lands outside Symmes's patent forfeit; the bill became law the next year.<sup>78</sup>

As his house of cards began to collapse around him, Symmes became increasingly desperate. To obtain influence, he took "infinite pains" to secure the election of his son-in-law, William Henry Harrison, as the Northwest Territory's delegate to Congress. He

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<sup>77</sup> John Cleves Symmes to Peyton Short, November 14, 1796, Folder 1, Short-Harrison-Symmes Papers; John Cleves Symmes to Peyton Short, April 28, 1797, Folder 1, Short-Harrison-Symmes Papers; John Cleves Symmes to Peyton Short, August 10, 1797, Folder 1, Short-Harrison-Symmes Papers.

<sup>78</sup> "No. 23: Contract with John Cleves Symmes," May 5, 1796, in *ASP: PL*, 59-60; "No. 33: Contract with John Cleves Symmes," February 9, 1797; John Cleves Symmes to Peyton Short, April 22, 1798, Folder 1, Short-Harrison-Symmes Papers; Act of March 2, 1799, Ch. 34, 1 Stat. 728. For Gallatin's role, see 6 Annals of Cong. 2247-48, 2367-38 (1797). In the midst of these congressional discussions, Gallatin wrote to his wife that he was "worthless" because he had "sat up for two hours examining Judge Symmes's contract for lands on the Miami, which is now before Congress" instead of writing her. Albert Gallatin to Hannah Gallatin, January 24, 1797, in Henry Adams, *The Life of Albert Gallatin* (Philadelphia: J.B. Lippincott & Company, 1880), 182. Gallatin made his disapproval of Symmes's actions well known: he observed that Symmes was advertising the lands he did not own in the newspaper, and attempting to seduce investors with the prospect that they could purchase lands at one dollar an acre and promptly resell them at two. 6 Annals of Cong. 2247-48.

also turned to another source of authority—his position as a judge on the General Court, the Northwest Territory’s highest tribunal.<sup>79</sup>

The overlap between corporate and federal authority in the territory had long made Governor St. Clair uneasy. Years earlier, he had pointed out that main settlements in the Territory lay on Miami and Ohio Company lands, and that the Companies’ management had “laid the foundation of endless disputes.” Yet Symmes as well as Rufus Putnam, while serving as heads of these companies, were also General Court judges. “Every land dispute will be traced to some transaction of one or other of those Gentlemen in those capacities,” St. Clair observed, “and they are to sit in Judgement upon them.” St. Clair feared the risk of “Biass.”<sup>80</sup>

Now, St. Clair’s fears were seemingly being realized, as Symmes used his judicial authority to try to stop the proliferating lawsuits based on his dubious land sales. In one case, Symmes supposedly told some of the purchasers of his lands that they should go ahead and litigate a suit challenging their title’s validity. If, as was likely, they lost in the lower county court, “they should remove it into his Court, where they might be sure, he would not give Judgment against himself.” In *Ludlow v. White*, an ejectment action before the General Court, the plaintiff argued that Symmes should recuse himself because he was “directly interested” in the outcome: the defendant had purchased the disputed land from Symmes, who had warranted the title (meaning he was legally liable if the title proved defective). Symmes refused, insisting he had “no interest” in the suit and presiding over much of the trial. Yet in the middle of the proceedings, Symmes suddenly

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<sup>79</sup> Unknown to Arthur St. Clair, November 1799, Reel 4, ASCP.

<sup>80</sup> Gov. Arthur St. Clair to President, August 1789, in *TP: Vol. II*, 204-12; Gov. Arthur St. Clair to Secretary of State, December 15, 1794, in *TP: Vol. II*, 499-500.



reversed himself. Reportedly, he “openly acknowledged that he was the person most interested in the event of the suit” and stepped down from the bench. He then walked across the courtroom to the bar, from which he “advocated [the case] for the defendant.”<sup>81</sup>

Symmes’s erratic behavior was not confined to the courtroom; he was reportedly also advocating extrajudicial means to protect his title. In one deposition, a man named McCashen reported going to Symmes to demand back the money he had paid for his land. Symmes refused. He instead urged McCashen to go home and “shoot or drown any person who might molest him.” This approach had worked for the squatters in Pennsylvania, so, “if the purchasers under [Symmes] would follow th[is] example . . . their attempt would prove successful.” Symmes had similarly urged others to “hold[] their possessions by force of arms,” St. Clair reported to the Secretary of State. St. Clair wondered whether Symmes could be prosecuted under the Sedition Act for these actions.<sup>82</sup>

These extreme efforts notwithstanding, the Miami Company crumbled around Symmes. Besieged by lawsuits stripping him of tens of thousands of acres of land—he was arrested three times for debt in 1802 alone —Symmes slid toward penury. In a final appeal to Congress, Symmes stated that its statutes voiding the contract were causing him “very great hardships, tending to the utter destruction . . . of his whole property.” Referred Symmes’s petition, the Attorney General presented a lengthy report that determined that Symmes had no legal rights based on the contract. In fact, the Attorney

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<sup>81</sup> Arthur St. Clair to Secretary of State, December 2, 1799, Reel 4, ASCP.

<sup>82</sup> “Deposition of James McCushen,” August 13, 1799, Box 7, Folder 5, ASCP; Arthur St. Clair to Secretary of State, July 15, 1799, Reel 4, ASCP.

General concluded it was Symmes who had violated a provision in his patent and so owed the U.S. over \$15,000 in compensation. Symmes never paid this debt. He died penniless in North Bend, Ohio—the town he had created—in 1814.<sup>83</sup>

Both the federal government and Symmes entered the Miami Purchase expecting mutual benefits; both came away feeling used. In particular, both Congress and Symmes felt that they had been burdened with all the risk while other party had sought to profit.

Congress's disappointment was understandable. Instead of producing the reliable and orderly settlement Congress had anticipated, Symmes had used implicit congressional backing to spin an elaborate scheme of debt and dubious title. And just as in the case of the Scioto Company, the costs of these reckless speculations with the public domain fell on innocent purchasers, and ultimately the federal government, to resolve. Bombarded with petitions asserting that roughly 2,000 settlers with questionable title would lose "their only support & means of subsistence," the federal government felt constrained to offer the right of preemption to Symmes's claimants. But, while these gestures were more generous than Congress's treatment of other unauthorized settlers, federal policy, rather than assuaging the settlers, produced "very great alarm." Congress's beneficence, after all, only granted the settlers the right to repurchase, at two dollars per acre, lands for which they had already paid one dollar per acre. Many could not exercise their preemptive rights because they had only verbal contracts with Symmes; others had no money to make the purchase. Of the roughly 100,000 acres ultimately

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<sup>83</sup> John Cleves Symmes to Jonathan Dayton, March 5, 1804, in *CJCS*, 189-90; John Cleves Symmes to Jonathan Dayton, February 13, 1800, in *CJCS*, 183-88; "No. 70: Contract with John Cleves Symmes," April 29, 1802, in *ASP: PL*, 115; "No. 72: Contract with John Cleves Symmes," January 28, 1803; *CJCS*, 19-24.

purchased under the preemption statute, 30,000 were ultimately forfeit because the claimants lacked the downpayment necessary; much of the rest fell to speculators rather than individual holders.<sup>84</sup>

Symmes emphasized a different sort of risk. Part of the risk was financial. Symmes had created a “respectable settlement” at his own expense, spending four thousand dollars supporting “starving emigrants” and paying “presents” to the Indians. And by removing Anglo-Americans’ “horrid impressions” of the Indian threat, he had, in his estimate, doubled the value of the unsold federal lands. Yet all these services to the nation, Symmes lamented, had “no weight with Government.”<sup>85</sup>

But Symmes also stressed the broader risk he had taken—a gamble on the process of colonization and the success of the federal government itself. Symmes saw himself as a “patriotically bold and adventurous” man who had hazarded his fortune and his life “at an early day in aid of Government . . . to extend the empire of the United States and reclaim from savage men and beasts a country that may one day prove the brightest jewel in the regalia of the nation.” But federal policy favored the timid men who “grip[p]ed hard their certificates” and “s[a]t quietly by their own firesides,” waiting while Symmes took on the financial and physical dangers needed to subjugate the country, and only then swooping in to reap the rewards. “[I]s this what you call fair, sir?” Symmes appealed.<sup>86</sup>

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<sup>84</sup> “Report of Arthur St. Clair on Western Lands,” February 21, 1799, Senate Territorial Papers, M200, Reel 1; Arthur St. Clair to Joseph Parks, December 13, 1798, in *SCP*, 2:436-38; Israel Ludlow to Paul Fearing, January 8, 1802, Box 2, Folder 11, Paul Fearing Papers; Arthur St. Clair to Secretary of State, July 1799, in *SCP*, 2:443-45; Act of Mar. 2, 1799. When the initial statute proved inadequate—only three people had taken advantage of the statute by December 1800—Congress lengthened the terms and extended credit. Oliver Wolcott, “Statement of What Has Been Done, since the Establishment of the Present Government, Respecting the Lands of the United States in the Territory North-West of the Ohio,” Dec. 1800, Box 5, Folder 12, Oliver Wolcott Papers, Conn. Historical Soc’y, Hartford, Conn; “No. 55: Claimants Under John Cleves Symmes,” April 16, 1800, in *ASP: PL*, 93-95.

<sup>85</sup> Symmes to Dayton, August 15, 1791.

<sup>86</sup> *Ibid.*

Symmes's self-pitying and self-serving rationalizations ignored the extent to which his failure was self-created. Nonetheless, others found Symmes's feeling of grievance justified. The Attorney General, for one, though he emphasized that Symmes had no legal claim to relief, nonetheless viewed him as a "pathetic" figure whose "misfortune" had been "productive of particular benefits" for the nation.<sup>87</sup>

In fact, both Symmes and federal officials had used each other, by design. Western land was supposed to unite them: Symmes would secure access to formal, legitimate title, while the federal government could transform its landed holdings into revenue without an elaborate and costly bureaucracy, all while creating orderly and unambiguous ownership. This would-be symbiosis was the heart of the first federal land system, which envisioned that this alignment of interests between speculators and federal officials would produce both private gains and public benefits.

Symmes's failure ultimately spoke as much to the flaws of this vision as to his personal shortcomings. As it turned out, private and public interests ran in opposite directions. As Symmes's experience demonstrated, everyone involved in land in the early republic—from the small Kentucky claimants to grand investors—was out to secure a quick return by selling things that they did not yet own. Land speculation was built on contingencies and future promises of title: Congress itself sold the future right to public lands based on the promise of future payment, the better to secure higher revenues. But these features, which made land such a potentially lucrative investment, were fundamentally at odds with certainty and order; land speculation thrived on confusion. In the end, though, someone had to resolve the mess, a role that usually fell to the

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<sup>87</sup> "No. 72: Contract with John Cleves Symmes," January 28, 1803.

government. In short, the knot of confusing claims and contradictory title Symmes left in his wake—yet another source of ownership to be hashed out in lengthy nineteenth-century litigation—proved the predictable legacy of this failed experiment in distributing the public lands.

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The situation in the Southwest Territory was different from that north of the Ohio. North Carolina's extensive land grants meant that the federal government had little title with which to entice land companies. Yet just to the south, Georgia had millions of acres to offer, and in the early 1790s, it entered into a series of contracts known as the Yazoo sales that were larger and even more poorly defined than the Scioto or Miami speculations. Though most histories of Yazoo have focused on the sales' political and financial consequences, few have examined what happened in the vast and nebulous spaces that Georgia purported to sell. Like their competitors to the north, the Yazoo companies represented an effort to use title to extend governance and state power into these uncertain regions. But unlike the Ohio and Miami Companies, these companies existed in tension with, and often in outright defiance of, federal authority. For much of the 1790s, then, federal officials struggled to suppress these state-backed land companies by asserting federal law. And though their lands ostensibly lay just over the border within Georgian territory, much of this struggle between federal and corporate authority centered in the Southwest Territory.<sup>88</sup>

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<sup>88</sup> The standard history of Yazoo, focused almost entirely on its constitutional consequences, is C. Peter Magrath, *Yazoo: Law and Politics in the New Republic: The Case of Fletcher V. Peck* (Providence, R.I: Brown University Press, 1966). Additional exploration appears in George R. Lamplugh, *Politics on the Periphery: Factions and Parties in Georgia, 1783-1806* (Newark: University of Delaware Press, 1986).

The most significant effort at actual settlement of the Yazoo lands was undertaken by the Tennessee Company, headed by Zachariah Cox, who would later gain the Creek title of “leader of the Ecunnaunuxulgee,” which was translated as “those greedily grasping after land regardless of governmental disapproval.” Like many speculators, Cox started as a surveyor, working in Wilkes County on the Georgia frontier. Cox first became interested in western lands in 1785, when he sought to lead a group of Georgia settlers to the area known as Muscle Shoals.<sup>89</sup>

Located in present-day Alabama, Muscle Shoals was one of the most strategically significant locations in the Southeast. The Shoals was located at the “Bent” of the Tennessee River, the region’s most important waterway, which traced a U-shaped path between its origin in the Smoky Mountains (present-day eastern Tennessee) and its end at the Ohio River, linking the Tennessee Country to the Mississippi watershed. The “Bent” was the Tennessee’s southernmost point, from which a short portage connected to rivers that ran south to the Gulf of Mexico: one Tennessean described this “small . . . neck of land” as key to the region’s “intercourse and commerce” with “every quarter of the globe.” The Shoals also lay at the junction of Cherokee, Creek, and Chickasaw territory, and so had long served as a center of trade and diplomacy among the three nations. In

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<sup>89</sup> Benjamin Hawkins, “Journal,” November 24, 1797, in *Letters, Journals, and Writings of Benjamin Hawkins*, ed. C. L. Grant (Savannah, Ga.: Beehive Press, 1980), 220-222; “Foreward,” in Isaac Joslin Cox and Reginald Charles McGrane, eds., *Documents Relating to Zachariah Cox* (Cincinnati: Press of Jennings and Graham, 1913), 31-32; David M. Robb, “Zachariah Cox,” in *Encyclopedia of Alabama*, Alabama Humanities Foundation, last modified Mar. 22, 2011, <http://www.encyclopediaofalabama.org/article/h-1915>. The Tennessee Company was arguably not the most significant in terms of size—the largest was the Georgia Company, which was also the most politically influential—but because Cox, nearly uniquely among the Yazoo Companies, actually attempted to make settlement. Nonetheless, Cox is entirely absent on current literature on Yazoo, which focuses almost exclusively on the legal and partisan wranglings that followed the sale, especially in the early nineteenth century. The foremost books on Yazoo are C. Peter Magrath, *Yazoo: Law and Politics in the New Republic: The Case of Fletcher V. Peck* (Providence, R.I: Brown University Press, 1966); George R. Lamplugh, *Politics on the Periphery: Factions and Parties in Georgia, 1783-1806* (Newark: University of Delaware Press, 1986). A brief mention of Cox appears in Bergmann, *The American National State and the Early West*, 207-08.

the 1786 Treaty of Hopewell with the Chickasaws, the United States had promised to establish a trading post at the Shoals, on the site of an earlier French fort.<sup>90</sup>

These prospects for Indian and riverine commerce early attracted would-be speculators. Formally within Georgia, the Shoals' location tied it to the Tennessee Country and excited the interest of North Carolinians. In 1783, the ubiquitous William Blount, with several other prominent North Carolinians, finagled the Georgia legislature into a complicated land deal for the Shoals. The project failed, though, when the speculation became entangled with the short-lived secessionist state of Franklin.<sup>91</sup>

After Cox's 1785 scheme similarly came to naught, he seized a new opportunity in 1789. Though the federal government urged states to cede their western lands, cash-strapped Georgia proved particularly resistant. Instead of cession, Georgia followed the federal government's lead and in 1789 sold off enormous tracts of its western territory to land companies. One of three newly created speculative organizations, Zachariah Cox's Tennessee Company received 3.5 million acres centered at the Shoals, at a heavily discounted price of 1.3 cents per acre, to be paid within two years.<sup>92</sup>

Georgia's model of corporate state-building, however, differed from the federal government's. Georgia had little interest in the issues of system, clarity, or governmental authority that preoccupied federal officials. Its model echoed more closely the unregulated land schemes of North Carolina and Virginia, except that, while those states focused on availability to smallholders, Georgia fixated almost solely on profiting as

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<sup>90</sup> John Sevier to Andrew Jackson, William Claiborne, and Joseph Anderson, November 26, 1797, in *Andrew Jackson Papers*, 1:154-56; Treaty with the Chickasaws, January 10, 1786, 7 Stat. 24.

<sup>91</sup> A. P. Whitaker, "The Muscle Shoals Speculation, 1783-1789," *The Mississippi Valley Historical Review* 13, no. 3 (December 1, 1926): 365-86; William H. Masterson, *William Blount* (Baton Rouge: Louisiana State University Press, 1954), 71-73, 91, 108, 119.

<sup>92</sup> "[Virginia; South Carolina]," *Georgia Gazette*, December 31, 1789; Act of December 21, 1789, in [Laws], (Augusta, Ga.: Printed by John E. Smith, 1790), 27-28.

quickly as possible from millions of acres formally included within the state but in practice entirely outside state jurisdiction. The state's own title to the Yazoo lands was questionable: nearly all the land was still legally owned by Native nations, a right guaranteed under federal treaty. This uncertainty of the title was reflected in the bargain purchase price—1.3 cents per acre, to be paid within two years, far below the sixty-six cents per acre paid by the Ohio and Miami Companies. Legally, Georgia resolved the dilemma of title by requiring the land companies to extinguish Indian claims and keep the state “free from all charge and expences” from Indian affairs.<sup>93</sup>

Georgia's plans deeply troubled federal officials, who viewed the purported sale of federally guaranteed Native lands as a flagrant violation of federal law. Secretary of War Henry Knox and Secretary of State Thomas Jefferson both concluded that the sale was unconstitutional. Since the United States held the “only constitutional right” of negotiating with Indians, Knox reasoned, “the state of Georgia could not delegate to the companies . . . a right which they do not possess.” Jefferson agreed with this legal conclusion, but urged suasion rather than coercion to resolve the conflict, at least initially.<sup>94</sup>

As federal officials debated, Cox began preparations for settlement. Throughout 1790, he distributed advertisements throughout Kentucky and the Southwest Territory, promising free land to would-be settlers who raised a crop at the Bent. Over the winter, Cox and his would-be settlers gathered on the Tennessee River in the Southwest Territory and built boats. In late March of 1791, Cox and thirty-one armed men traveled downriver

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<sup>93</sup> Act of December 21, 1789, in [Laws], (Augusta, Ga.: Printed by John E. Smith, 1790), 27-28.

<sup>94</sup> Henry Knox to Anthony Wayne, April 10, 1790, #27, Reel 26, Henry Knox Papers; Thomas Jefferson, “Opinion on Certain Georgia Land Grants,” May 3, 1790, in Julian P. Boyd, ed., *The Papers of Thomas Jefferson: Main Series* (Princeton: Princeton University Press, 1950), 16:406-07.



to the Shoals. In a letter widely reprinted in eastern newspapers, Cox reported meeting with Piamingo, leader of the Chickasaws, as well as representatives of the Cherokees. Both supposedly assured Cox of their friendship, though other reports suggested that Cox had told the Natives only of plans to trade and kept silent about his planned settlement.<sup>95</sup>

In Philadelphia, federal officials, including President Washington, read the newspaper accounts of Cox with alarm. “Notwithstanding the existing laws [and] solemn Treaties” protecting Indian lands, an angry Washington wrote, “the agents for the Tennessee company are at this moment by public advertisements under the signature of a *Zachariah Cox* encouraging by offers of land, & other inducements, a settlement at the Mussle-Shoals.” Jefferson forwarded Cox’s advertisements to William Blount, now governor of the Southwest Territory, with instructions to halt the plan; Knox supposedly gave Blount orders to prevent the settlement “at all events.”<sup>96</sup>

Cox’s settlement came at a tricky time for Blount, who was in the midst of negotiating what would become the Treaty of Holston with the Cherokees. When word of Cox’s planned settlement reached the gathered Cherokees, they were “exasperated” and “Indigna[n]t.” The Natives complained to Blount that he was only “amus[ing] them with friendly Talk” of a treaty while the United States was committing an “open

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<sup>95</sup> William Blount to Secretary Smith, April 17, 1791, in *TP: Vol. IV*, 55-59; “Extract of a Letter from Zachariah Cox, Esq. to His Correspondent in Maryland, Dated Fredericksburg,” *Daily Advertiser*, August 12, 1791; Holstonian to Mr. Claypoole, August 16, 1791, Western Americana Collection, Beinecke Library, Yale University, New Haven, Conn.

<sup>96</sup> George Washington to Edmund Randolph, October 10, 1791, in W. W. Abbot and Dorothy Twohig, eds., *The Papers of George Washington, Presidential Series* (Charlottesville: University Press of Virginia, 1987), 9:68-70; Secretary of State to William Blount, Aug. 12, 1791, in *Papers of Thomas Jefferson: Main Series*, 22:29-30; “New-York, Monday, July 18,” *Daily Advertiser*, July 18, 1791.

Though Washington fixated Cox, Cox’s activities had a parallel in the actions of James O’Fallon, the supposed “general agent” for the South Carolina Company. Basing himself in Kentucky, O’Fallon attracted the attention of Arthur St. Clair as well as Thomas Jefferson, who instructed the U.S. attorney in Kentucky to initiate a prosecution against O’Fallon: Jefferson warned, “a well ordered government [cannot] tolerate such an assumption of it’s sovereignty by unauthorised individuals.” Thomas Jefferson to William Murray, March 22, 1791, in *Papers of Thomas Jefferson: Main Series*, 19:598. President Washington also issued a proclamation against O’Fallon warning that O’Fallon was violating the Trade and Intercourse Act, and that participants in his scheme risked federal prosecution. “Proclamation,” Mar. 19, 1791, in *Papers of GW: PS*, 7:605-06.

Violation” of their earlier agreements by permitting a settlement “on their usual hunting grounds.” When Bloody Fellow and other Cherokee leaders visited Philadelphia early the next year, the Cherokees specifically demanded that the federal government prevent the Tennessee Company’s planned settlement.<sup>97</sup>

Cox’s plans similarly angered the Creeks. The influential Creek leader Alexander McGillivray found himself pursued by a man named Gordon, whom Cox had apparently sent to “Cajole” Creek support “by the most profuse and wild promises he could invent.” But McGillivray wanted nothing to do with “these wild Speculators.” “These fellows must think me as mercenary, base & unprincipled as themselves,” wrote the incredulous McGillivray. Cox may have won over a few “Infatuated Indians,” but McGillivray recognized the danger. “The Tennessee Companies Grant,” he observed, “includes every foot of our, the Cherokees & Chickasaw Hunting Grounds.”<sup>98</sup>

Trying, and failing, to halt Cox in the Southwest Territory, Governor Blount sought to assuage Natives by distancing the federal government from Cox’s actions and relying on Native jurisdiction to enforce federal law. “[T]he Tennessee Company,” Blount told the Cherokees, “was acting without any Permission or Authority of the Supreme Government, & contrary to the Views of the Same.” Blount’s statement implicitly granted the Cherokees the right to attack Cox under the Treaty of Hopewell; Blount even allegedly encouraged Natives to “intercept” Cox’s party.<sup>99</sup>

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<sup>97</sup> Holstonian to Mr. Claypoole, August 16, 1791; “Report of the Secretary of War to the President,” January 17, 1792, in *TP: Vol. IV*, 111-15.

<sup>98</sup> Alexander McGillivray to William Panton, May 8, 1790, in John Walton Caughey, *McGillivray of the Creeks* (Columbia: Univ of South Carolina Press, 2007), 259-63.

<sup>99</sup> Holstonian to Mr. Claypoole, August 16, 1791; “New-York, Monday, July 18,” *Daily Advertiser*, July 18, 1791.

McGillivray also concluded that federal law—in his case, the recently ratified Treaty of New York with the Creek Nation—authorized resistance to Cox’s settlement. “This Measure of Messr. Cox I conceivd to be a flagrant Violation of the treaty, because Congress had pledgd themselves not to Countenance the Georgia Grants to the Yasou & Tennessee Companys,” McGillivray wrote, which “left me at liberty to act hostilely against them if they should presume to Settle the Countrys in question.” Accordingly, when McGillivray learned that Cox’s men had begun their attempt, he sent a Creek force to destroy Cox’s settlement. But when they arrived at the Shoals, the Creeks found the site abandoned. Likely learning of the dangers, Cox and his men had stayed only briefly to trade with local Chickasaws before heading back upriver. McGillivray posted guards in case Cox returned.<sup>100</sup>

Cox and his men retreated to the Southwest Territory. There, Blount ordered them bound to appear before the Superior Court of the Washington District on charges of violating the federal Trade and Intercourse Act, which prohibited private purchases of Native land. But the result was not what Blount wished: “[t]he Grand Jury would [not] find the bill against Cox and others,” he complained. In the eyes of the territory’s settlers, federal officials feared, seizure of Native land was no crime; many of the jurors themselves were supposedly illegally settled on Cherokee land. But Attorney General Randolph also questioned whether would-be private purchasers like Cox had committed any crime, because the statute, seemingly through inartful drafting, merely voided private purchases without attaching any criminal penalties. Cox’s actions led President Washington to propose a new version of the statute, ultimately enacted in 1793, that

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<sup>100</sup> Alexander McGillivray to Esteban Miro, June 8, 1791, in Caughey, *McGillivray*, 291-92.

contained a provision urged by James Madison that specifically criminalized settlement and surveying on Indian lands.<sup>101</sup>

In the interim, the controversy over Cox roiled the Southwest Territory. Blount's defenders praised his resistance to Cox, since it saved the Territory's citizens from entanglement in a scheme "unwarrantable by the Laws of the Union & in Violation of Subsisting Treaties, which are the Laws of the Land." For his part, Cox claimed that Blount's opposition to his plan had turned many residents against the governor; Blount himself lamented that the grand jury's decision "has given the Company a sort of triumph in the Eyes of ignorant People over Government." Blount's deputy Daniel Smith told Jefferson that Cox's "acquittal by the Jury at the last Superior Court" led many there "to believe the laws cannot punish them for settling at the shoals." The defiant Cox announced plans to continue his open violation of federal law by returning to the Shoals the following year.<sup>102</sup>

In the end, Cox's proposed 1792 expedition never happened. In part, this was due to continued federal resistance. Refusing to accept the grand jury's verdict as the final word, Blount promised that the federal government held "other means in store" to stop Cox's settlement. A gubernatorial proclamation forbade Cox from passing through the Southwest Territory and threatened that any citizens "so injudicious" as to join him would be hauled "before the federal court." In spring 1792, territorial judge David Campbell issued a lengthy charge to a grand jury reiterating the constitutional provision

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<sup>101</sup> William Blount to James Robertson, Sept. 3, 1791, in *TP: Vol. IV*, 79; Washington to Randolph, Oct. 10, 1791; Jefferson to Blount, Aug. 12, 1791, n.1.; Edmund Randolph to George Washington, Sept. 12, 1791, in *PGW:PS*, 8:524-26; Act of Mar. 1, 1793, Ch. 19, 1 Stat. 329, 3 *Annals of Cong.* 827-28.

<sup>102</sup> Holstonian to Mr. Claypoole, August 16, 1791; William Blount to James Robertson, Sept. 3, 1791, in *TP: Vol. IV*, 79; Acting Governor Smith to Secretary of State, Oct. 4, 1791, in *TP: Vol. IV*, 83-84; "Extract of a Letter from Zachariah Cox, Esq. to His Correspondent in Maryland, Dated Fredericksburg," *Daily Advertiser*, Aug. 12, 1791.

that all treaties made by the United States were the “supreme Law of the Land,” urging their strict observance by the territory’s citizens. Printed and distributed throughout the territory, Campbell’s charge “operated much to the disgrace of those Adventurers,” according to one observer.<sup>103</sup>

But ultimately, it was Indian power and financial worries, not federal law, that doomed Cox’s 1792 plans. The Cherokee and Creek threat remained very real: Cox and his men would be “mad . . . to attempt another Settlement,” one newspaper correspondent wrote, “unless they can embody a force sufficient to act in opposition to all the Southern Indian Tribes.” Meanwhile, at the same moment that the Ohio and Miami Companies were struggling to meet their obligations to the federal government, Cox found himself unable to scrounge together the money needed to pay Georgia, which (unlike the federal government) insisted that payment be made in hard currency rather than near-worthless state currency. “Your good friends the Muscle shoal Compy. have faild to make pay[men]t,” a gleeful and sarcastic correspondent informed William Blount, “& I am told have Squandered the[ir] Certificates in such manner as not to be able to settle with their Associates.”<sup>104</sup>

Notwithstanding this initial failure, neither Georgia nor Cox was ready to foreswear such a lucrative scheme because of a few setbacks. Several years later, Cox and a number of associates revived their plans, liberally plying the Georgia legislature with bribes. In 1795, Georgia sold the lands once again to several companies, including

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<sup>103</sup> Blount to Robertson, Sept. 3, 1791; Smith to Secretary of State, Oct. 4, 1791; David Campbell to Secretary of State, February 25, 1792, in *TP: Vol. IV*, 121-28; George Ogg to William Blount, April 16, 1792, Folder 4: 1792, WBP:LC.

<sup>104</sup> Holstonian to Mr. Claypoole, August 16, 1791; Ogg to Blount, April 16, 1792.

nearly three million acres around the Shoals to the Tennessee Company for \$60,000. Unlike the earlier sales, however, this land grab caused tremendous ferment. Outrage over the legislation, which became known as the “Yazoo fraud,” led to the election of a new legislature the following year, which not only repealed the earlier legislation as unconstitutional but literally burned the earlier statute.<sup>105</sup>

Neither repeal nor controversy daunted Cox, who, following the precedent of other land companies, constructed a complicated charter for his new settlement. He would begin by building trading posts for the Chickasaws, making it all the easier to obtain their lands “under the authority of the United States.” Like the Ohio Company, the Tennessee Company would then subdivide its lands into various lots. Each settler would receive 1,001 acres: a single acre houselot in the town of “Ockochappo” and then one 50-, one 200-, and three 250-acre lots. Rather than paying for their lands, would-be settlers would obtain deeds by working for the Company for twelve months. But Cox was adamant that no settlement would occur until he had obtained the “apportionment of Congress” for his actions.<sup>106</sup>

As Cox set about his plan, rumors about his intentions reached government officials. In 1797, Cox returned to Knoxville—now the capital of the new state of Tennessee, created from the former Southwest Territory the previous year—where he opened a store. There, Cox reportedly began buying up weapons and ammunition, including \$1200 in cavalry swords, and gathering a private army.<sup>107</sup>

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<sup>105</sup> Magrath, *Yazoo*; Act of Jan. 7, 1795, in *Acts of the State of Georgia: Passed at Augusta, December, 1794, and January, 1795* (Augusta, Ga.: Smith, John E., 1795), 3-6.

<sup>106</sup> “[Plan of Operations],” in McGrane, ed., *Documents Relating to Zachariah Cox*, 92-95.

<sup>107</sup> Benjamin Hawkins, “Reports to the Secretary of War about the Indian Boundary,” June 9, 1797, Hawkins Family Papers, Southern Historical Collection, University of North Carolina, Chapel Hill, N.C.; “Intelligence Re a Mr. Cox of Savannah,” June 12, 1796, Box

Cox reassured every official curious about his mysterious behavior that his purposes were lawful. He told both John Sevier, the new governor of Tennessee, and the state assembly, where he spoke briefly, that he “should not proceed until authorized by the laws of his country.” As for the arms, he would use them only “defensively” to guard against Indian attacks. Sevier gave Cox his blessing to pass through Tennessee. Cox also called on Benjamin Hawkins, the federal Indian agent for the Southeast, to reiterate his obedience to federal law. Cox supplied Hawkins a copy of his plan and asked for a license to trade with the Chickasaws.<sup>108</sup>

These proclamations of lawfulness, however, relied on an expansive and self-serving interpretation of the law, as Hawkins recognized. Cox believed himself entitled to construct a trading post at Muscle Shoals on the basis of an earlier Chickasaw cession to the federal government at the Treaty of Hopewell, notwithstanding that he himself lacked federal authority or sanction. The supposed lawfulness of Cox’s plan also depended on the sympathy and influence of “well wisher[s]” like Tennessee’s newly elected congressman Andrew Jackson, who, Cox believed, would ensure that the extension of the Indian boundary to encompass Cox’s lands would “shortly take place.” “Government will find it a better policy to people a country with their own citizens,” Cox wrote the sympathetic Jackson, “than to reserve it as an asylum for savages.” Many Tennesseans strongly supported Cox in this goal. Governor Sevier, for one, regarded the

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1, James McHenry Papers; “The Philadelphia Gazette, and Universal Daily Advertiser. Friday, 11th August, 1797,” *Philadelphia Gazette*, August 11, 1797.

<sup>108</sup> John Sevier to Andrew Jackson, William Claiborne, and Joseph Anderson, Jan. 22, 1798, in *Papers of Andrew Jackson*, 1:171-72; Benjamin Hawkins to James McHenry, August 6, 1797, Thomas Foster, ed., *The Collected Works of Benjamin Hawkins, 1796-1810* (Tuscaloosa: University of Alabama Press, 2003), 190; Zachariah Cox to John Sevier, August 31, 1797, in McGrane, ed., *Documents Relating to Zachariah Cox*, 97-98.

federal government's "prevention of a settlement at or near the muscle shoals . . . a manifest injury done the whole western country."<sup>109</sup>

For their part, Native nations strongly contested Cox's claims of legality. As reported by Benjamin Hawkins, the Cherokees and Chickasaws had received remarkably accurate accounts of the Georgia sales, and intended to resist. The Chickasaws, having already given Cox "notis" not to "make Attempt to Settlet," threatened to immediately "strike" any settlement. Nor, they warned, should Cox rely on the agreement of a few Chickasaws, "for such permission is not By the consent of the Chickasaw Nation." As for the Cherokees, a national council wrote to the President appealing for him to "fulfill his promises" by preventing Cox's settlement. If that failed, Hawkins reported that the Cherokee warriors "have their moccasins ready" to resist.<sup>110</sup>

Federal officials in the Adams Administration, fearful of the consequences of Cox's plans, sided with the Native nations. "Tennessee and Cox have a good deal disturbed me," Secretary of War James McHenry confided. McHenry believed that Cox's plans, if carried out, would "menace[] the United States in an extensive Indian war." Insisting on upholding federal guarantees of Native lands, McHenry gave explicit orders not to allow Cox and his men to pass by U.S. forts, even if they presented state passports.<sup>111</sup>

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<sup>109</sup> Benjamin Hawkins to Zachariah Cox, August 6, 1797, in *The Collected Works of Benjamin Hawkins, 1796-1810*, 189-90; Zachariah Cox to Andrew Jackson, April 27, 1797, in *PAJ*, 1:131-32; John Sevier to Andrew Jackson, William Claiborne, and Joseph Anderson, November 26, 1797.

<sup>110</sup> James Robertson to John Sevier, April 15, 1797, Box 2, Folder 2, John Sevier Papers, 1796-1801, First Administration, Governor's Papers, Tennessee State Library and Archive; Benjamin Hawkins to Zachariah Cox, May 4, 1797, in *The Collected Works of Benjamin Hawkins, 1796-1810*, 134-35; "A Talk of the Chiefs and Warriors of All the Cherokees to the President of the United States," April 28, 1797, in *The Collected Works of Benjamin Hawkins, 1796-1810*, in 163-64; Benjamin Hawkins to James McHenry, July 5, 1797, in *The Collected Works of Benjamin Hawkins, 1796-1810*, 181-82.

<sup>111</sup> James McHenry to Oliver Wolcott, September 22, 1797, Box 2, James McHenry Papers; James McHenry to Thomas Butler, March 23, 1798, Box 3, James McHenry Papers.



Federal officials grew anxious when Cox seemed to take the first steps toward settlement. In 1798, he created a town called Smithland at the confluence of the Tennessee and Ohio. His somewhat opaque motives seem to have been to use this location as an eventual springboard for travel up the Tennessee to the Shoals, over two hundred miles to the south. Smithland itself was in the narrow strip of far western Kentucky between Tennessee to the south and the Northwest Territory (present-day Illinois) to the north, where, across the river, federal Fort Massac controlled the Ohio River. But, despite some confusion over whether Cox's settlement was on Indian land, the federal government was largely powerless to halt the settlement. After meeting Cox, Kentucky's governor sanctioned the plan, and Cox involved the local militia commander in the scheme. If the federal government did invoke the Trade and Intercourse Act to forcibly expel Smithland, word had it that Cox intended to "defend the place as long as he had a man able to fire a gun."<sup>112</sup>

Federal officials were also troubled by reports that Cox was experimenting in private government, turning Smithland into his own personal fiefdom by establishing his own courts—"tribunals . . . unknown to the nation," in the words of one federal official. Martin Wickliff, a passing trader, reported that Cox had arrested him for violating "the laws of Smithland" when he got into a fight with one of Cox's men. When Wickliff told Cox he "did not think Smithland had any right to make laws," Cox insisted, "every man has a right to make himself laws of his own house, and that the houses there were his."

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<sup>112</sup> "#166: Arrest of Zachariah Cox by the Governor of the Mississippi Territory," Nov. 24, 1803, in *American State Papers: Miscellaneous*, 1:358-61; Zachariah Cox, *An Estimate of Commercial Advantages by Way of the Mississippi and Mobile Rivers, to the Western Country. Principles of a Commercial System and the Commencement and Progress of a Settlement on the Ohio River, to Facilitate the Same; with a Statement of Facts* (Nashville: J. M'Laughlin, 1799), 20. The town seems to have been named after Cox's associate John Smith.

Wickliff particularly hit a nerve when he stated he intended to inform the local army commander. “By God we are not to be threatened with the Federal Officers,” Cox thundered, before expelling Wickliff from the settlement. Yet, as egregious as Cox’s “usurpation . . . of the rights of sovereignty” was, it did not violate federal law, since Smithland lay within Kentucky, not the federal territories.<sup>113</sup>

The stalemate persisted until July 1798, when Cox and a number of his men attempted to pass Fort Massac to continue down the Ohio. Their destination was unknown. Cox proclaimed that he intended only to go to New Orleans for supplies, but federal officials believed, and later adduced depositions asserting, that Cox actually intended to travel up the Tennessee and “force a Settlement” at Muscle Shoals. Though Cox had a pass signed by the supportive Kentucky militia commander, the fort’s commander, Major Kingsberry, refused to allow Cox and his men to proceed, citing orders that barred the passage of all armed parties by the fort. If Cox attempted to pass, Kingsberry warned, he would be constrained to fire on him. Cox ranted against this exercise of “military prerogative,” a violation of the free navigation of the Ohio “guaranteed to every citizen by the constitution and laws of the United States.” Finally, Kingsberry agreed to allow Cox and a few of his men to pass, as long as he could inspect the boats and no more than a third of the men were armed. Cox complied, but he also evaded Kingsberry’s orders by sending the rest of his men overland to rejoin him further

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<sup>113</sup> *Ibid*; “Deposition of Martin H. Wickliff,” August 9, 1798, *Documents Relating to Zachariah Cox*, 106-11; Cox, *An Estimate of Commercial Advantages*, 22; Arthur St. Clair to Gen’l Wilkinson, July 16, 1798, in *SCP*, 2:427-28.

downriver. He then continued, not up the Tennessee to the Shoals, but down the Mississippi to Natchez, capital of the newly created Mississippi Territory.<sup>114</sup>

When they learned of Cox's apparent deception, furious federal officials pursued him. Cox awoke in his room in Natchez surrounded by what he described as a "battalion of federal troops, with fixed bayonets." On the orders of Winthrop Sargent—the former Ohio Company official and Secretary of the Northwest Territory had just been appointed as Mississippi's territorial governor—Cox was arrested and held in federal Fort Panmure. Allegedly held in "close confinement" and denied letters and visitors, Cox appealed to Sargent for a hearing, and, subsequently, the writ of habeas corpus, guaranteed to him "as well as every other citizen of the United States, by the federal constitution." He received no answer; his pleas to territorial judges were similarly unavailing.<sup>115</sup>

Finally, despairing of his situation, Cox climbed over the fort wall and escaped. Fleeing first to New Orleans, where the Spanish governor refused American demands for extradition, Cox proceeded through Choctaw Country back to Tennessee, supposedly pursued by Indians offered a federal reward for his capture. (This measure especially angered Cox, smacking of "savage or military prerogative" in contrast to the "impartial laws" that he claimed existed in the states.). Arriving in Nashville, Cox was arrested on a federal warrant and brought before a federal judge. Attorney General Charles Lee told the Secretary of State he thought that Cox's actions "come under the description of

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<sup>114</sup> "Deposition of Robert Prior," January 12, 1799, in *Documents Relating to Zachariah Cox*, 103-06; Cox, *An Estimate of Commercial Advantages*, 25, 31, 62-63. .

<sup>115</sup> Cox, *An Estimate of Commercial Advantages*, 36-42; Zachariah Cox to Winthrop Sargent, September 3, 1798, Reel 4, WSP; Zachariah Cox to Winthrop Sargent, September 20, 1798, Reel 4, WSP.

Treason in levying war against the United States.” But after being detained for an additional three months, Cox was released, evidently for lack of evidence.<sup>116</sup>

Despite his ultimate vindication, Cox’s arrest represented the “end to this troublesome man’s career,” in one newspaper’s words. Cox lost control over the Tennessee Company, and Muscle Shoals remained Indian country until after the War of 1812. In 1803, Cox petitioned Congress, alleging that he had lost \$9,000 in goods—merchandise, a boat, and a slave—from his arrest. Though it conceded the evidence of his transgressions was thin, Congress referred him to the courts for relief. Cox moved to Virginia, where died in the 1830s.<sup>117</sup>

But even after Cox’s settlement schemes faded, the controversy over the sales to the Tennessee Company and other Yazoo companies persisted. Zachariah Cox’s deeds still floated around the Southwest Territory, regarded as “of little Value” by territorial citizens but ultimately snapped up by investors, who spawned a generation of litigation over these paper empires. With Georgia’s 1802 cession of its western lands, the federal government inherited responsibility for Georgia’s dubious land dealings. In the 1810 case of *Fletcher v. Peck*, in a decision that intertwined federalism, Indian affairs, and land policy, the U.S. Supreme Court ruled that Georgia’s 1796 repeal of the Yazoo land sale violated the Constitution’s Contract Clause. In 1814, a compelled Congress compensated purchasers, including the latest shareholders of the Tennessee Company, with the promise of \$5 million in proceeds from future land sales.<sup>118</sup>

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<sup>116</sup> Cox, *An Estimate of Commercial Advantages*, 49-51, 62-70; Charles Lee to Timothy Pickering, September 11, 1798, Reel 4, WSP.

<sup>117</sup> “Zachariah Cox,” *Philadelphia Gazette*, January 11, 1799; “#167: Arrest of Zachariah Cox by the Governor of the Mississippi Territory,” November 28, 1803, *American State Papers: Miscellaneous*, 361-62.

<sup>118</sup> Stockly Donelson v. Etheldred Williams (Hamilton District Court of Equity 1801), in Historical Records Survey, Works Progress Administration, *Records of Knox County, Superior Court Record Book “B”, 1797-1804* (Nashville: Historical Records Survey, 1939).

It is easy to follow Alexander McGillivray and read the Tennessee Company as a “wild speculation.” The colorful Zachariah Cox presented a sharp difference from the respectable New Englanders who established the Ohio Company, who saw themselves as advancing federal authority and interest. By contrast, Cox—notwithstanding his constant protestations of obedience to “any constituted authority derived from our government”—demonstrated a loose and permissive approach to federal law, skirting outright defiance. Cox’s opportunistic machinations represented precisely the kind of land speculation that Congress had hoped to forestall.

Part of the difference for Cox was federalism. The state he was bolstering was Georgia, not the United States, and he readily hopscotched across jurisdictions, securing support from Kentucky and Tennessee, even as his enterprises took him into domains governed by tribes or the federal government, often represented by the army: the “savage” and “military” authority Cox so despised.

Cox’s scheme also underscored the interrelationship between land companies and Indian affairs. Unlike Putnam and Symmes, Cox had little sense that recasting Indian affairs to correspond with the federal government’s newly solicitous approach would yield dividends. For Cox, as for an earlier generation of land speculators, Native nations only represented an obstacle; their leaders were to be cajoled or bribed into providing a

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202-211; *Fletcher v. Peck*, 10 U.S. 87 (1810); William Wirt, “The Yazoo Claims,” June 24, 1826, in J. Hall, ed., *Official Opinions of the Attorneys General of the United States: Advising the President and Heads of Departments, in Relation to Their Official Duties* (Washington, D.C.: Robert Farnham, 1852), 2:35-38.

The subsequent history of the Yazoo claims is highly tangled and ironic. Though Cox had presented himself as a champion of state and local sovereignty in opposition to federal authority, most of the Yazoo claims passed into the hands of Federalist New Englanders, who then sought federal compensation under a highly nationalist interpretation that sought to use the Contract Clause to limit the discretion of state legislatures. They in turn were staunchly opposed by Jeffersonian Republicans advocating for state sovereignty. See generally Magrath, *Yazoo*, esp. 20-49.

fig leaf of legality to settlement, with the ultimate aim of removal and dispossession. Natives actually *were* a barrier for Cox, as Native jurisdiction proved far more effective than federal justice at forestalling his settlement. It was Creek, Cherokee, and Chickasaw resistance, not Blount's ineffectual legal efforts, that ultimately prevented Cox from controlling Muscle Shoals. But as Cox understood, the boundaries between Native and federal authority proved blurry. In contrast to the Delawares' and Shawnees' studied cultivation of the Ohio and Miami Companies as federal proxies, Native leaders south of the Ohio recognized that Cox lacked federal support and so could be punished with impunity. In fact, thanks to treaty provisions as well as the encouragements of Blount and Pickering, Creeks, Cherokees, and Chickasaws were implicitly enforcing federal as well as Native law when they threatened to expel Cox.

Yet Cox's efforts were not as different from the Ohio and Miami Companies as federal officials imagined. Land in the early republic was powerful and disruptive. Cox's settlement in Smithland demonstrated, just as Marietta and Cincinnati had, that ownership often bled into jurisdiction. The difference was that schemes in the Northwest Territory had ostensibly sought to harness land's power to bolster federal authority, while Cox's self-aggrandizing efforts were seemingly freed from all restraint, and thus "inimical to our government." The extreme reaction to Cox underscored the perceived seriousness of his threat: without settling a foot of land at Muscle Shoals, Cox's plans convulsed the Creek, Cherokee, and Chickasaw Nations, the Southwest Territory, and the Washington and Adams Administrations.<sup>119</sup>

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<sup>119</sup> "Extract of a Letter from a Gentleman at Fort Massac, Dated July 11," *Gazette of the United States*, September 14, 1798.

The final result, however, was strikingly similar. The Miami and Ohio schemes had ultimately ended with speculators struggling to use their authority and control against, rather than on behalf of, the federal government. The Tennessee Company merely laid bare the tension between corporate and federal sovereignty that the Ohio and Miami Companies had attempted, largely unsuccessfully, to paper over. Ultimately, Cox's would-be enrichment at public expense was merely more obvious and flamboyant. Ironically, thanks to the Supreme Court's intervention requiring that the Yazoo Companies' shareholders be compensated, it also proved the most remunerative.

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In 1790, as the second session of the first Congress began, Abraham Baldwin, congressman from Georgia, wrote to Joel Barlow, overseas in France selling land on behalf of the Scioto Company. Predictably, land matters dominated the letter: Baldwin discussed plans to purchase federal lands in the Illinois Country, Georgia's sale of the Yazoo lands, the Scioto Company's dealings, and a visit from Rufus Putnam and Manasseh Cutler. But above all, Baldwin wrote to reassure Barlow, who, despite his foreign posting, had managed to get hold of the congressional journal and read about Congress's debates over opening a land office. "From the whole you conclude that there is nearly an end to the plan of selling in large tracts, and say we are impolitic &c," Baldwin stated. "There is no such thing . . . Everybody is in favour of selling in large

tracts, rough & smooth, if we can.” Baldwin pointed toward two favorable congressional reports on recent petitions to purchase still more lands.<sup>120</sup>

As Baldwin’s letter demonstrates, the lure of the first federal land system—large-scale sales to speculative land companies—remained strong into the 1790s. The appeal for Congress was undeniable. Distributing title through the companies offered a potent tool to pursue orderly title and restrain speculation, or so federal officials believed. And land companies promised to achieve these goals without requiring the creation of expensive bureaucracies or systems of office-holders. In fact, throughout much of the Northwest Territory, the Ohio and Miami Companies provided both the framework and the personnel on which federal territorial governance was built.

In ways difficult to appreciate now, title provided a form of governance that the companies were to use to pursue policy aims that dovetailed with federal goals. To borrow Arthur St. Clair’s phrase, owning and selling property implicated “rights of sovereignty,” including fiscal state-building, diplomacy and war with Native nations, and dispute resolution. In the early American west, this corporate sovereignty existed alongside, and intersected with, Native, state, and federal sovereignty, in ways that suggest continuities with both the colonial past and broader global imperialism. The irony was that the federal government empowered the Ohio and Miami Companies to act at the same moment that it was asserting its sole authority to govern in these areas against rival claimants such as states, foreign nations, and private purchasers from Natives. It came,

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<sup>120</sup> Abraham Baldwin to Joel Barlow, April 7, 1790, in Linda Grant De Pauw et al., eds., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791* (Baltimore: Johns Hopkins University Press, 1972), 19:1160-65.



too, as the long-standing link between property and governance was dissolving in the wake of the American Revolution.<sup>121</sup>

Perhaps for these reasons, the late-eighteenth century land companies were a far cry from the East India Company; in practice, the power that they enjoyed was thin and highly dependent on the federal government. Ohio and Miami Company officials adjudicated disputes, but they did so as federal officers, even if Symmes heavily blurred the boundaries. They conducted their own diplomacy with Native nations, but, at the first sign of trouble, insisted on their entitlement to federal military protection. And the companies' financial success and failure, it turned out, rested not only on the state of federal finance but also on Congress's willingness to rescue them from their own excesses.

Similarly, although some of the companies' proponents may have dearly believed in the "system" they promised, in the end they were selling a bill of goods. In this sense, the Ohio and Miami Companies were no different from Cox's scheme. Lured by the promise of paper fortunes, Symmes, Sargent, and Cutler happily built settlements, like Cincinnati and Gallipolis, that rested on the same (dubious) legal footing as the intruders that the federal government evicted at gunpoint. But it was in failure, rather than success, that the companies demonstrated just how much authority they really enjoyed. As the federal government's panicked response to Zachariah Cox suggests, the entanglement between title and jurisdiction gave the companies considerable power to disrupt as well as further federal aims. The companies used their quasi-governmental role to force the national government to bear the costs of their avarice, a reality Congress discovered when

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<sup>121</sup> Hartog, *Public Property and Private Power*, 103-19.

it felt morally (or, in the case of the Tennessee Company, legally) obligated to relieve the unwitting victims of the land companies' speculative schemes.

As a result, it was Barlow's prediction, not Baldwin's, that proved more accurate. Congress did not continue selling large tracts to speculators. The era of the great land companies proved brief, and the Ohio, Scioto, and Miami Purchases were, in the end, the only direct sales of federal land to companies. Similarly, after Georgia transferred its domain to the federal government in 1802, states no longer had vast tracts of land to sell. The result was that, going forward, the federal government, and its officials, would dispense and determine the validity of title directly. "[S]elling lands," one congressman argued as Congress debated a land office in 1796, "should always be kept in the hands of Government, and not in those of speculators." The experiment of the middlemen was over, at least for the time being.<sup>122</sup>

The deeper legacies, however, remained. As landholder, the federal government still used its power over title to try to shape policy, reserving lots for education and religion, subsidizing internal improvements, and paying its soldiers in public lands. Much later, far larger corporate quasi-sovereigns fueled by the federal domain returned, in the form of the transcontinental railroads. And the states subsidized a new generation of speculators who proved just as adept at holding out the prospect of public goods while using government support to underwrite their own risky ventures. In this sense, the

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<sup>122</sup> 5 Annals of Cong. 413 (1796).

tension between corporate and governmental sovereignty remained deep within American legal and political thought and practice.<sup>123</sup>

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<sup>123</sup> On the federal use of the public domain to subsidize internal improvements, see John Lauritz Larson, *Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States* (Chapel Hill: University of North Carolina Press, 2001); Alison L. LaCroix, "The Interbellum Constitution: Federalism in the Long Founding Moment," *Stanford Law Review* 67 (2015): 397, 409-40. On the public domain and railroads, see Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W. W. Norton & Company, 2012). On state subsidization of private enterprise, see Robert A. Lively, "The American System: A Review Article," *The Business History Review* 29, no. 1 (1955): 81-96.

### Chapter 3: Rise of Federal Title

In October 1789, the recently inaugurated President Washington wrote to Arthur St. Clair, newly appointed as governor of the Northwest Territory. Among other directives, Washington urged St. Clair to head to the town of Vincennes “as soon as possible,” telling St. Clair it was a “circumstance of some importance” that the inhabitants be guaranteed their lands “by some known and fixed principles.” The President later received a lengthy and highly detailed report from St. Clair about Vincennes lands, as well as three separate petitions from the town’s inhabitants on the subject, which he forwarded to Congress.<sup>1</sup>

Addressing the minutiae of land practice in a small and distant village—Vincennes was a settlement of several hundred French settlers along the Wabash River in present-day Indiana—is likely not what the Constitution’s drafters had had in mind when they created the Presidency two years earlier; nor does it comport with present-day visions of the weighty matters that occupied the first president. Yet Washington was not alone. Resolving the land claims in Vincennes and other French settlements in the Illinois Country produced voluminous reports from Governor St. Clair and territorial secretary Winthrop Sargent, lengthy correspondence involving cabinet officers, especially Secretary of State Thomas Jefferson, and two separate acts of Congress, along with numerous petitions and congressional reports. As for the issues that occasioned these deliberations—the validity of villagers’ claims to title to small town lots or

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<sup>1</sup> George Washington to Arthur St. Clair, October 6, 1789, Reel 2, ASCP.

neighboring vacant farmland based on decades-old grants—they were more typical of a local county court docket than the national legislature and executive.<sup>2</sup>

But, as surprising and unfamiliar as this federal attention to these small-bore disputes may seem in the present, it was characteristic of federal land practice in the 1790s. To call this a system or policy would suggest a level of planning and forethought that was absent. Rather, as in the case of Vincennes, the federal government was dragged into one parochial, fact-intensive property controversy after another. Like the Illinois settlers, Native nations arguing over their borders with one another and military bounty holders alleging fraud and theft all advanced claims to territorial lands, thrusting the federal government into complicated tangles of competing ownership. Often, their asserted property rights rested on unfamiliar and foreign bodies of law that nonetheless required acknowledgment, even if implicitly, within Anglo-American law.

Considered in parallel, a certain pattern emerges from these seemingly disparate and disconnected disputes. Most saliently, in all these conflicts, it was the federal government—sometimes Congress, but more frequently federal officials and administrators—who became the arbiter of property rights. This was not wholly accidental. The federal government’s authority to resolve property conflicts served its own ends, even when it had no material interest in their outcome. As Washington’s letter suggested, merely creating property based on “known and fixed principles” made property rights more legible, and their administration simpler, for the federal government.

There is another sense, though, in which federal officials became the arbiters of these disputes almost by default. As the only “constituted authorities” within the U.S.

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<sup>2</sup> This process is discussed more fully in the text accompanying notes below.

territories, federal officials became saddled with the responsibility to resolve property disputes, even when they would rather not have done so. Sometimes, this charge came from above, as when Congress and the President burdened St. Clair and Sargent with the thankless job of adjudicating French titles. Just as often, the pressure came from claimants themselves. When charged with buying Indian land and granting military bounty land, most federal officials had little interest in determining the intricacies of Native property under Native law or in resolving fact-bound allegations of fraud in conveyances. But Native leaders and military veterans pressed their claims and insisted on federal intervention; federal officials, with varying degrees of eagerness, were constrained by their sense of obligation and duty to give these contentions at least some consideration.

An alternative would have been to rely on courts, especially local courts, which were well versed in small-scale property disputes of this nature. In fact, some federal officials sought to devolve responsibility to the judiciary, particularly in the contentions involving military bounty lands. But, though courts intervened in these controversies in the long run, they rarely did so in the 1790s. As slow and individualized institutions, courts could not create an entire property scheme from hundreds of existing claims, as territorial officials did in Vincennes; nor did Anglo-American courts enjoy authority over the diplomatic arenas in which negotiations over Native property rights played out. Federal officials confronted a jurisdictional and competence gap that they were often forced to fill.

By circumstance as much as by design, then, the federal government found itself repeatedly serving as arbiter in territorial property controversies. Contemporaries, as well as later historians, paid little attention to this process: they were fixated on the lengthy and fruitless debates over the creation of the federal land offices and public sales. But as Congress dithered, throughout the 1790s the federal government was already engaged in real property work, out in the territories. Unlike the land offices, this work focused on adjudication, not distribution; rather than creating new property rights, officials sought to weigh existing claims and translate them into an authoritative title. And, because this process was improvised, this had little of the routinized feel of the later land office. Nonetheless, by the end of the period, this ad hoc solution to the challenge of the multiplicity of title had crystallized into precedent, providing the template for the property adjudications that followed.

As they sifted through these conflicting claims, federal officials were also shifting the meaning of property in the territories. In all these disputes, the final outcome of the federal government's deliberations was a piece of paper from the federal government conferring title: a federal land grant, in the case of the French settlers and the military veterans; a formal treaty with written guarantees of territory, in the case of Native nations. As a result of these adjudications, then, ownership came to derive from the authority of the United States, rather than from the plural sources that had previously undergirded property rights. This transformation toward a more positivist conception of ownership, centered in the national state, provided the necessary support for the land offices and the century of expansion that followed.

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Title in the federal territories always began with Native nations, as we have seen. Even within the blinkered legal conceptions of Anglo-Americans, Natives could only alienate what they owned. This seemingly straightforward requirement paradoxically meant that federal officials had to decipher Native land claims at the same moment they sought to “extinguish” and erase them. But as officials discovered to their dismay, the only basis for assessing the validity of competing Native claims to title were Native ownership concepts themselves. This structural feature of early American land required federal officials to become the often reluctant arbiters of Native property law as they dimly understood it. In one sense, this constraint reflected Native power and federal weakness, in the sense that Native legal systems could not be ignored or disregarded. Yet at the same time, adjudicating Native title aggrandized federal authority and made Native ownership rest on the questionable interpretations of Native legal concepts made by federal officials who were far from disinterested.<sup>3</sup>

In the late eighteenth century, Natives and most Anglo-Americans agreed that Native nations owned most of the Southwest and Northwest Territories, even if the precise nature of that ownership was unsettled. The Southwest Territory encompassed the heart of what historians now call the Native Southeast. The Smoky Mountains and

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<sup>3</sup> This attentiveness to the boundaries of Native territory by federal officials—grudging and partial though it was—has largely escaped the notice of historians of Native North America, who describe federal officials as committed to a process of erasing Native ownership. For instance, in her path-breaking article on Native territory and its boundaries, Juliana Barr argues that “[s]ilencing an Indian presence became requisite in [U.S.] attempts to solidify national borders.” Juliana Barr, “Geographies of Power: Mapping Indian Borders in the ‘Borderlands’ of the Early Southwest,” *The William and Mary Quarterly* 68, no. 1 (January 1, 2011): 8. But as the history here suggests, Natives were more successful than Barr acknowledges in forcing federal officials to consider their territorial claims, even though this process arguably, and ironically, furthered the federal project of “extinguishing” Native property rights that Barr describes.



their foothills, where the Anglo-drawn borders of the Southwest Territory, North Carolina, and Georgia converged, were Cherokee territory, while to the south, largely within Georgia's purported borders, were the lands of the Creek confederacy. The territory of the Chickasaw and Choctaw Nations lay further west and south, between present-day Nashville and the Mississippi River. North of the Ohio River, in the Northwest Territory, the United States confronted diverse tribes that Anglo-Americans struggled to distinguish. Some, such as the Miamis, Weas, and other tribes of what federal officials dubbed the Wabash Confederacy, had long lived along the Miami and Wabash Rivers. Others, such as the Delawares and Shawnees, were more recent arrivals, pushed from ancestral homelands along the eastern seaboard by Anglo-American dispossession.<sup>4</sup>

Despite differing concepts of ownership, these diverse nations shared overlapping understandings of personal and national property and territory that they articulated in negotiations with Anglo-Americans. Most fundamentally, life in these nations centered on villages surrounded by cornfields. Long-standing occupation of these lands conferred ownership. The Miami chief Little Turtle told federal commissioners that his nation owned its lands because they were “enjoyed by my forefathers time immemorial”; throughout the territory, “[t]he print of my ancestors’ houses are every where to be seen.”<sup>5</sup>

Beyond these Native hubs were the broad territories that Anglo-Americans denominated as the nations’ “hunting grounds.” Natives measured these lands and their

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<sup>4</sup> For a discussion of the Native peoples of the Ohio, Illinois, and Tennessee Countries, see the Prologue.

<sup>5</sup> “Minutes of a Treaty with the tribes of Indians called the Wyandots, Delawares, Shawanese, Ottawas, Chippewas, Pattawatamies, Miamies, Eel River, Kickapoos, Piankeshaws, and Kaskaskias, begun at Greenville, on the 16th day of June, and ended on the 10th day of August, 1795,” in Walter Lowrie and Matthew St. Clair Clarke, eds., *American State Papers: Indian Affairs*, vol. 1 (Washington: Gales and Seaton, 1832) [hereinafter ASP:IA].

boundaries less through formal markers than through a sense of distance and their relational position. One Delaware informed missionaries that even though he “did not rank with the for[e]most . . . he possess as much Land as a man could walk over in the best part of a day.” This Delaware’s statement exemplifies the complicated coexistence of individual, clan-based, and national claims to property. Many Native rights to property consisted of use rights in a commons shared among multiple tribal members, and even multiple nations. The Cherokees, for instance, repeatedly rejected U.S. efforts to obtain the land around Muscle Shoals by informing federal officials that they could not sell them “as they were not clearly our property” alone, since they were held as “a sort of common property” for hunting among the Chickasaws, Choctaws, and Creeks, as well as the Cherokees.<sup>6</sup>

Migration further complicated Native property claims. Particularly in the Ohio country, as tribes arrived from the eastward to settle among other nations that had been long resident, they worked out arrangements whereby the newcomers acknowledged prior occupants’ title. One Anglo-American discussed Ohio country tribes’ appropriation of lands as a “new District” to recently arrived Shawnees. When an emissary bearing an invitation to an Anglo-American treaty arrived at a Kickapoo village north of Vincennes,

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<sup>6</sup> John Parrish, “Journal, #4,” 30 June 1793, John Parrish Journals, Clements Library, University of Michigan; “Conference of the Chiefs of the Cherokee Nation with the Secretary of War,” ASP:IA,1:204; Benjamin Hawkins to William Blount, March 10, 1791, Folder 3: 1791, WBP:LC. For a similar statement, see Extract of Leonard Shaw to [Secretary of War], June 20, 1792, in “Extracts of Correspondence on Indian Affairs,” October 1792, in *PGW:PS*, 11:291-315. Work on Native property rights has grown considerably over the last several decades. For an early consideration, see William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, 1st ed (New York: Hill and Wang, 1983). Important recent works include Barr, 6-45; Angela Pulley Hudson, *Creek Paths and Federal Roads: Indians, Settlers, and Slaves and the Making of the American South* (Chapel Hill: University of North Carolina Press, 2010), 17–20; Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (New York: Oxford University Press, 2004), 13–34; Allan Greer, “Commons and Enclosure in the Colonization of North America,” *The American Historical Review* 117, no. 2 (April 1, 2012): 365–86.

the Kickapoos informed him that they could give no answer “without consulting the Ouatonons [Weas], being the owners of their [the Kickapoos’] lands.”<sup>7</sup>

Encounter with Euro-American law also transformed Native conceptions of property. By the late eighteenth century, years of experience had schooled Natives on Euro-American conceptions of ownership, and they worked to translate their long-standing views on property into forms that their Anglo-American interlocutors would understand. This was particularly true with respect to Native methods of recording property claims. To supplement methods of preserving territorial claims such as oral testimony, marks on the landscape, and wampum belts, Natives began to use written records of land transactions. So Native leaders carefully preserved copies of the treaties and other papers given them by Europeans, presenting them to later Euroamerican negotiators as proof of their land claims. At one treaty negotiation, “the Indians produced a bundle of papers as records & ratifications of former treaties.” Native access to written texts often caused alarm among federal officials as producing claims that were *too* legible in Anglo-American law. In 1797, U.S. Army General James Wilkinson was highly “embarrass[ed]” when a group of Natives in the Northwest Territory presented him with a document “asserted to be the original counterpart of the Treaty of Greenville left with the Indians” by the federal commissioners. This copy, Wilkinson noted with anxiety, outlined borders that differed from the version ratified by the President and Senate.<sup>8</sup>

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<sup>7</sup>Arthur Camp[bell] to Arthur St. Clair, January 8, 1791, Reel 3, ASCP; “Report of Antoine Gamelin,” 17 May 1790, in SCP, 155–60.

<sup>8</sup>John Parrish, “Book Relative to Indian Affairs Journals to Treaties,” June 12, 1791, Ayer MS 3146, Newberry Library, Chicago, Ill.; James McHenry to Maj. H. LeButts, December 15, 1797, Box 2, James McHenry Papers, Clements Library, University of Michigan. On the role of writing among Native communities during this period, see Shoemaker, *Strange Likeness*, 61–81; Phillip H. Round, *Removable Type: Histories of the Book in Indian Country, 1663–1880* (Chapel Hill: The University of North Carolina Press, 2010).

As these instances suggest, though Native concepts of property diverged from fee-simple ownership, they were neither unfamiliar nor illegible to Anglo-Americans. Community-held commons, as well as parcels subdivided into various interests, had deep roots in the Euroamerican legal tradition. And unclear and uncertain boundaries were characteristic not just of Native property rights, but of property practice of the era more generally. The worn copies of treaties that Natives presented federal negotiators were simply yet more documents asserting ownership amidst the maelstrom of warrants, deeds, and grants engulfing the early American borderlands.<sup>9</sup>

This similarity between Native and Anglo-American concepts of ownership in the borderlands provided cold comfort to federal officials. For them, it merely meant that, like other property claims in the borderlands, Native property and territorial divisions were “extremely vague,” as one federal official complained, requiring those officials to extract order from a complicated and ill-documented history. The diverse forms of communal and shared ownership made parsing out chains of title, as well as obtaining the consent of all the owners, highly challenging. But, as in other instances of line-drawing, the stakes for the federal government were high. Constructing explicit lines of Native property and territory served national interests, bolstered federal authority, and created a clear basis for ownership. As congressional commissioner Samuel Parsons observed,

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<sup>9</sup> On the congruence, rather than divergence, between European and Native property concepts, particularly concerning common ownership, see Greer, 365–86; Shoemaker, 13-34.

“the security of the Title to those [western] lands is much concerned in procuring the confirmation . . . of the Indian Title.”<sup>10</sup>

Creating unambiguous delineations of property was even more salient in the context of Indian affairs because of the risk of conflict. Many federal officials blamed violence between Natives and whites on ill-defined borders. President Washington insisted that Indian boundaries be “very distinctly marked,” so that “ignorance may no longer be offered as a plea for transgressions on either side.” Thomas Jefferson proposed giving Natives letters protecting their lands with “marks of solemnity”—printed on parchment with seals and in tin cases—to guard against intrusions. Natives, too, often sought explicit borders in an effort to curb Anglo-Americans: the Shawnees and Delawares of the Ohio Country demanded that one treaty line be marked by a “great road” cut by axemen to “prevent the White people from settling on their hunting grounds.” For differing reasons, then, both Natives and Anglo-Americans saw the formalization of informal land practices as essential to cross-cultural harmony.<sup>11</sup>

Boundaries between Native and U.S. territory were one thing, boundaries *among* Native nations another. Many federal officials attempted to steer clear of these disputes. Secretary of War Timothy Pickering found these “altercations among [the Indians] about their boundaries” to be “tedious and . . . inconvenient,” and urged federal commissioners at the Treaty of Greenville to enter a single treaty with all the tribes at once to obviate the need to adjudicate Native boundaries: “one instrument,” he wrote, “will save much time

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<sup>10</sup> Timothy Pickering to Anthony Wayne, April 8, 1795, NWTC.; Samuel Holden Parsons and James Davenport to His Excellency Governor [Samuel] Huntington, April 6, 1789, Ayer MS 687, Newberry Library.

<sup>11</sup> George Washington to Secretary of War [James McHenry], July 18, 1796, George Washington Collection, MS-1033, Rauner Special Collections Library, Dartmouth University; Thomas Jefferson to George Washington, March 13, 1793, in *PGW:PS*, 12:314-15; Rufus Putnam to Oliver Wolcott, March 15, 1799, Reel 1, Letters Sent by the General Land Office to the Surveyors General (microfilm), M27, U.S. National Archives, Washington D.C.

and trouble.” At the earlier Treaty of Hopewell, federal commissioners merely guessed at borders between southeastern nations by marking them on the map with a dotted line and describing tribal territories only by referring to neighboring tribes rather than establishing clear boundaries. They told the Chickasaws that they left the question of intertribal boundaries to “the respective tribes.”<sup>12</sup>

Yet the federal government found that it could not extract itself from adjudicating property among tribes. The question of which Native nations were “true owners” of disputed lands, for instance, recurred at the Greenville negotiations, despite Pickering’s instructions. The commissioners at Hopewell ended up promising the Chickasaws that, once they had “agree[d] with the neighbouring tribes respecting their boundary,” the United States “would send a white man to [be] present with the Indians and see them mark it.” (This promise went unfulfilled.) Even Pickering himself sometimes violated his own prescription to avoid intertribal property disputes. When the Chickasaws proposed creating a trading post along the Tennessee River, Pickering authorized it only “if the Chickasaws indisputably own the land, and the Cherokees do not claim it or also consent to the measure.” Pickering even implicitly conceded the role of the United States in resolving intertribal property disputes in yet another controversy about Chickasaw territory, this time about the proper interpretation of a presidential proclamation protecting the Chickasaws. President Washington, Pickering insisted, had clearly not intended “to decide the boundaries between the lands of different Indian nations.”—“at least on the mere representation of only one of the parties,” Pickering

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<sup>12</sup> Timothy Pickering to Anthony Wayne, April 4, 1795; Henry Knox to George Washington, July 21, 1794, in *PGW:PS*, 16:402; Timothy Pickering to David Campbell, August 28, 1795, Folder 2, Timothy Pickering Letters, Ayers 926, Newberry Library; Hopewell Commissioners to John Hancock, January 14, 1786, Item No. 138, Henry Knox Papers (microfilm), Reel/Vol. 47, Massachusetts Historical Society.

quickly continued. As this caveat demonstrated, even Pickering acknowledged that the federal government would intervene to arbitrate property disputes among tribes.<sup>13</sup>

One reason federal officials could not avoid intertribal property claims was that Natives themselves insisted on federal involvement. At the Treaty of Hopewell, for instance, the question of the Chickasaw boundary with the Creeks only arose when an unnamed Chickasaw chief demanded of the commissioners to show him his nation's boundaries on the map: "he wished," the commissioners reported, that "Congress would point out his lands to him, he wanted to know his own."<sup>14</sup>

Subsequent incidents help illuminate why a Native leader would ask United States officials to clarify his own nation's territory. Natives were not ignorant of their own boundaries, but they were eager to learn—and codify—which property rights Congress would protect. At the Treaty of Fort Harmar, for instance, the Wyandots "strongly insisted" on their claim to the lands that the treaty acknowledged as belonging to the Shawnees, even going so far as to demand an explicit treaty provision to recognize their claim. The Wyandots told Arthur St. Clair, serving as treaty negotiator, that they "so much insisted" on this claim because they were certain that the Shawnees would continue their attacks on the United States. As a result, unless the Wyandots' separate property claim was protected under Anglo-American law, the Wyandots would forfeit their rights alongside the Shawnees when the United States punished the recalcitrant Shawnees. The Chickasaws offered similar logic at a negotiation several years later. There, the Chickasaws reportedly told the Cherokees, "Your nation . . . must look upon our lands

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<sup>13</sup> "Minutes of a Treaty . . . Begun at Greenville," 570; Hopewell Commissioners to Hancock, January 14, 1786; Timothy Pickering to David Henley, March 23, 1795, Folder 4, Timothy Pickering Letters, Ayers 926, Newberry Library; Henry Knox to George Washington, 21 July 1794, in *PGW:PS*, 16:402; Pickering to Campbell, August 28, 1795.

<sup>14</sup> Hopewell Commissioners to John Hancock, 14 Jan. 1786.

apart from yours. . . . We want ours separate.” The Chickasaw fear was that the Cherokees were so “stained with the blood of the white men” that it must “end in [the United States] driving you from your lands.”<sup>15</sup>

As these instances exemplify, there were good reasons why Native nations sought federal confirmation of intertribal boundaries. Because the effectiveness of Native title increasingly hinged on U.S. acknowledgment, there were strategic benefits for Natives to write their ownership of disputed territories into federal treaties, thereby enshrining those claims in future disputes with the United States. In the process, Natives forced federal officials to adjudicate property disputes they would have gladly avoided.

Defining Native territory—whether to purchase it or to assuage Native demands—required some basis for determining Native property rights. Anglo-American property law provided little help: interested in taking, not defining, Indian lands, even the most ardent expansionists did not assert that these doctrines, rooted in British common law and state statutes, extended into territory still acknowledged as Indian country. Expansionism did, of course, lead many Anglo-Americans to argue that Natives held few legally protected property rights. Yet, not only had the federal government rejected this position, assessing whether Native title was equivalent to that enjoyed by whites was irrelevant when resolving property disputes *among* Native nations.

Only one form of property law, then, seemed to exist in Indian country: Native property concepts themselves. In the absence of any other basis, adjudicating tribal

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<sup>15</sup> Arthur St. Clair to President [Washington], May 2, 1789, in *TP: Vol. II*, 191–93; James White to James Monroe, August 9, 1792, in *The Papers of James Monroe*, eds. Daniel Preston and Marlena C. DeLong (Westport, Conn: Greenwood Press, 2003), 2:555–57.



property involved determining which tribes were proper owners under Native law. This requirement thrust federal officials into the unlikely role of trying to understand, interpret, and apply Native concepts of ownership.<sup>16</sup>

To gain this information, federal officials came to rely on both Native and non-Native informants. When Knox met with Native leaders, he engaged them in long conversations about the histories and origins of their nations; he also copied ethnographic tracts by travelers in Indian country like William Bartram. For their information, St. Clair and especially Blount turned to a network of official and quasi-official Indian agents, many of whom were intermarried with Native women, knew Native languages, and had long lived in Indian country. Blount praised temporary agent John McKee, previously a trader among the Cherokees, as possessing a deep “knowledge of Indians, their habits & dispositions”; he similarly commended interpreter James Carey, whose “long and intimate” relationship with the Cherokees, “understanding [of] their language and connexion with them,” made him a reliable source on Cherokee country.<sup>17</sup>

In particular, to find out Native ownership rights, federal officials were often instructed simply to ask Natives directly. As Henry Knox instructed a federal negotiator to the Ohio Country, one of the “first objects” of the treaty was “to ascertain *from the Indians* what tribes are the allowed proprietors” of the lands under discussion. Echoing this view, President Washington instructed the Attorney General to determine which

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<sup>16</sup> In the sense that federal governance came to rely on the power conferred by knowledge of the colonized, the early United States represents an early manifestation of what Nicholas Dirks has termed the “ethnographic state.” Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India*. (Princeton, N.J: Princeton University Press, 2001). This link between quasi-ethnographic knowledge of Native peoples and administration had parallels in early Spanish colonialism: see Jeremy Ravi Mumford, *Vertical Empire: The General Resettlement of Indians in the Colonial Andes* (Durham, NC: Duke University Press, 2012). It would also later become more institutionalized, and elaborated, in federal governance of Native peoples. Frederick E Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (Lincoln, Neb: University of Nebraska Press, 1984), 116-45.

<sup>17</sup> William Blount to Secretary of War, November 10, 1794, in *TP: Vol. IV*, 364-70; William Blount to Secretary of War, March 20, 1793, in *TP: Vol. IV*, 244-47.

Native nations were the “acknowledged proprietors” of disputed land in the Ohio country based on which nations’ claims were “conceded generally by other Indians bordering” those lands. Washington continued: at least “as far as the information shall be attainable.”<sup>18</sup>

As Washington’s caveat reflected, parsing Native ownership often confounded federal officials, who disagreed in their interpretations of Native property law. In the Southwest Territory, U.S. representatives struggled to distinguish the overlapping territories of the Cherokees, Creeks, Chickasaws, and Choctaws. One particularly contentious issue proved to be Native ownership of the Cumberland district around Nashville. Both the Creeks and Cherokees objected to Anglo-American settlement, repeatedly informing federal officials that the Cumberland lands were hunting grounds communally owned by them as well as the Chickasaws and Choctaws. They acted on their property rights through near-constant raids: one Cumberland resident complained to congressman James Monroe that the “incessant . . . indian depredations & murders” experienced in the region could “hardly [] be conceived at a distance.”<sup>19</sup>

William Blount, the Southwest Territory’s governor, waded deep into what he understood as Native law to dismiss Cherokee and Creek property claims as mere pretence. Based on “the greatest contiguity to hunting grounds, and the prior use of them”—which, he argued, provided “the best claim Indians can establish” for ownership—the lands properly belonged to the Chickasaws (who had, conveniently, already ceded their claim). Indeed, he argued, in various discussions with federal

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<sup>18</sup> Henry Knox, “Instructions to Major General Anthony Wayne Relatively to a Proposed Treaty with the Indians North West of the Ohio,” 4 April 1794, NWTC (emphasis added); President [Washington] to Attorney General, February 12, 1793, in *TP*., Vol. II, 435.

<sup>19</sup> White to Monroe, August 9, 1792.

representatives that the Cherokees themselves had “admitted the Chickasaw claim was just.” Nor did the Cherokees have a sound basis to establish their own property right. “[B]y the best information I can collect,” Blount told the Secretary of War, “the Claim of the Cherokees to the lands lying on Cumberland is a recent thing,” undermining any basis in long-standing usage. As he pointed out, the Cherokee homelands lay considerably further east, along the Smoky Mountains. It was only as the Cherokees had drifted down the Tennessee in the wake of the Revolution, Blount noted, after ceding their eastern lands, that they showed any interest in the Cumberland territory.<sup>20</sup>

Blount found the Creek claim even more unfathomable. Blount’s Cherokee and Chickasaw informants told him that the Creek hunting grounds traditionally stopped well south of the Tennessee River, and that the Creeks had hunted along the Atlantic coast until the Georgians forced them inland. Moreover, he observed, the nearest Creek village was two hundred miles away from Cumberland, while McGillivray, the Creek leader, lived over three hundred miles away. Blount obtained confirmation of these views at Tellico in 1794, where he grilled Cherokee leaders. “[I]s it not a fact,” Blount leadingly asked Cherokee John Watts about Creek lands, “that in the division of the Lands among them red people . . . [the] Tennessee bounds them on the North?” “What you say about the Boundary of the Creek Land is right,” Watts reportedly replied. Thus, “from anything I have ever heard,” Blount concluded that the Creeks had not even the “colour of claim” to “a foot of land” north of the Tennessee River.<sup>21</sup>

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<sup>20</sup> William Blount to Secretary of War [Henry Knox], January 14, 1793, in *TP: Vol. IV*, 226-34; William Blount to Secretary of War [Henry Knox], Nov. 8, 1792, in *TP: Vol. IV*, 114.

<sup>21</sup> William Blount to Secretary of War [Henry Knox], Nov. 8, 1792; “Conference at Tellico Blockhouse,” November 7, 1794, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 3, no. 4 (October 1, 1898), 367-72.

Blount's interpretations reflected more than self-dealing and arrogance, though they contained a healthy dose of both. As blinkered and ethnocentric as Blount was, he nonetheless keenly felt the need to explain and justify his views based not on Anglo-American law but on Native law as he constructed it, legitimated by Native statements themselves. Yet his interpretation differed sharply from that of the Natives themselves, for two reasons. First, he deprecated Native nations' own statements of their property as opportunistic, favoring the views of neighboring (though hardly disinterested) tribes. Second, he insisted on Native national territory as fixed and unchanging and was unwilling to acknowledge the migrations resulting from Anglo-American colonialism. This position was especially ironic for a man whose political career stemmed from the territorial expansion of the United States and whose personal wealth derived from rampant speculation in western lands.

Not everyone in the Washington Administration agreed with Blount's approach to Native property in the Southwest Territory. Secretary of War Timothy Pickering, for instance—who had a fraught relationship with Blount—found Blount's rejection of Native testimony, and their own actions, unaccountable. “The inveteracy with which the Creeks committed depredations on Cumberland,” Pickering wrote Blount, “satisfied me that they had some latent claim to the lands,” implicitly rebuking the governor. Consulting with James Seagrove, the U.S. agent to the Creeks, Pickering found “his answer justifies my suspicion. The Creeks said their claims on those lands had never been extinguished.” As further proof that the Creeks had a legitimate claim to Cumberland, Pickering pointed to the recent treaty of Colerain, in which the Creeks had

relinquished their claim to the area. Since then, incessant Creek violence against the Southwest Territory had ceased. For Pickering, these actions, rather than the testimony of neighboring tribes or immemorial usage, constituted the strongest evidence of Native property rights.<sup>22</sup>

A similar conflict played out in the Ohio Country, where federal officials confronted an even more complicated set of overlapping claims produced by an even longer history of Native mobility. The Wyandots, Shawnees, Delawares, Ottawas, Chippewas, and Senecas, for instance, all claimed ownership over the lands between Ohio River and Lake Erie, present-day eastern Ohio. Some of these tribes, such as the Wyandots, had been long resident, but most, particularly the Shawnees and Delawares, had arrived from elsewhere. Following Blount's emphasis on immemorial usage, some federal officials concluded that, under Native law, these newcomers lacked any ownership rights. Congress, for instance, opined that the Shawnees "are not considered *by the Indians* as a Nation having any Claim of Territory." Or, as treaty commissioner Samuel Parsons put it more bluntly, the Shawnees "do not own a Foot of Land in the World"; an Indian country trader told a federal military commander that the same principle applied to the Wyandots and Delawares as well.<sup>23</sup>

Other officials followed the course charted by Pickering and credited nations' ownership claims based on occupancy, regardless of earlier history. Secretary of War Henry Knox, for instance, instructed negotiators to acknowledge title in the tribes "who were the actual occupants of the lands as the proper Owners thereof." This argument

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<sup>22</sup> Pickering to Campbell, August 28, 1795.

<sup>23</sup> Worthington Chauncey Ford, ed., *Journals of the Continental Congress 1774-1789* (Washington: Government Printing Office, 1904-37), 34:95-101 (emphasis added); Samuel Holden Parsons to Samuel Johnson, December 3, 1785, Folder 5, Samuel Holden Parsons Papers, Connecticut Historical Society; David Duncan to Josiah Harmar, March 28, 1786, Vol. 3, JHP.

rested in part on analogy to Euroamerican legal concepts. In the eyes of one army officer, the Delawares were the “actual proprietors” of the lands in the eastern Ohio Country. But because other nations “now reside and hunt on those Grounds,” they “by possession have attended a kind of claim.” As these statements suggest, Anglo-Americans believed that under Native law, as in Anglo-American law, occupancy itself could yield title. Occupancy as the basis for ownership had the added benefit of clarity in the midst of an often confusing muddle.<sup>24</sup>

Occupancy became a particularly salient legal concept as federal officials waded into the question of Haudenosaunee (Iroquois) ownership of the Ohio Country. Decades earlier, at the 1768 Treaty of Fort Stanwix with the British, the Six Nations had ceded land south of the Ohio that they purportedly owned through conquest, much to the anger of Shawnees and other tribes who actually inhabited that territory. In the 1784 Treaty of Fort Stanwix, this time held with federal commissioners of the United States, the Six Nations now ceded the United States lands *north* of the Ohio, claimed “by virtue of [the Six Nations’] former conquests,” a cession reconfirmed at the 1789 Treaty of Fort Harmar.<sup>25</sup>

Federal officials now came to question the validity of these claims to ownership under Native law. When Timothy Pickering asked the Six Nations about the Ohio Country, for instance, the chiefs declared “their title to the lands . . . was acknowledged by *all* the Western Indians.” But when Pickering pressed the Six Nations to cede these

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<sup>24</sup> Henry Knox, “Instructions to Major General Anthony Wayne Relatively to a Proposed Treaty with the Indians North West of the Ohio,” April 4, 1794, NWTC; Jonathan Heart to William Judd, August 20, 1789, Jonathan Heart Papers, VFM 5748, Ohio Historical Society, Columbus, Ohio.

<sup>25</sup> Knox, “Instructions to Major General Anthony Wayne,” April 4, 1794. On the 1768 Treaty of Fort Stanwix, see William J. Campbell, *Speculators in Empire: Iroquoia and the 1768 Treaty of Fort Stanwix*, New Directions in Native American Studies vol. 7 (Norman: University of Oklahoma Press, 2012); Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* (New York: Oxford University Press, 2013), 49-95.

lands to the United States for a third time, the chiefs “confessed that the four most hostile tribes denied their right to it.” Pickering concluded that, “whatever claim the Six Nations might formerly have to the lands Westward of the Allegany, they long relinquished the same to the Delawares and others of the present Western Indians.” All the earlier cessions of the Six Nations, then, “I consider as affording us but the Shadow of a title” to the Ohio Country; the federal government would have to negotiate with the lands’ actual inhabitants to extinguish their claims.<sup>26</sup>

In the end, whether they happily made supposedly authoritative pronouncements on the validity of Native property, like Blount or Parsons, or waded into the morass of competing assertions only grudgingly, as with Pickering and Knox, federal officials all became interpreters of Native property law. In determining which property rights the federal government would honor, Pickering and Knox’s broader approach, favoring occupancy and tribes’ own statements of ownership, prevailed over the more crabbed and static vision of Blount, in which tribes’ property rights derived from immemorial usage alone. In part, this was a matter of expediency. As Pickering’s instructions at Greenville suggested, it was easier to simply compensate tribes than to haggle over property rights or risk conflict. But it was also a matter of the legibility of Native property law. The ubiquity of occupancy as a source of ownership in Anglo-American law made it difficult to deny Native rights grounded in the same principle. Occupancy was also more workable: ironically, given its stinginess, Blount’s approach required wading into history to uncover the “true” owners, while occupancy afforded a bright-line rule for adjudicating Native disputes like that over the Ohio country. In working through these

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<sup>26</sup> Pickering to Wayne, April 8, 1795.

disputes, federal officials created their own federalized version of Native property law, as they wished to understand it.

The history of federal adjudication of Native property rights presents a paradoxical view of the rise of federal authority over title. On the one hand, as eager as federal officials were to seize Native land, most had little desire to determine questions of Native property law. It was the structure of early American land law that made federal adjudication of Native ownership inescapable. Natives could only alienate what they owned, and, with the federal government the only legitimate purchaser, federal officials had to decide thorny questions of Native law as they interpreted it, for they had no other basis to determine the legitimacy of Native property rights. The role of arbiter of Native property law was also thrust on reluctant federal officials by Native peoples themselves. For all that westward expansion involved the denial and erasure of Native governance and property, then, the requirement of valid title entailed federal officials' implicit recognition and attempt, however half-hearted, to understand Native law.

But on the other hand, the consequence of this constrained choice by federal officials was the aggrandizement and expansion of federal power over property. This outcome reflected the constrained choices that Native peoples confronted: federal acknowledgment of Native title, especially in formal Anglo-American legal documents, presented one of the only viable avenues to attempt to preserve Native lands against Anglo-American encroachments. But the effect was that property disputes under Native law came to be adjudicated within a federal forum, relying on incomplete federal



understandings of indigenous legal orders. This pattern, which held throughout the nineteenth and twentieth centuries, had pernicious consequences for Native peoples. It made Native title appear as if it existed merely at the sufferance and whim of federal officials, and transformed Native property rights into “claims” whose validity hinged on legibility within highly formalized Anglo-American law. In this sense, even though federal officials embraced a vision of Native property more sympathetic than most Anglo-Americans of the time, the rise of federal title came at the expense of Native ownership.<sup>27</sup>

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At the same time that federal officials were struggling to make sense of Native property law, some of those same officials were working to interpret another body of foreign law to codify customary property practice within the U.S. territories. The law in question was that of the French inhabitants of villages stretching along the Mississippi and Wabash Rivers in the Northwest Territory. Both the law of nations and the Northwest Ordinance guaranteed the property rights of these settlers. Yet implementing this promise by determining the title of these few hundred settlers proved daunting. Beginning in the late 1780s and lasting for over a decade, adjudicating these French property claims occupied inordinate amounts of federal administrative attention. The governor and secretary of the Northwest Territory spent years untangling the settlers’ rights. As in the case with Native title, though, the result of this process was more than

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<sup>27</sup> For histories that consider Native land claims advanced before federal officials in the twentieth century, see Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* (New Haven: Yale University Press, 2007); David E. Wilkins, *Hollow Justice: A History of Indigenous Claims in the United States* (Yale University Press, 2013). The history presented here suggests that the more explicit role for ethnohistorical sources in Native land claims that McMillen traces has important precursors in the more informal ethnography forced on federal officials in the late eighteenth century.

the sum of its parts. In working through these seemingly penny ante disputes, federal officials established precedent for resolving what came to be known as private land claims, and entrenched the principle that land claimants looked to the national government for secure title.

French settlers arrived in what was then known as the Illinois country in the late seventeenth and early eighteenth centuries. They built villages along the rivers linking French Canada and Louisiana: Vincennes, along the Wabash River in present-day southern Indiana; Kaskaskia, Cahokia, and Prairie du Rocher, along the Mississippi River in present-day downstate Illinois. Remote outposts whose residents were closely tied to surrounding Native nations through kinship and intermarriage, these towns capitalized on their proximity to Natives to serve as entrepôts in the Indian trade between the continent's vast Native interior and the Euroamerican commercial centers of Montreal and Detroit.<sup>28</sup>

Despite their isolation from other European settlements, the villages' strategic location along the Mississippi and Wabash made them integral in the long contest for control over the continent. By the time federal officials arrived in the late 1780s, formal sovereignty over the territory had switched three times. First, at the end of the Seven

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<sup>28</sup> On the history of French settlements in the Illinois country and their relations with Natives, see Robert Michael Morrissey, *Empire by Collaboration: Indians, Colonists, and Governments in Colonial Illinois Country* (University of Pennsylvania Press, 2015); Carl J. Ekberg, *French Roots in the Illinois Country: The Mississippi Frontier in Colonial Times* (Urbana: University of Illinois Press, 1998). On Vincennes in particular, see Andrew R. L. Cayton, *Frontier Indiana* (Indiana University Press, 1998), 1–97; Denise Marie Wilson, “Vincennes: From French Colonial Village to American Frontier Town, 1730-1820” (West Virginia University, 1997). Detroit, formally part of the United States under the terms of the Treaty of Paris, remained under British control until 1796, when the British ceded sovereignty. As discussed later in the chapter, after cession Detroit presented many of the same land claims problems as the Illinois and Wabash countries. On Detroit, see Catherine Cangany, *Frontier Seaport: Detroit's Transformation into an Atlantic Entrepôt* (Chicago: University of Chicago Press, 2014); Karen Marrero, “On the Edge of the West: The Roots and Routes of Detroit's Urban Eighteenth Century,” in *Frontier Cities: Encounters at the Crossroads of Empire*, eds. Jay Gitlin, Barbara Berglund, and Adam Arenson. (Philadelphia: University of Pennsylvania Press, 2012), 66-87.

Years' War, the British had replaced the towns' French government. Then, during the American Revolution, the Virginians invaded, at once displacing the British and ravaging the towns' economy, as the militia freely pillaged from the people they had supposedly liberated. Finally, sovereignty passed again when Virginia ceded both ownership and jurisdiction over the region to the federal government in 1784.<sup>29</sup>

When federal officials at last arrived at the villages beginning in the late 1780s, they were unimpressed by what they saw, filtering their impressions through a haze of class and cultural contempt. Vincennes, the largest of the three settlements, held only 330 families. With its economy wrecked by war, the town's buildings were "low, Old, and ugly," many in "decay'd & even ruinous condition." (The situation in the other towns was similar: Kaskaskia was reportedly "nothing more then [sic] a heap of ruin.") Anglo-American visitors had little respect for the inhabitants, whom they found "very Ignorant," even though, not knowing French, many officials could not speak with them. Their disdain also had a racial element. As a result of the inhabitants' "vicinity, trade, and intermarriages" with neighboring tribes, Vincennes residents were "a good deal on the savage establishment" and "barely . . . removed from the Indians"; many wore Indian clothes and had "brown complexions." Federal officials thought these residents ill-suited for American governance. "The people will not relish a free government," territorial judge John Cleves Symmes reported after a visit to Vincennes. "[T]hey say our laws are too complex, not to be understood, and tedious in operation—the command or

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<sup>29</sup> On the Revolutionary War in the Illinois Country, see George Rogers Clark, *The Conquest of the Illinois*, ed. Milo Milton Quaipe (Carbondale: Southern Illinois University Press, 2001); Cayton, *Frontier Indiana*, 70-97.

order of the Military commandant is better law and speedier justice for them & what they prefer to all the legal systems found in Littleton and Blackstone.”<sup>30</sup>

Symmes’s sneers notwithstanding, the French settlers possessed a legal system that depended on more than military whim. Their property law, based on a French legal code known as *Coutumes de Paris*, was grounded in notarial practice, with formal, written deeds in standardized language sworn before publically appointed notaries. The settlers employed community schemes of marital property, required wives’ consent for sales of communally held lands, and measured lands in arpents, a standard French unit slightly smaller than the Anglo-American acre. They had developed a tripartite division for their lands—individually held townlots, river lots divided in French fashion into long strips, and commons. Individuals owned the river lots, but they were worked communally through an open-field system.<sup>31</sup>

Yet, just as Littleton and Blackstone were poor guides to the property law on the Anglo-American frontier, the French villagers’ property practices reflected the exigencies and customs of the borderlands as much as they did the *Coutumes*. In particular, land ownership did not have the salience for the *habitants* it held for the land-crazed Anglo-Americans. In the mid-eighteenth century, the Illinois Country had been the center of a booming flour trade, producing wheat and livestock that was transported downriver to

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<sup>30</sup> John Cleves Symmes to Robert Morris, June 22, 1790, in *CJCS*, 287; William Clark, “Journal,” August 20, 1797, NWTC; John Armstrong to Richard Anderson, August 8, 1787, Box 1, Folder 20, Armstrong Papers, M6, Indiana Historical Society; Symmes to Morris, June 22, 1790. On Anglo-American views of the *habitants*—which sometimes romanticized them as pre-modern peasants—see Edward Watts, *In This Remote Country: French Colonial Culture in the Anglo-American Imagination, 1780-1860* (Chapel Hill: University of North Carolina Press, 2006).

<sup>31</sup> The foremost work on land tenure in the Illinois Country is Carl J. Ekberg, *French Roots in the Illinois Country: The Mississippi Frontier in Colonial Times* (Urbana: University of Illinois Press, 1998). Ekberg observes that “the system of land tenure in the early Illinois Country was variegated and complex,” but notes that, throughout the region, nearly all the towns employed the same land use pattern, what he terms the “iron triad” of “nuclear village, compound of arable fields, pasture commons.” *Ibid.*, 31-110. For an examination of the *Coutumes de Paris* in the region, see Carl J. Ekberg and Sharon Person, *St. Louis Rising: The French Regime of Louis St. Ange de Bellerive* (Urbana ; Chicago ; Springfield: University of Illinois Press, 2015),

Louisiana. But thirty years of war, competition from Anglo-American farmers up the Ohio, and an exodus of many into Spanish-held Louisiana led the remaining *habitants* to live mostly by commerce, describing themselves as “chiefly addicted to the Indian trade”; Anglo-Americans ironically disdained the French they encountered as “indifferent Farmers.” Moreover, communal farming and the settlements’ remote location meant that there was little to be gained by engrossing enormous tracts in the fashion of Anglo-American speculators. Land held little value as a commodity without the prospect of ever-increasing land values driven by constant immigration. As a result, land practice in the French villages reflected the informality of life in close-knit communities where residents knew each other’s holdings. Boundaries were drawn haphazardly and imprecisely; Vincennes was remarkable, an Anglo-American surveyor observed, for its “extreme irregularity.” Written deeds spoke vaguely of lots extending “of the depth of one street to the next” and referenced locations based on neighboring owners. One land contract contained only a promise to sell along with the assurance that, “as soon as we see each other again I will straighten all things out.”<sup>32</sup>

Anglo-American law guaranteed the persistence of French property law and norms in the villages after the cession to the United States. Under the law of nations, private property rights within transferred territory could not be invalidated. Honoring this requirement, Virginia’s cession to the federal government required that the French settlers “shall have their possessions and titles confirmed to them.” The Northwest

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<sup>32</sup> “Journal Kept by George Hunter of a Tour from Philada. to Kentucky by the Illinois Country,” July 14-Oct. 15, 1796, American Philosophical Society, Philadelphia, Penn.; “Land Sale Contract Btw/ Dominique Burguant and Josete Poirier and Vital Bouche,” (typescript translation), December 24, 1782, Translation, I.164, Lasselie Family Papers, L127, Indiana State Library, Indianapolis, Ind.; “Land Contract,” (typescript translation), February 28, 1792, I.291, Lasselie Family Papers.

Ordinance in turn promised that French settlers' "laws and customs" concerning "the descent & conveyance of property" would remain valid.<sup>33</sup>

In June 1788, responding to petitions from the French villages, the Continental Congress sought to fulfill these guarantees by legislating that "ancient settlers" who had lived within the villages in 1783 would have their claims confirmed; they would also each receive nearby tracts of 400 acres, to be laid in parallelograms. It directed the newly appointed territorial governor Arthur St. Clair to adjudicate and confirm the settlers' titles, "according to the laws & Usages of the Governments under which they have respectively settled." Congress even recognized that that the settlers "may have acquired equitable Titles to lands under some peculiar Customs established and recognized in the ancient French Colonies where no actual grants have passed." It accordingly ordered St. Clair to honor these "equitable or Customary rights to Lands" rather than dispossess the villagers.<sup>34</sup>

St. Clair finally reached the Illinois and Wabash Countries in summer 1790. He and his second-in-command, territorial secretary Winthrop Sargent, instructed the towns' residents to appear before them with the papers and witnesses necessary to establish their claims to land, on which St. Clair and Sargent would then pass judgment.

This task proved more daunting than either Congress or Washington anticipated when they charged the territorial officials with this responsibility. Part of the problem was volume: St. Clair received over 4,000 land claims to adjudicate. An even more

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<sup>33</sup> "Cession of Western Land Claims," March 1, 1784, in *TP: Vol. II, 6-9 Journals of the Continental Congress, 1774-1789*, 32:334-43. For a codification of the requirement of honoring the land rights of conquered peoples in the era's most influential international-law treatise, see Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Chapter XIII, § 200 (Indianapolis, IN: Liberty Fund, 2008).

<sup>34</sup> *Journals of the Continental Congress*, 34:247-52; "Resolution of Congress: The Inhabitants of Vincennes," August 29, 1788, in *TP: Vol. II*, 145-47; "Report of Committee: Petition from Post Vincennes and the Illinois Country," May 5, 1788, in *TP: Vol. II*, 105-09.

substantial problem was evidence. St. Clair and Sargent were accustomed to Anglo-American land recordation schemes, in which counties tracked parcels in official ledgers. The villages lacked anything comparable. “[N]o records are preserved,” one official lamented. There had been written grants from French and British officials, but they had been scribbled on “small scrap[s] of paper,” Sargent complained, then passed to notaries who recorded them on “loose sheets.” These notarial papers rarely survived. One notary had reportedly run off with all the public records, while the other papers were simply scattered upon a notary’s death. Notaries also passed deeds into the hands of owners, but these records were either later “fraudulently destroyed” by interested parties, or, entrusted to people Sargent thought “unacquainted with their consequence” who then lost them: “for, by the French usage, [these deeds] are considered as family inheritance, and often descend to women and children.” Sargent thus read the difficulty as one of cultural difference—the failure of French law to conform to Anglo-American legal and gender norms. In fact, the villages’ “usage” reflected less differences in formal law than the legal norms of a society where the absence of a land market among strangers created little need to establish clear chains of title.<sup>35</sup>

This informality extended beyond recordkeeping to encompass the sources of ownership. “The confusion of title here is a labyrinth of perplexity,” Judge Symmes reported from Vincennes, “which requires the utmost care nay tenderness to set right.” Symmes noted the “variety” of titles: “prescription, bar[e] possession—fraudulent deeds from those who had no right to sell.” Title to much of the land around Vincennes rested

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<sup>35</sup> Symmes to Morris, June 22, 1790; “Report of the Proceedings of Winthrop Sargent Upon the Land Claims of the Settlers of Vincennes,” July 31, 1790, in *The Territorial Papers of the United States, Vol. III, The Territory Northwest of the River Ohio, 1787-1803, Continued*, ed. Clarence Edward Carter (Washington, D.C.: Government Printing Office, 1934) [hereinafter *TP: Vol. III*], 323-32.

on a purchase from the local Piankeshaw Indians that had been made, the town's inhabitants insisted, in "utter[]" ignorance of the "laws of America, respecting land-affairs." Other portions of land were commons, which some settlers now sought to have distributed in individual tracts.<sup>36</sup>

The fundamental challenge that confronted St. Clair and Sargent, then, was translating a customary land system suited for local needs into a formalized framework legible in Philadelphia and elsewhere, one in which ownership rested on legitimate sources of title established by written, impersonal evidence. Overseeing this act of translation gave St. Clair and Sargent tremendous discretion in determining which claims to honor and which to reject. The paucity of written evidence presented them—"there is scarcely one case in twenty where the [written] title is complete," Sargent lamented—meant that they had to rely on "oral Testimony" about land ownership (though, in a rare fit of optimism, Sargent conceded that much of this testimony was "very good").<sup>37</sup>

This task also thrust the Pennsylvanian St. Clair and the New Englander Sargent into the unlikely role of experts on French colonial land law, addressing questions for which, as in the case of Native title, there was no basis for adjudicating other than reference to validity under prior local practice. In one case in the town of Kaskaskia, St. Clair rejected the claim of a man named Cruelly, who proffered testimony from a Mr. Bughet that he had received a land grant. St. Clair nonetheless disallowed the claim on the ground that, based on Bughet's testimony, the grant appeared to be on Jesuit land. But if Cruelly had obtained the land from the Jesuits, it could only be a leasehold, since

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<sup>36</sup> Symmes to Morris, June 22, 1790; "Petition of the Inhabitants of Post Vincennes," July 26, 1787, in *TP: Vol. II*, 58-60.

<sup>37</sup> "Report of the Proceedings of Winthrop Sargent," 323-32.



under French practice, as understood by St. Clair, Jesuit land “could not be alienated.”

St. Clair also faced a question of land tenure when ruling on the titles of settlers who had crossed the Mississippi to Spanish territory. Because these grants were not in fee simple but reverted to the king’s domain when vacated—or at least so St. Clair concluded—these tracts “strictly” belonged to the United States as the king’s successor, though St. Clair hinted to the Secretary of State that he thought some temporary relief warranted.<sup>38</sup>

The thorniest question confronting St. Clair and Sargent, though, was not an “ancient” claim at all, but a hybrid issue of custom and federalism that had arisen only a few years earlier. Shortly after the Virginians arrived in the Illinois Country, their regional commander, Lieutenant Todd, had authorized the local courts to make land grants, which they did right up through 1787, to the amount of 48,000 acres. Todd claimed this authority based on precedent: local court officials explained to Sargent that “since the Establishment of this Country, the Commondants have always appeared to be vested with the powers to give Lands.” Local courts then issued land grants citing both Todd—inflated into the “Chief Justice for the United States”—and “utmost necessity” for authority, while also stressing that the granted lands had not been given or owned by anyone.<sup>39</sup>

St. Clair recognized none of these authorities. In his view, Todd’s grants were triply invalid. First, Todd held no authority to grant land under Virginia law; second, even if he had, he could not delegate this power to the courts; and, third, since most of the

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<sup>38</sup> “List of Lots at Kaskaskia,” March 17, 1790, Reel 7: Financial & Military Records, Personal Papers, 1776-1818, ASCP; “Report of Governor St. Clair to the Secretary of State,” February 10, 1791, in *TP: Vol. II*, 323-37.

<sup>39</sup> “Report of the Secretary of State to the President,” December 14, 1790, in *TP: Vol. II*, 315-17; “F. Bosseron and Others to Acting Governor Sargent,” July 3, 1790, in *TP: Vol. II*, 282-83; Gabriel Legrand, clerk of the court, “Land Grant to Thomas James,” (typescript translation), February 22, 1782, I.157, Lasselie Family Papers.

grants had occurred after Virginia's cession to the United States, they were "absolutely void." St. Clair accordingly "uniformly rejected" these grants as "altogether unauthorized" and "usurpation[s]" by "self created" officials.<sup>40</sup>

The irony in these assessments was how little they resembled the operation of a "free government" as envisioned by Judge Symmes. St. Clair and Sargent were not law-trained judges determining title in adversarial cases turning on the fineries of Blackstone. They were unelected federal administrators, appointed by a distant legislature without any involvement of the French villagers, passing judgment based on their own impoverished understandings of French land law and practice. They became, in short, the latest in the line of "commandants" to rule over the villagers and their property. Yet they differed from their French and British predecessors in their insistence on formalizing local land practices. By the end of 1790, St. Clair, with Sargent's assistance, had ruled on the myriad claims presented him. Now, in place of the plurality of sources of ownership that had previously governed village life, St. Clair aspired to substitute a single valid title—a patent, issued by an authorized representative of the national sovereign, with the promise of the clear and authoritative point of origin that St. Clair and Sargent had found so lacking.

If the United States was more autocratic than Symmes believed, the French settlers proved both less acquiescent and better equipped to navigate the "free" institutions of their new government than he anticipated. Rather than passively accepting St. Clair's judgments, petitioners from the villages importuned Congress to allow claims

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<sup>40</sup> "List of Lots at Kaskaskia," March 17, 1790; Arthur St. Clair to Winthrop Sargent, July 6, 1790, in *TP: Vol. II*, 283-84.

based on Indian purchases as well as on Todd's grants. The French foray into the early American culture of petitioning proved successful. Likely anxious to secure the allegiance of the French villagers in a volatile borderland, Congress granted relief to many of the claimants St. Clair had denied. Under a 1791 statute, both Indian purchases and Todd's grants were allowed as long as the lands had been "actually improved." Congress responded to further complaints from the villagers in another statute two years later, promising to pay for surveying at public expense.<sup>41</sup>

Yet the French settlers confronted another, less appealing facet of Anglo-American governance when they faced interminable delays in securing their title. The villages' informal land system had had little call for the elaborate boundary-drawing that employed so many young Anglo-American men as surveyors: unlike Cincinnati or Marietta, where nearly every man of property had started as a surveyor, the Illinois Country had only one man "who could run a single line," in St. Clair's estimation. When this single surveyor became ill, St. Clair struggled to find a replacement to mark out the new tracts. Centralizing the authority to grant lands in the federal government also held matters up, as administrators debated the legal niceties of authority. St. Clair had first flagged the question of whether he held the authority to issue patents early in 1792; in 1794, U.S. Attorney General William Crawford was still discussing the question. He concluded that the 1791 statute only implied, but did not specifically provide, that this authority should be held by the territorial governor; nor did the Constitution or the laws

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<sup>41</sup> Act of March 3, 1791, 1 Stat. 221; Act of February 21, 1793, 1 Stat. 318. For negotiations over the price of surveying Vincennes lands, see Samuel Baird to Winthrop Sargent, July 5, 1792, Reel 3, WSP.

authorize the President to fill this breach. The residents would have to wait, the Attorney General concluded over Winthrop Sargent's objections, for Congress to act.<sup>42</sup>

This delay turned the forthcoming federal grants into yet another paper promise of land circulating freely and widely through the early republic, luring speculators. Anglo-Americans had arrived in the French villages early after the American Revolution, attracted by word of the French charters that promised solidity of title. Now, with the promise of federal patents, the French lands became commodities, casting them into the churning sea of early American land speculation. The French residents—many of whom were part of a trading culture that held that “Merchants ought to have nothing to do with lands,” others of whom had already moved across the Mississippi River into Spanish territory—largely cashed out, transferring the promise of their grants to a “few speculators.” When territorial judge George Turner came to Vincennes in 1794, he reported that “[b]y far the greater part [of the French settlers], having neither patience nor, as they say, much confidence left in the promise of Government, have sold their rights for little or nothing,” reducing the poorer residents to living as tenants on their neighbors' lands. Supposedly a federal grant could be purchased for a rifle or a mediocre horse. When Governor St. Clair at last returned to the Illinois and Wabash Countries the next year to rule on expanded land rights authorized by the 1791 statute, he found the claims had proliferated: both the “old rights and the Court Grants had become subjects of traffic, and scattered in different parts of the United States.”<sup>43</sup>

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<sup>42</sup> “Report of Arthur St. Clair on Western Lands,” February 21, 1799, Reel 1: Territory Northwest of the Ohio River, Senate Territorial Papers, M200, U.S. National Archives; William Bradford to Secretary of State, March 25, 1794, Northwest Territory Archives, Burton Historical Collection, Detroit, Mich.; Winthrop Sargent to Secretary of State, April 19, 1794, in *ibid.*

<sup>43</sup> Thomas Forsyth to [Unknown], August 20, 1802, Francis Vigo Papers, M289, Indiana Historical Society, Indianapolis, Ind; “Journal Kept by George Hunter,” July 14-October 15, 1796; Judge Turner to Gov. Arthur St. Clair, June 14, 1794, in *TP: Vol. II*,

St. Clair's return visit to the Illinois Country in 1796 was, in many respects, a repeat of his first. Once again, he faced the challenge of adjudicating claims based on a vague standard, although in this case the source was not French but federal law. Congress's 1791 law protected the rights of settlers who had constructed an "actual improvement": this, St. Clair complained, "is not a very definite term." St. Clair delegated the task to Sargent, who, in 1797 and '98, parceled out tracts of 400, 200, or 25 acres, based on his assessment of a parcel's state of improvement. After Sargent left to serve as governor of the Mississippi Territory, St. Clair struggled to make sense of the notes he had left behind. "[I]t is not easy to discover by what rule [Sargent's grants] were governed," he lamented. "[T]he people are extremely dissatisfied."<sup>44</sup>

Patents to the lands finally began to be issued in 1799. But, as with many land sagas, conflict and confusion over title in the Illinois and Wabash Countries dragged on—past the creation of a new and separate Indiana Territory with Vincennes as its capital, from the Illinois and Wabash Countries, and even past the admission of Indiana and Illinois as states. Congress ultimately created a board of commissioners in 1804 to weigh unexamined claims anew, and 1812, established another board to reassess the validity of the grants made by St. Clair and Harrison. These boards demonstrated that St. Clair's promise of definitive ownership, resting on a clear chain of ownership, was illusory. On the contrary, they spoke of St. Clair just as the governor had dismissed the land practices of Todd and others. St. Clair had managed the "business" in a "loose

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325-26; Gov. Arthur St. Clair to Secretary of State, January 1796, *TP: Vol. II*, pp. 542. For examples of residents selling their lands, see "Land Contract" (typescript translation), April 15, 1791, I.293; "Land Contract," August 24, 1791, translation, I.298, Lasselie Family Papers. William Henry Harrison, perhaps hyperbolically, asserted that a rifle or horse was the price of 1,000 acres of land in Vincennes in the 1790s. Francis S. Philbrick, *The Laws of Indiana Territory 1801-1809* (Springfield, Ill.: Trustees of the Illinois State Historical Library, 1930), lxxiii.

<sup>44</sup> St. Clair to Secretary of State, January 1796; "Report of Arthur St. Clair on Western Lands," February 21, 1799.

manner,” they lamented, relying on ill-defined “bundles of papers” to determine claims, and sometimes exceeded his authorization from Congress. Throughout the entire process, they discovered copious evidence of fraud and self-dealing, in the form of perjured affidavits, faked transfers, and illegal interpolations in the entry books. And they hinted that St. Clair had colluded in the process, confirming tens of thousands of acres in dubious grants obtained by his sons as well as St. Clair’s associate, the local magistrate John Edgar. They did not wish to “impeach the character of any man,” the commissioners observed, but if the facts made it “appear that something has indeed been ‘rotten in Denmark,’ we cannot help it.” The stream of petitions and congressional interventions did not finally end until the 1830s. In the end, many of St. Clair’s seemingly questionable grants stood, receiving confirmation through congressional statutes that simply confirmed titles that the commissioners had questioned but not rejected outright.<sup>45</sup>

The commissioners cast their struggle in moralistic terms, describing themselves as wading through the “very mire and filth of corruption.” Yet, as we have seen, St. Clair and Edgar were hardly alone in using official positions to pursue land speculation. In the territories, the ability to tilt property confusion to personal advantage was less a character flaw than a requirement for office—quite literally, given how many territorial officials

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<sup>45</sup> *ASP:PL*, 1:539, 2:176. Tracing the incredible tangled history of the land claims in the Illinois Country and Vincennes—described by a chronicler as “tedious in its details”—is beyond the scope of this study. An overview appears in Francis S. Philbrick, “Introduction,” in *The Laws of Indiana Territory 1801-1809* (Springfield, Ill.: Trustees of the Illinois State Historical Library, 1930), lxxv-c; see also Leonard Lux, *Vincennes Donation Lands* (Vincennes, Ind.: Vincennes Historical and Antiquarian Society, 1977). Some of the lengthy reports considering the subsequent history of land claims in the region appear in *ASP:PL*, 1:146, 237, 264, 267, 508; 2:101, 220, 389; 3:1, 249, 341, 359, 379, 381, 409.

It is also important to note that there was no direct judicial review available for the decisions of commissioners, which were confirmed through Act of Congress and so primarily subject to congressional oversight, a pattern that remained for the better part of the nineteenth century. The legality of governmental land grants were frequently litigated in ejectment actions between conflicting claimants, but the government was not a party, and judicial scrutiny was limited. For background on this procedural history, see Jerry L. Mashaw, “Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829,” *Yale Law Journal* 116 (2007): 1725–27; Ann Woolhandler, “Judicial Deference to Administrative Action - A Revisionist History,” *Administrative Law Review* 43 (1991): 216–21.

owed their appointments to their prominence as landholders. By personalizing the confusion and placing the blame on St. Clair's self-dealing, the commissioners overlooked the deeper roots of what happened in Vincennes and the Illinois Country. Fraud and deceit were the consequence of the collision between informal village land systems with multiple, poorly documented sources of ownership, and the rapacious early American land market. Congress exacerbated the problem when it granted a single official expansive discretion, and confusing instructions, to parse thousands of poorly documented claims that he barely understood. Clarity of title, the federal government discovered, could not be so easily or so cheaply bought.<sup>46</sup>

The struggles to address the title of the French settlers were a harbinger of things to come. Even before Sargent had finished his work in the Illinois Country, he found himself replicating the process in Detroit, which passed to U.S. sovereignty in 1796. Once again, Sargent was shocked by how “extreme loose[ly]” the inhabitants had dealt with land, with “scarcely a single Deed made where a Boundary was expressed”; he once again set about attempting to create what he saw as order from perceived chaos. There were more Vincennes and Detroits down the line as the United States expanded. Even as the federal land system envisioned tidily surveyed rectangular tracts marching across vacant land, the territory the United States sought to incorporate was seldom empty or unclaimed by Europeans, let alone Native peoples. Recognizing and resolving these

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<sup>46</sup> *ASP:PL*, 1:539.

claims consumed enormous amounts of federal time and resources over the nineteenth century.<sup>47</sup>

The challenges presented by prior Native and European ownership were more similar than the sharp dichotomies drawn between Natives and Euroamericans then and now—between oral and written cultures, or between customary and formal law—would suggest. In both Native and French villages, land practice reflected societies in which ownership was informal and localized, and where title relied on a hybrid of oral and written remembrance for proof. The structure of early American land law similarly constrained the federal government to acknowledge the property law of both sets of prior claimants to the land, even if the recognition of Native law, unlike the formal incorporation of French law, was implicit and partial at best. As a result, in both instances, often reluctant federal officials found themselves mired in the details of alien property regimes, as they sought to use incomplete and contradictory evidence to translate informal ownership practices into a system where official documents granting well-defined and unambiguous title circulated as commodities.

The difference lay in the purpose, not the nature, of the assessment. Federal officials sought to interpret Indians' title in order to extinguish it; they sought to understand the French villagers' title to confirm it, even if they regarded the French settlers as barely distinguishable from Natives. Undoubtedly racial, this distinction also owed much to the contrast between the quasi-foreign status of Native nations and the

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<sup>47</sup> Winthrop Sargent to Secretary of State, September 30, 1796, *TP: Vol. III*, 456-68. A consideration of these claims appears in Paul W. Gates, *History of Public Land Law Development*. (Washington: [For sale by the Supt. of Docs., U.S. Govt. Print. Off.], 1968), 87-120.



position of the French settlers, however unwilling, as newly minted “citizens” of the United States.

Another parallel between Native and Euroamerican claims concerned the role of the federal government. As with Native title, arbitrating property rights within the French villages both constrained and expanded federal authority. Congress’s decision to task federal territorial officials with this job did not result from a thoughtful deliberation that the territorial governor was well equipped to wade into the villagers’ land problems; rather, urgent petitions from the French settlers forced the federal government to fulfill the abstract promises extracted by Virginia in its cession, and St. Clair and Sargent were already there. But making these local land decisions a federal responsibility granted a *de facto* right of appeal to Congress and the executive branch. As a result, though neither the President, his cabinet, nor Congress had expertise, nor likely much interest, in colonial French land practice, they confronted constant petitions and appeals to recognize settlers’ land claims. In this manner, the settlers and claimants claimed an unlikely and outsized presence on the national agenda and forced the federal government to repeatedly intervene in their jejune land disputes.

The claimants, of course, were pursuing their self-interest, not trying to bolster federal authority. But the consequence of their actions was the considerable centralization of these small-bore disputes in the federal government. Most title disputes in early America were settled in local courts, a precedent Virginia happily followed in the Illinois Country by devolving all authority to local judges and then entirely neglecting the region. Title in Vincennes and elsewhere, by contrast, became a federal question

adjudicated by federal administrators. The result, though largely unintended, was the creation of a precedent that questions of preexisting ownership claims by Euroamericans would be resolved, extrajudicially, by federal administrators. These bodies would evaluate claims based on earlier property systems and laws and translate these preexisting, often inchoate rights into definitive, federally recognized land title. As a result, Congress ensured that petitions and appeals from remote borderlands villages, burdened with the minutiae of local property disputes, would continue to flow eastward to Washington throughout the coming century.

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Throughout the 1790s, the federal government found itself entangled with resolving earlier claims to land. The settlers at Vincennes were only one of a number of groups who pressed their land rights on Congress, resulting in an ad hoc process of confirmation. Since 1785, Congress had promised land to the Moravians, a German religious order whose settlements of converted Delawares along the Muskingum River, in the Northwest Territory, had been brutally attacked by Anglo-Americans during the Revolution. Their lands were finally surveyed, and title confirmed, in 1797. A territorial resident named Ebenezer Zane secured a bill confirming his land rights based on his development of a road, while his brother Isaac, long held captive among the Wyandots and subsequently a federal Indian interpreter, later won a similar confirmation based on an old Indian grant. In the Southwest Territory, meanwhile, federal officials were

occupied with resolving conflicts between the lands sold by North Carolina and Native land rights as guaranteed under treaties.<sup>48</sup>

All the while, even as it worked through these claims, Congress, as well as would-be purchasers, anticipated the opening of a land office—the symbolic moment when, pre-existing claims resolved, the remaining vacant land could be sold to individual purchasers. Much of the West, John Cleves Symmes wrote at one point from near Cincinnati, was “running mad with expectations of the land office opening in this country.” Debated since 1789, proposed in an influential report by Secretary of Treasury Alexander Hamilton the following year, the opening of this office was perennially expected, and perennially delayed. Part of the delay reflected the fact that, in the wake of Jefferson’s 1791 report and the confusions surrounding the Ohio and Miami Companies, it was unclear which lands the federal government could in fact sell. But most of the delay seemed to stem from the ongoing war against the Northwest Indian Confederacy.<sup>49</sup>

Congress returned to the question of the land office only at the end of 1795, after the Treaty of Greenville. “There never was a bill of greater importance than that before the House,” stated one representative at the outset of the debate, “[T]hat House were the fathers of the country.” But Congress turned out to be full of bickering parents. For over two weeks, debate over the land office was the “principal business” of the House of Representatives. None of the contentions from four years earlier, when Congress had last

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<sup>48</sup> “Land Ordinance of 1785,” May 20, 1785, in *Journals of Continental Congress*, 28:375-81; Act of May 17, 1796, 6 Stat. 27.; William Blount to Nicholas Romayne, February 5, 1795, in *JGBP*, 2:484-89. On surveying, see Rufus Putnam to Oliver Wolcott, July 22, 1797, Letters Sent by the General Land Office to Surveyors General, M027, Reel 1:1796-1816, U.S. National Archives. On the massacre of Moravian Indians during the Revolution, see Rob Harper, “Looking the Other Way: The Gnadenhutzen Massacre and the Contextual Interpretation of Violence,” *The William and Mary Quarterly*, Third Series, 64, no. 3 (July 1, 2007): 621–44.

<sup>49</sup> John Cleves Symmes to Jonathan Dayton, August 6, 1795, in *CJCS*, 172-75; Alexander Hamilton, “Plan for Disposing of the Public Lands,” July 22, 1790, in *ASP:PL*, 4-5. Edmund Randolph observed that a land office would likely be opened as soon as “the hostility of the Indians will permit.” Edmund Randolph to George Washington, October 28, 1792, in *PGW:PS*, 11:272-73.

debated the land office, had been resolved. Many still strongly advocated for the system of indiscriminate location; others, arguing that this made it “impossible . . . to make titles certain,” insisted on the rectangular survey. The congressmen disagreed about the size of the lots sold, the amount of land to be sold, where sales should be held, whether sales should be through auction or land offices, which executive department should oversee the sales, and whether purchasers should be required to actually settle on the purchased lots. The weight of earlier precedent weighed heavily in their deliberations: James Madison remarked that he “was not surprised to hear different opinions on this question, according as members felt from the usages of the States to which they belonged.” But there were now also new, federal precedents to draw from: several members cited the experiences of the Ohio and Miami Companies in their arguments, largely as cautionary tales.<sup>50</sup>

Overlaying all these disputes was the broader question of which claimants the new land system should serve. The committee that drafted the bill had been tasked primarily with crafting a system that would sell as much land as possible as quickly as possible to extinguish the national debt. “It is immaterial to us who buys the lands so [long as] we get a good price for them,” John Stanwick, a Democratic-Republican from Philadelphia observed, voicing this perspective. “I think it worth while to employ the present moment of avidity to speculate in our lands, so as to clear off our Debts.” But many members, particularly from western regions, were strongly opposed to a system that would privilege the wealthy. Setting out to “destroy that hydra, speculation, which had done the country great harm,” they argued that it was possible to “raise money and

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<sup>50</sup> John Steele to John Haywood, February 28, 1796, Box 2, Folder 14, Ernest Haywood Collection of Haywood Family Papers, Southern Historical Collection, University of North Carolina. For the debates and congressional actions on the bill, see 5 Annals of Cong. 149-50, 328-55, 402-23, 802, 855-68 (1795-96).

invite settlers” at the same time. “Persons of property . . . can generally accommodate themselves,” John Williams, a representative from upstate New York insisted. “[W]e ought to accommodate the lower classes of the people.” In fact, both goals seemed to secure broad agreement from the congressmen; where they disagreed was over means. Many insisted that small lots served the interests of smallholders as well as the United States: Albert Gallatin of Pennsylvania, outspoken during the debate, argued that this approach “will give to the Government all the profits of the speculator. Government would be, in effect, its own speculator.” Others, however, insisted that smallholders would never purchase even the small lots. There were also strong disagreements over whether settlement requirements would advantage poor claimants or merely depress the price of lands.<sup>51</sup>

The statute that these debates produced was, unsurprisingly, a compromise. It provided that lands would be auctioned, at both Philadelphia and Pittsburg, at a minimum price of two dollars per acre. The lot size, determined after much contention, was settled at a compromise of one section of 640 acres, or one square mile. In the end, the rectangular survey prevailed and was written into the statute.<sup>52</sup>

What was arguably most significant about the 1796 law, though, was its existence. After long delay, Congress had at last enacted its first forward-looking land statute, envisioning a system that, in design, was the antithesis of the arbitrary and post-hoc systems that had emerged to resolve prior Native and European claims. The statute created a federal officer, the surveyor general, to oversee a team of surveyors who would

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<sup>51</sup> 5 Annals of Cong. 328-55, 402-23 (1796).

<sup>52</sup> Act of May 18, 1796, 1 Stat. 464.

map out vacant lands into neatly demarcated square townships. Meanwhile, in place of the vague directions given St. Clair and Sargent to adjudicate private claims, the Secretary of the Treasury created elaborate and detailed instructions on the rules to govern the land sales. The hope, as with many of the territorial land schemes of the era, was to create security of title at the outset. In this sense, the 1796 statute, rather than the 1785 Ordinance, represented the true beginning of the later federal land office system.<sup>53</sup>

Yet even this origin story is doubly misleading. For one, the new statutory and administrative scheme relied on structures in the Territory created by previous land efforts. The 1796 statute placed the responsibility of overseeing auctions in the hands of the ubiquitous Governor St. Clair. Meanwhile, the newly created post of Surveyor General fell to Rufus Putnam just as he was wrapping up his responsibilities as director of the Ohio Company. Putnam neatly transitioned from overseeing the Company's surveyors to supervising the federal government's—who were often the same people; others had worked for Symmes and the Miami Company.<sup>54</sup>

For another, the statute's actual operation proved a flop. Congress, it turned out, knew very little about what was actually happening in the territories, an ignorance many representatives freely confessed. One observed that, even though he was on the committee that drafted the statute, he was “very imperfectly acquainted with the subject.” Representative Coit of Connecticut argued that the House should delay acting until a survey had been done, since “they were legislating on a subject upon which they had very

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* Israel Ludlow, for instance, surveyed extensively for Symmes prior to his work for Putnam. Israel Ludlow to Arthur St. Clair, May 18, 1791, Reel 3, ASCP; Alexander Hamilton to Israel Ludlow, November 25, 1792, NWTC; John Mathews surveyed for the Ohio Company before successfully supplicating Putnam—his uncle—for a position as federal deputy surveyor. John Mathews to Rufus Putnam, February 19, 1796, Box 2, Folder 5, RPP.

little information.” But Coit was shouted down on the grounds that the “present” was the best time to sell, “when speculation was at so high a pitch.” But the federal government actually had very little land ready to sell, much of which had already been available. Speculators proved more interested in the cheaper, and choicer, lands already available through land companies or the states. Sales at the first public auction under the law, held in Pittsburgh in October 1796, were so disappointingly small that it was not repeated, and ended up as the *only* auction held under the 1796 statute. For his part, Governor St. Clair, after complaining about the expense and inconvenience of the travel, further moaned about the auction itself. “[T]he whole business” remained in “a state of disorder,” St. Clair grumbled, the elaborate precautions of the Secretary of the Treasury notwithstanding.<sup>55</sup>

In the end, it was not the hotly debated terms of sale that were the most consequential legacy of the 1796 statute, but the labor-intensive work of surveying. Putnam and his surveyors had to first survey the Treaty of Greenville boundary, and only then proceeded to mark the grid established under the law over much of present-day Ohio. The pace was frenetic. In 1798, Putnam oversaw the survey of over 3 million acres. Putnam claimed he and his men worked longer hours than “any Public Office within my Knowledge.” This system of prior survey consumed tremendous sums—over \$25,000 in 1799 alone, nearly three times what the government annually paid Native nations of the Ohio Country for the same land.<sup>56</sup>

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<sup>55</sup> 5 Annals of Cong. 328-37 (1796); Miscellaneous Letters Sent by the General Land Office, 1796-1889, M25, Reel 1, National Archives, Washington, D.C.

<sup>56</sup> Rufus Putnam to Oliver Wolcott, 12 July 1800, Reel 1, Letters Sent by the General Land Office to Surveyors General, 1796-1816 (microfilm). I derived cost of surveying by adding the sums expended over the year. See Rufus Putnam to Oliver Wolcott, 9 March 1798, Box 2, Folder 10, RPP; “John Mathews, Deputy Surveyor, Copy of Account and Receipt to Rufus Putnam for Surveying

The purpose of these expansive and expensive efforts was to avoid the challenges that had made earlier sources of title such an abundant source of confusion. Yet this elaborate solution misdiagnosed much of the problem. The challenge with the preexisting claims was only partly that they were vague and confusingly marked. The more fundamental issue, as the federal government's experience with Native and Euroamerican claims showed, was that acknowledging land rights rooted in the past, even the very recent past, commodified them. Suddenly valuable, papers and certificates establishing these rights proliferated, their pedigree difficult to trace. Federal officials struggled to distinguish legitimate from opportunistic or fraudulent claims, a task in which neat grids and elaborate rules helped little. Rather, as in Vincennes or in Cumberland, claimants dragged reluctant officials into the mess of adjudication, forcing them to address the consequences of speculation.

This quickly became apparent even in the newly gridded public domain. Thanks to federal efforts to resolve or "extinguish" Native, state, and private rights, title to this land now vested in the federal government—most of it had never been legally settled by Anglo-Americans—but even the public domain already had existing claims. The federal government had already promised enormous portions of the public land being surveyed in the Northwest Territory to satisfy the military bounties offered to Revolutionary War veterans.

Like the states, the Continental Congress had recruited soldiers with promises of land at war's end. Recruits had been pledged parcels ranging from 100 acres for privates

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Military Lands," December 30, 1797, Box 2, Folder 9, RPP ; "Jonathan Stone and Jeffery Mathewson, Copy of Account to Rufus Putnam, for Surveys Mad[e]," 20 January 1798, Box 2, Folder 10, RPP; Rufus Putnam to Joseph Nourse, 20 October 1798, Box 2, Folder 12, RPP.



and noncommissioned officers up to 1100 acres for a major general. Just as with public land sales, satisfying these warrants was long delayed. A handful were located on land set aside under the 1785 Ordinance. In 1788, Congress created a system for redeeming the remaining bounties, but did not assign any lands. Eight years later, when Congress created the system of public land sales, it also created a framework for at last satisfying the warrants. A large part of the Northwest Territory was designated as the Military Tract, to be surveyed by the Surveyor General, from which lands would be apportioned. Those holding warrants were required to submit their claims to the Secretary of Treasury, and then, the Secretaries of the Treasury, War, and State would gather to hold a lottery to determine the order in which the confirmed warrants could select their lands. With repeated extensions by Congress, this lottery was not held until February 1800.<sup>57</sup>

Federal bounty land warrants suffered the predictable consequence of federal promises of land early made and long delayed. They quickly became a speculative investment. When Congress discussed the warrants, one representative said that he did not know a “single soldier” who still held one; another observed that they could be purchased in New York for a “mere trifle.” Speculation in the warrants was particularly intense in the Northwest Territory, where residents marketed themselves as possessing superior knowledge about western lands. Stationed in the Territory, U.S. Army Captain John Armstrong attempted to involve his eastern acquaintances in a scheme for 17,000 choice acres of bounty lands that, he asserted, only he knew of, including secret information about coal and iron deposits; he was simultaneously involved in a separate

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<sup>57</sup> Henry Knox, “List of Soldiers Entitled to Bounty Lands,” November 14, 1787, Reel 2, WSP; *Journals of the Continental Congress*, 33:226; Act of May 18, 1796, 1 Stat. 464; Act of June 1, 1796, 1 Stat. 490; Act of March 2, 1799, 1 Stat. 724.

plan to engross 30,000 acres that included valuable salt springs. One of Armstrong's eastern correspondents took him up on these proposals, purchasing 5,000 acres in military warrants until "the soldiers have quit calling on me." Armstrong had an advantage here, too. As an army captain, he had ready access to soldiers, many of whom were revolutionary veterans. Armstrong set about buying up the bounty rights from the soldiers under his command for a little over 1 pound a piece.<sup>58</sup>

This freewheeling market in bounty land certificates presented a challenge for speculators and the War Department alike. Congress felt obligated to regulate the bounty market at least minimally, but was permissive about the legal niceties required for a transfer. Because many soldiers had sold their bounties "without any formal Conveyance," it required that the Secretary of War honor either written conveyances or the presentation of soldiers' discharges from the army, unless "fraud in Obtaining such discharge shall be proved."<sup>59</sup>

These seemingly nominal requirements nonetheless often foiled speculators, who in their zeal for purchasing had ignored even basic formalities. Captain Armstrong, for instance, found many of his claims rejected because he lacked discharges, because the conveyances had not been "registered and acknowledged before a magistrate," because the land had already been claimed, or because the soldiers were ineligible. Another speculator found that 1400 acres of his 2600-acre claim were rejected—some conveyances lacked the proper power of attorney; others lacked a year or date; others, as

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<sup>58</sup> John Armstrong to Mathey McConnel, Francis Johnston, and William Alexander, 5 September 1788, Box 1, Folder 21, Armstrong Papers, M6, Indiana Historical Society, Indianapolis, Ind.; Mathey McConnel to John Armstrong, 29 October 1788, Box 1, Armstrong Papers; Indenture to John Armstrong, 1 January 1789, Box 2, Folder 1, Armstrong Papers. One study found that about 2/3 of the 9900 land warrants issued had changed hands, at an average price of ten cents per acre, far below the federal minimum price for land on the open market as established in the 1796 act. Hutchinson, *Bounty Lands*, 251.

<sup>59</sup> *Journals of the Continental Congress*, 34:95-101.

in Armstrong's case, had already been claimed. John Cleves Symmes's associate Jonathan Dayton complained that the military rights Symmes had purchased caused him "an inconceivable amount of trouble"; despite over twenty visits to the War Office, he had still not received his land warrants.<sup>60</sup>

At the same time, these minimal bureaucratic precautions seemed to do little to halt actual fraud and abuse, complaints of which overwhelmed the War and Treasury Departments. As under the state law system, disgruntled soldiers and claimants sought to file caveats that would prevent land entries from being issued. Many alleged that the purported conveyances were fraudulent. A man named Henry Hill noted that the conveyance of his claim was supposedly executed in New York, where he had never been. Judah Alden alleged that "two swindlers" on State Street in Boston had taken his warrants. Others claimed that they had lost or misplaced their warrants, including the executor to the estate of Baron von Steuben, the prominent general who had helped train the Continental Army at Valley Forge.<sup>61</sup>

Federal administrators were conflicted on how to address these contentions. Secretary of War James McHenry was unwilling to allow "[e]very devise of dishonest cunning," as he described these frauds and misrepresentations, to defeat the "hard earned dues of Offices and Soldiers." He attempted to forestall the proliferation of forgeries by distributing a printed broadside requiring that all magistrates must swear that the transferer was personally known to them before registering either deeds or powers of

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<sup>60</sup> Indenture to John Armstrong, March 2, 1789, Box 2, Folder 1, Armstrong Papers; "List of the Men for Whom I Have Not Drawn Lands with the Reasons Annexed to Each Name," 1789, Box 2, Folder 3, Armstrong Papers; Jonathan Story to Ebenezer Sproat, October 12, 1789, Solomon Sibley Papers, Burton Historical Collection, Detroit Public Library; John Cleves Symmes to Jonathan Dayton, May 16, 1789, in *CJCS*, 213-18.

<sup>61</sup> Henry Hill to Secretary of Treasury, Dec. 29, 1798; Judah Alden to Secretary of Treasury, Jan. 18, 1800; Benjamin Walker to Secretary of Treasury, Feb. 6, 1797, in Box No. 1, Letters Received by the Secretary of the Treasury, 1796-1851, Entry 179, RG 49, Bureau of Land Management, U.S. National Archives.

attorney conveying bounty rights. Furthermore, the magistrates would need to provide the War Department evidence that they were, in fact, Justices of the Peace. And, lacking any “other guard for individual rights to military lands,” McHenry enjoined “strictness and caution . . . at the War Office,” requiring that his clerks closely scrutinize all the warrants presented.<sup>62</sup>

Nonetheless, McHenry lamented, even such careful examination “must often be ineffectual,” due to “the great diversity of the Arts practiced to deceive.” He urged Congress to adopt a more comprehensive administrative solution. He noted that the 1796 statute provided no relief, although the customary practice before his arrival, without any statutory authorization, was to permit claimants to file caveats. Going forward, McHenry advocated an administrative proceeding similar to that used in Pennsylvania, where the Board of Property had adjudicated disputed rights to land.<sup>63</sup>

Though he likely did not realize it, McHenry’s proposal echoed earlier calls for some sort of federal administrative tribunal to adjudicate disputed land rights. In his 1790 report proposing the creation of a public land office, Alexander Hamilton had urged that the land office commissioners should be empowered to “determine[.]” the “controversies concerning rights to patents or grants of land” that arose in their district. A year later, Thomas Jefferson observed that he, too, had argued for “the establishment of a proper judicature for deciding speedily all land controversies between the public and individuals,” but that Congress had not acted.<sup>64</sup>

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<sup>62</sup> “Printed Broadside in Re: Military Bounty Lands,” 4 May 1796, Box 1, McHenry Papers; James McHenry to [Congress], 15 April 1800, McHenry Papers, Clements Library, University of Michigan.

<sup>63</sup> McHenry to [Congress], April 15, 1800.

<sup>64</sup> “Plan for Disposing of the Public Lands,” July 22, 1790, *ASP:PL*, 4-5; Secretary of State to John Cleves Symmes, December 4, 1791, in *TP: Vol. II*, 352-53. Jefferson stated that he had argued for such a judicature in his lengthy report to Congress on the public

McHenry's similar plan envisioned that appointed federal officials would hear evidence on the land warrants and rule on their validity. For him, the important benefit of this approach was that it would not require defrauded claimants to file suit, where they would bear the burden of proof. Rather, because the "rights appears [sic] to strongly to center" in the original holders, they should "stand upon the footing of Defendants," with the burden of proof "on the other party to make out his own rights (as is understood to be legal principle) compleat."<sup>65</sup>

McHenry's proposed administrative adjudication contrasted with the approach advocated by Oliver Wolcott, who as Secretary of Treasury was responsible for administering the actual distribution of lands (as opposed to the registering of bounty rights). Wolcott concluded that the 1796 statute granted "no power to investigate or decide on the titles of the holder of military land Warrants." Exhausted by the constant filing of caveats, he directed the recorder of deeds to inform the claimants that "the merits of their claims can only be determined at Law"—that is, through the courts. This approach reflected both a statutory textualism as well as a grounding in the practice of most states, where disputes were referred to courts rather than being adjudicated by the executive. Wolcott adopted a similar approach for disputes that arose through the Land Office.<sup>66</sup>

On paper, Congress sided with Wolcott, if only through inaction. A committee was appointed to "inquire into the expediency or in expediency of passing a law to

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lands, discussed at the outset of Chapter 1. He was likely referring to his statement that a "local judge will doubtless be provided" to decide these disputes. "Report on Public Lands," November 8, 1791, in *PTJ:MS*, 22:274, 283-84.

<sup>65</sup> McHenry to [Congress], April 15, 1800.

<sup>66</sup> *Ibid.*; Oliver Wolcott, Secretary of Treasury, to Joseph Nourse, Registrar of the Treasury, January 9, 1800, Letters Received by the Secretary of the Treasury, 1796-1851. On the role of courts in resolving disputes that arose in the land office, see Secretary of the Treasury to Thomas Worthington, June 10, 1801, in *TP: Vol. III*, 139-44; Secretary of the Treasury to Judge of Court of Common Pleas of Ross County, August 7, 1802, in *TP: Vol. III*, 240-42.

regulate the manner of entering caveats to prevent the issuing of patents for land granted for military services,” but its report does not seem to have survived; at any rate, no legislation passed, and Congress later rejected a petition from claimants arguing that their lands had been fraudulently obtained, urging them to obtain “full and complete relief” from a “court of competent jurisdiction.” Yet the War Department continued to assess the validity of land warrants: in the decades following 1800, it rejected nearly four claims for every warrant that it issued. And in some respects, Congress itself fulfilled the role McHenry urged, albeit in ad hoc fashion. It constantly extended the deadline for filing, and, even while paying lip service to opposing legislative resolution of individual claims, it passed statutes authorizing relief for individuals who had lost their bounty rights. After the War of 1812, it attempted to preemptively forestall the recurrence of the problem by barring the transfer or sale of bounty rights; only soldiers themselves could claim them, though they could then sell the land warrants. This prohibition failed, and the land office found itself once again confronting caveats filed by disgruntled claimants; the new Secretary of War ended up making policy by banning filings from attorneys altogether. In short, however much Congress and the executive wished to avoid getting dragged into determinations on individual claims, it proved difficult for the federal government to avoid making quasi-judicial decisions to afford claimants relief.<sup>67</sup>

The federal government’s experience with the military bounty lands underscores that the earlier (and ongoing) struggles over Native and French title represented more than the resolution of prior claims necessary before the federal government could itself

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<sup>67</sup> 10 Annals of Cong. 519, 625; “Military Bounty Land Warrants Fraudulently Obtained,” Feb. 27, 1809, in *ASP:PL*, 827. For the number of warrants issued versus claims rejected, see Hutchinson, *Bounty Lands*, 151.

divide and alienate the public domain. Rather, even as the federal government sought to parcel out lands over which it claimed ownership, it continued a pattern in which federal administrators, or even Congress itself, passed judgment on the validity of individual titles. Judicial involvement, when it occurred, came much later, and usually granted considerable weight to earlier federal pronouncements.

As this process suggests, it was not vague boundaries or multiple sources of ownership alone that forced the federal government to wade into the morass of conflicting property rights. Even when the federal government itself created the terms of ownership, disputes arose that required federal intervention, in large part because of the paper promises that floated freely through the early republic and made exploiting the land system too tempting to forego. Federal administrators' incessant despair over fraud and confusion—whether in Native, French, or veterans' claims—was the result. As these complaints demonstrate, officials were rarely anxious to adopt this role: some, like Wolcott, attempted to avoid it altogether, while others, like McHenry, saw it as part of a national commitment to the veterans. But like earlier adjudications, the pressure to arbitrate these questions came from claimants themselves, who demanded resolution from the federal apparatus.

Like the settlers in Vincennes, bounty rights holders were merely following the chain of authority. But this process also oriented claimants toward Philadelphia, and later, Washington. The most influential speculators became those who, like Captain Armstrong, had some sort of privileged access to federal power. Others from the territories served as intermediaries, gathering claims to make the journey to the capital,

where they could press their case in person. Those who could not travel wrote letters and sent petitions to Congress instead. This process, of course, favored the wealthy and well-connected over smallholders. But it also meant that, for citizens scattered throughout the United States, their prospect of landed wealth rested on the determinations of the federal government. Their fates rested with a distant bureaucratic office, in which beleaguered clerks hoped their close scrutiny could thwart the “dishonest cunning” that seemed to infect all early American markets in land.

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As they delved into local property disputes throughout the U.S. territories, federal officials felt, perhaps, a sense of *déjà vu*. Despite dramatically different contexts, these officials were called on repeatedly to assess the validity of property claims, often under unfamiliar legal orders, and translate them into definitive federal title.

Unlike the land systems that preceded or followed it, this adjudicatory role of the federal government was not planned in any meaningful way. It happened because Anglo-American law made the federal government sovereign over the territories, with the consequence that the constant property disputes that resulted from the proliferation of title in territories became a federal responsibility. Natives, French settlers, and military veterans all pressed their demands for the government to honor their property rights, rooted in ambiguous title histories, and federal officials sought to determine which claims were legitimate. In the process, they distilled the complicated and plural sources of ownership in the territories into a single document, a federal title that issued—eventually—under federal authority.



In the long run, the rise of federal title was not a boon for most individual claimants. Precisely because federal land grants were legible and purportedly authoritative, federal guarantees turned out, in practice, to undermine the smallholders' security of title. Natives, French settlers, military bounty holders—all were swept into the voracious maw of the early American land market, which alienated their federally recognized ownership rights through transactions sometimes coerced, and always marked by dramatically unequal bargaining positions. This result occurred not because the claimants were naïve, but because they confronted constrained choices, of which federal protection seemed the least bad option. Ironically, the real winner in this struggle was the federal government. This was not just because land was a valuable asset, but because throughout early America land ownership was a tremendous source of power. Just as the federal government discovered that sovereignty reinforced ownership, title, it turned out, became a potent source for exercising sovereignty in practice.

## **PART II: NATIVES**

## Chapter 4: Federal Sovereignty

Soon after Washington's inauguration, Secretary of War Henry Knox drafted a series of highly influential reports urging the transformation of federal policy toward Native nations. In one of them, Knox's the Secretary observed that, when the federal government gained control over the territories, it had gained authority over a world of violence and casual brutality. "For some years past," Knox informed Washington, both Natives and non-Natives in the borderlands had "exercis[ed] indiscriminate hostilities on each other." At that point, it would be futile to "ascertain the original aggressors"; the only clear fact was that the "the innocent on both sides suffer more frequently than the guilty." Knox argued against the view that this violence between Natives and U.S. citizens was the natural and inevitable state of the borderlands. He believed that the federal government could "remedy" these evils—but only if "the administration of indian affairs" were "conducted by fixed principles established by Law, and which being published should be rigidly enforced."<sup>1</sup>

Knox's report epitomized the Washington Administration's vision for remaking Indian affairs, one that, to paraphrase Lisa Ford, might be called "federal sovereignty." But the federal sovereignty of 1790s was very different from the settler sovereignty that Ford describes emerging in the Georgia borderlands in the 1820s and 1830s. Federal sovereignty was not primarily focused on the extension of territorial sovereignty, nor was it directed solely against Native peoples. Rather, at the core of Knox's plan was the concept, familiar to historians of early federal law more broadly, that the federal government alone could serve as a neutral arbiter in the seemingly intractable and violent

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<sup>1</sup> "Henry Knox's Notes on the State of the Frontier, January 1790," January 1790, in GWP:PS, 5:76-81.

disputes between Natives and non-Natives. Knox believed firmly in the majesty of a supreme and impartial law, forcefully applied against both Natives and citizens of the United States who violated it. The federal government, Knox wrote, “must keep both [Indians and whites] in awe by a strong hand, and compel them to be moderate and just.”<sup>2</sup>

These views formed the basis for the Trade and Intercourse Acts, a series of laws, enacted and expanded several times over the course of the 1790s, that robustly asserted federal criminal and regulatory jurisdiction over the borderlands. These laws applied anywhere in the United States that Native territory—what the statute labeled “Indian country”—existed, but they had particular importance in federal territories, which was where most Indian country, and most Indians within the United States, were. The statutes sought to preempt borderland violence in two ways. First, the federal government would create, police, and regulate well-delineated physical boundaries between Natives and U.S. citizens. Second, the federal government would assume jurisdiction over cross-cultural crime, vigorously punishing both Native and white offenders.<sup>3</sup>

As an effort to prevent violence and crime, the Acts, and federal sovereignty more generally, failed. Such boundaries as there were remained permeable, and federal efforts to hold Natives and whites legally accountable for their crimes rarely succeeded. In explaining this failure, federal officials constantly wrung their hands at federal powerlessness, as they found themselves unable to compel either Natives or their own citizens to obey the law. Scholars have since expanded and refined this contemporaneous

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<sup>2</sup> Report of the Secretary at War to Congress, July 10, 1787, in *TP: Vol. II*, 31-35.

<sup>3</sup> Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139. In his detailed study of the Trade and Intercourse Acts, Father Paul Prucha relied almost entirely on territorial sources, especially the printed territorial papers. Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780-1834* (Cambridge, Mass: Harvard University Press, 1962). Nonetheless, significant portions of Indian country also existed in New York and Georgia, particularly in Georgia’s unceded western lands, though these would later become part of the Mississippi Territory.

complaint. One line of scholarship, drawing on work on the rise of sharp racial boundaries between “red” and “white” people in the late eighteenth century, has emphasized the dominance of a “language of exterminatory anti-Indianism,” in the words of Peter Silver, that undermined official efforts to secure justice for Native peoples. Lisa Ford’s work, by contrast, demonstrates how governments’ necessary reliance on both Native diplomacy and localism entrenched long-standing customary practices of reciprocity, retaliation, and justifiable violence shared by both Natives and white settlers.<sup>4</sup>

These works powerfully and compellingly elucidate many of the dynamics in the borderlands, but their focus risks obscuring the institutional factors that allowed popular practices and narratives to prevail. In embracing the triumph of custom over formal law, they fail to consider the limitations of federal officials’ own vision. In particular, Knox, as well as others in the Washington Administration and in territorial government, had little sense of law’s limits. Many of them were military men, and so embraced an extreme positivist model of law as command and coercion. But as a descriptive matter, this was a poor understanding of early American law, in which courts and other legal institutions were arenas for contest far more than they were institutions for enacting the sovereign will. Knox and others failed to appreciate how the formal limits within federal

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<sup>4</sup> An older view on the failure of the Trade and Intercourse Acts, which reflects the complaints of federal officials, appears in Prucha, *American Indian Policy*, 189-210. For an overview of the large and growing literature on the rise of conceptions of Natives and non-Natives as separate “races” in the late eighteenth century, see Joshua Piker, “Indians and Race in Early America: A Review Essay,” *History Compass* 3, no. 1 (2005): 1–17; David J. Silverman, *Red Brethren: The Brothertown and Stockbridge Indians and the Problem of Race in Early America*, First (Cornell University Press, 2010); Daniel K Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, Mass: Harvard University Press, 2001), 190-236; Nancy Shoemaker, “How Indians Got to Be Red,” *The American Historical Review* 102, no. 3 (June 1997): 625–44.. For works that emphasize the role of racial hostility in forestalling the punishment of crimes against Natives, see Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York: Hill and Wang, 2007), 198–208; Peter Rhoads Silver, *Our Savage Neighbors: How Indian War Transformed Early America* (New York: W.W. Norton, 2008), 127–60.

Lisa Ford’s study focuses on Georgia during this period, although the history she traces is entangled with the Southwest Territory and Tennessee. Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, Mass: Harvard University Press, 2010). Kathleen Duval similarly emphasizes the role of other sources of law—in her case, Osage law—in limiting the reach of federal jurisdiction. Kathleen DuVal, “Cross-Cultural Crime and Osage Justice in the Western Mississippi Valley, 1700-1826,” *Ethnohistory* 54, no. 4 (October 1, 2007): 697–722.

law, including the explicit acknowledgment of other jurisdictions, the conflict of laws, and local autonomy, worked to cabin federal power.

The net effect of the Trade and Intercourse Acts, then, was not to end centuries of violence and discord; it was to channel these fierce contentions over Indian affairs into legal language and legal forums. But it would be a mistake to regard this outcome as a simple story of failure. Those resisting the federal government—to some extent Natives, but even more territorial citizens—came to rely on the tools of federal law to craft their argument, which, paradoxically, worked to legitimate and enhance federal authority. In this sense, the early effort to establish federal sovereignty created the parameters of legal debates over Indian affairs for the century that followed.

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To the untutored eye, frontier violence seemed to stem from lawlessness. But although federal officials sometimes slipped into this language, they generally thought they knew better. The problem was not law's absence, but that the wrong kind of law dominated the frontier. They dubbed this law "the Savage principle of retaliation," described elsewhere as the "Indian Construction and Operation of the Law of Blood for Blood."<sup>5</sup>

As Anglo-Americans understood it, retaliation was the foundation of the Native legal order. When applied to murder, Native law required that deaths be avenged by killing those from the same clan, nation, or ethnic group as the killers, even if those so

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<sup>5</sup> William Blount and Andrew Pickens to Secretary of War, August 6, 1793, in *TP: Vol. IV*, 296; Edward Telfair to Henry Knox, December 5, 1792, Reel 2: The Territory Southwest of the River Ohio, Senate Territorial Papers (microfilm), M200, U.S. National Archives. I refer to crime between Natives and non-Natives as "cross-cultural" for lack of a better term. "Interracial" adopts too readily the racial frame that I argue elsewhere in the paper was often problematic for understanding crimes between Natives and non-Natives; and "cross-national," while perhaps more accurate for how many federal officials and Natives interpreted these incidents, is too distant from current usage. "Cross-cultural," though imperfect, has the benefit of capturing the blurry boundaries between Native identity as both race and nationality during this period.

executed bore no personal responsibility. This form of collective guilt based on ethnic and national affiliations was termed “taking satisfaction.” Anglo-Americans believed that the commitment to this principle was deeply rooted in Native character and law. “The passion for revenge implanted in the earliest infancy of a Savage mind, and cherished by the force of habit,” Henry Knox reported, “is almost uncontrollable.” Knox may have derived this understanding from William Blount, governor of the Southwest Territory, who took great pains to explain Cherokee legal principles to Knox. Blount attributed retaliation to the Cherokees’ “Clanish Law,” which required that “each clan shall protect and take satisfaction for all injuries offered to person of each individual of it.” To bolster this argument, Blount recounted a story of how the Cherokee leader Bloody Fellow had executed another Cherokee who had turned over Bloody Fellow’s brother to the British for killing a white man.<sup>6</sup>

In casting retaliation as a Native legal principle, federal officials sought to differentiate it from Anglo-American law, in which the society at large adjudicated the guilt and innocence of individuals, not groups. “[W]hatever friend, Father, brother, or any other relation are lost in War, revenge is never sought for by the Whites,” army officer Henry Burbeck told gathered Anishinaabe at Michilimackinac. “[T]hey are buried with the Hatchet.” Henry Knox conveyed similar information to the Cherokee leader Hanging

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<sup>6</sup> Henry Knox to Edward Telfair, March 14, 1791, NWTC; William Blount to Secretary of War, November 8, 1792, in *TP: Vol. IV*, 208-16. Scholars of Cherokee law echoed Blount’s emphasis on retaliation. John Phillip Reid, *A Law of Blood; the Primitive Law of the Cherokee Nation* (New York: New York University Press, 1970); Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman: University of Oklahoma Press, 1975).

Maw. “We do not permit an individual who has been wronged to be his own avenger,” he wrote. “This is never allowed among the whites, when the society is well regulated.”<sup>7</sup>

But even as he mouthed these pieties to Native leaders, Henry Knox well knew that Anglo-American society in the territories was far from “well regulated,” at least as Knox envisioned it. On the contrary, territorial citizens explicitly adopted both the legal logic and the very language of their Native neighbors, based largely on the insistence that this was the appropriate body of law to govern cross-cultural conflicts. “Let the laws of retaliation be enforced,” one inhabitant of the Southwest Territory insisted in response to Cherokee and Creek attacks. William Blount had frequently informed Henry Knox that Anglo-American relatives of those killed by Natives in the Southwest Territory “thirst[ed] for revenge, or, what is here termed, satisfaction.” Like the Native satisfaction it aped, Anglo-American retaliation was indiscriminate, based on collective, not individual, responsibility: those whose relatives died at Native hands sought to “fall[] on the Indians and tak[e] satisfaction, without regard to age or sex.” White residents north of the Ohio felt similarly. As Arthur St. Clair complained to President Washington, “they are in the habits of retaliation perhaps, without attending precisely to the nations from which the injuries are received.”<sup>8</sup>

But, although retaliation had deep roots in both Native and American legal thought in the borderlands, by the 1780s and ‘90s it was the subject of vigorous challenge by both Native and American leaders. The critique was twofold. The first was it was

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<sup>7</sup> Henry Burbeck, “Speeches to Indians,” August 1797, Ayer 121, Newberry Library; “Message from the Secretary of War to the Hanging Maw, Sent by Governor Blount,” August 27, 1793, in *ASP:IA*, 431.

<sup>8</sup> William Cocke, “For the Gazette,” *Knoxville Gazette*, December 29, 1792; Blount to Secretary of War, November 8, 1792; “The Address of Governor Blount to the Chiefs and Others of the Cherokees . . .,” May 23, 1792, in *ASP:IA*, 268-69; Gov. Arthur St. Clair to President, September 14, 1789, in *TP: Vol. II*, 216-17. Ford draws attention to this shared culture of retaliation, though she gives shorter shrift to the critiques that emerged in the late eighteenth century. Ford, *Settler Sovereignty*, 35-42, 85-97.



indiscriminate, entirely disconnected from personal responsibility. “Let men die for their own crimes, when they commit such as are worthy of death,” the prominent Virginian Arthur Campbell urged the Cherokee leader Hanging Maw in a letter reprinted in the *Knoxville Gazette*. John Sevier, former governor of “Franklin” and the first governor of Tennessee, proclaimed that he held “the principle of retaliation . . . in the utmost detestation”; he sought “not the blood of the innocent, but that of the guilty.” Some Native leaders reportedly espoused the same view. The Chickasaw John Morris, on his deathbed after being shot by an anonymous white settler, urged that punishment be meted out only to the guilty. In another story, relayed by federal Indian agent Silas Dinsmoor to his children, a group of Cherokees plotted to kill Dinsmoor in revenge for the senseless murder of an old Cherokee man by two white hunters; the Cherokees demanded “pay, and good pay” for the murder. Discovering the plot, the Cherokee leader Bloody Knife berated the conspirators: “[S]uppose a mad dog should bite one of your children, would you kill all the dogs?” In Dinsmoor’s telling, the “logic was convincing and [the Cherokees] left, looking very sheepish.”<sup>9</sup>

But there was a second critique that was even more pressing for Anglo-American leaders, whose primary goal was to preserve a lasting peace. They lamented that retaliation’s demand that no death go unavenged required an endless and self-perpetuating cycle of violence. “[A]s the thirst of war is the dearest inheritance an Indian

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<sup>9</sup> “Copy of a Letter from Colonel Arthur Campbell to Captain John Watts,” *Knoxville Gazette*, January 28, 1792; John Sevier to Benjamin Hawkins and Andrew Pickens, April 19, 1797, in Samuel Cole Williams, ed., “Executive Journal of Gov. John Sevier,” Pts. 1-7, *East Tennessee Historical Society’s Publications* 1 (1929): 95-153, 2 (1930): 135-149, 3 (1931) 154-82, 4 (1932) 138-67, 5 (1933) 155-77, 6 (1934) 104-28, 7 (1935) 128-164 [hereinafter “Executive Journal of Gov. John Sevier”], pp. 149-51; “Knoxville, Saturday, June 1,” *Knoxville Gazette*, June 1, 1793; “Genealogies: Col. Silas Dinsmoor” n.d., Dinsmoor Alumni File, Rauner Special Collections, Dartmouth College. In a letter to William Blount, Hanging Maw, seemingly taking up Arthur Campbell’s urging, promised not to revenge the recent murder of a relative at the hands of Anglo-Americans. “[I]t is forgotten,” he wrote, “the death of my relation is to me as if he had died a natural death.” “Knoxville, Thursday, June 5,” *Knoxville Gazette*, June 5, 1794.

receives from his parents, and vengeance that of the Kentuckians,” Major Hamtramck wrote to Arthur St. Clair, referring to white settlers who proved most troublesome to federal authorities in the Northwest Territory, “hostility must then be the result on both sides.” The result was that relations between Anglo-American settlers and Natives were perhaps irrevocably poisoned. “An immortal hatred subsists in the breast of one against the other,” one frontier inhabitant reported. Whenever “a backwoods man meets an Indian he will kill or be killed, being possessed by this fury, no distinction of friendly or unfriendly Indians will be made.” The result was that *all* Indians would very quickly become unfriendly, and “every Nation will join against us.”<sup>10</sup>

The costs of retaliation were especially troubling to Secretary of War Henry Knox. Under the doctrine of retaliation, “the slightest offence occasions death—revenge occasions.” The result would be a “merciless war” which destroyed “the innocent and helpless with the guilty.” He specifically castigated the frontier settlers for “exercise[ing] indiscriminate revenge against all persons bearing the name of indians, under the specious pretext of retaliation.”<sup>11</sup>

Native leaders, too, were increasingly moving to abandon retaliation for the sake of peace. When two Cherokees were killed stealing horses in 1795, federal Indian agent Silas Dinsmore reported that the tribe’s “headmen,” who were “firmly disposed for peace,” had convinced the victims’ relations to “not take satisfaction.” By the late 1790s, both the Creek and Cherokee councils had voted to abolish aspects of retaliation; in 1797, Dinsmore’s superior, Indian agent Benjamin Hawkins, reported that the Creeks had

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<sup>10</sup> John Francis Hamtramck to Gov. Arthur St. Clair, December 2, 1790, in *SCP*, 197-98; W. North to Unknown, August 7, 1786, NWTC.

<sup>11</sup> “Report of the Secretary at War to Congress,” July 10, 1787, in *TP: Vol. II*, 31-35.

publicly executed six men, including one white man, for murder, which he stated “gives a hope that the right of revenge might be transferred from private hands to a public jurisdiction.” Though Creek and Cherokee leaders were responding to pressure from federal representatives, they were also trying to remake their societies to abandon a legal principle that proved so costly.<sup>12</sup>

Like the Creeks and Cherokees, Knox was also attempting to shift legal authority to a “public jurisdiction.” He particularly emphasized the need for some impartial arbiter to resolve disputes. “There can be neither Justice or observance of treaties,” Knox wrote, “where every man claims to be the sole Judge in his own cause, and the avenger of his own supposed wrongs.” In both federal Indian treaties and the Trade and Intercourse Acts, drafted largely by Knox and enacted first in 1790, Knox advocated a new law to govern cross-cultural relations—federal law—and a new judge—the federal government.<sup>13</sup>

As described earlier, the Acts codified three distinct legal principles that Knox and other federal officials believed would secure cross-cultural peace. The first was physical separation. “[D]eep rooted prejudices,” Knox argued, held both “by the Whites and Savages,” would “ever prevent their being good neighbours.” Other federal officials echoed this view: William Blount argued that the United States should prevent Natives and whites from “a too frequent promiscuous Intercourse with each other.” Some way to

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<sup>12</sup> Silas Dinsmore to David Henley, July 8, 1795, Folder 3, Silas Dinsmore Papers, Ayer MS 241, Newberry Library; Benjamin Hawkins to James McHenry, March 1, 1797, in C. L. Grant, ed., *Letters, Journals, and Writings of Benjamin Hawkins* (Savannah, Ga.: Beehive Press, 1980), 1:85-87. For discussions of the Cherokee and Creek modifications of retaliation, see William Gerald McLoughlin, *Cherokee Renaissance in the New Republic* (Princeton, N.J.: Princeton University Press, 1986), 43-46; Strickland, *Fire and the Spirits*, 57-72.

<sup>13</sup> “Henry Knox’s Notes on the State of the Frontier,” January 1790. The Trade and Intercourse Act was reenacted, with expansions, in 1793, 1796, 1799, 1802, and then finally in 1834. Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743.

sharply divide Natives and whites was necessary. President Washington and members of Congress spoke wishfully of a “Chinese wall” to divide the two groups. Blount, for his part, was besotted with the idea of a river, rather than an easily transgressed “imaginary line,” keeping Natives and whites apart.<sup>14</sup>

The Trade and Intercourse Act adopted more pragmatic approach. It drew a sharp legal boundary between “the Indian country,” a phrase the statute used to describe the territory under Native jurisdiction and ownership, and what was sometimes called the “ordinary jurisdiction” of the states and territories. From 1796 on, this boundary was written into the text of the statute itself. Crossing the boundary was increasingly regulated. At first, the Acts focused on requiring licenses and bonds from Indian traders, the most frequent non-Natives within Indian country. But subsequent versions expanded to require that *any* person who travelled into Indian country, at least south of the Ohio, would have to obtain a passport. Crossing into Indian country to hunt, settle, or survey Native lands were all criminalized, prohibitions enforceable by the federal military. Though shy of a wall, Henry Knox did set about creating a “chain of [federal] posts” to regulate the border.<sup>15</sup>

The second was federal jurisdiction over cross-cultural conflicts. “The right that each party assumes of being judges and prompt executioners in their own cause prevents all effectual interference,” Knox observed, “excepting by a legal coercive power, which shall make the necessary sacrifices to Justice, let them belong to which side they may.”

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<sup>14</sup> *Ibid.*; William Blount to James White, December 14, 1795, in *TP: Vol. IV*, 411-14; 4 *Annals of Cong.* 775-76; George Washington to Secretary of State, July 1, 1796, , in *The Writings of George Washington*, ed. Worthington Chauncey Ford (New York; London: G.P. Putnam’ Sons, 1889), 13:112.

<sup>15</sup> Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743.

Justice, impartially administered by the federal government, was a leitmotif for Knox; he insisted that both Natives and whites be judged and held accountable by the national government.<sup>16</sup>

At first blush, the Trade and Intercourse Acts seem a patchy and tepid expression of Knox's view. They asserted authority only over crimes committed by U.S. citizens against Natives, and only within "Indian territory." They did not displace Native jurisdiction over Indian country or claim jurisdiction over Natives. From this perspective, the Acts were, as Lisa Ford rightly notes, examples of legal pluralism, suggestive of how jurisdiction could quickly collapse into diplomacy, in which law enforcement required negotiations among sovereigns.<sup>17</sup>

But the Acts did not exist in isolation. Territory outside Indian country was already under federal sovereignty: "[A]ll the laws of Congress," Attorney General William Bradford wrote, "are, in their operation coextensive with the Territory of the United States, and obligatory upon every person therein, except independent Nations & Tribes of Indians residing on Indian lands." If a crime by or against Natives were committed outside Indian lands, it would already fall within either state or, even more likely, territorial jurisdiction. Extending federal jurisdiction over U.S. citizens within Indian country thus closed a jurisdictional gap. It was also a bold assertion of federal sovereignty, though this is less apparent in hindsight, given that the Trade and Intercourse Acts presaged further, more aggressive assertions of federal jurisdiction over Indian lands. But in the late eighteenth century, when most of the Anglo-American political

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<sup>16</sup> "Report of the Secretary at War to Congress," July 10, 1787; Henry Knox to George Washington, July 7, 1789, in *PGW:PS*, 3:134-40.

<sup>17</sup> Ford, *Settler Sovereignty*, 32-46.

elite still regarded tribes as “nation[s] of independent government,” exercising U.S. jurisdiction within Indian country, even over U.S. citizens, was a power grab, not a show of restraint; the United States was intruding into territory controlled by a quasi-foreign sovereign.<sup>18</sup>

As for Native people, treaties of the era all contained jurisdictional provisions requiring that signatory Native nations “deliver up” Indians who committed murder or robbery against a U.S. citizen, “to be punished according to the laws of the United States.” Knox made clear that his vision of federal supremacy embraced both Natives and white settlers: Indians as well as U.S. citizens, he argued, had to be shown “the absolute necessity of submitting to the justice and mercy of the United States.”<sup>19</sup>

Viewed in this frame, the Acts represented a muscular assertion of federal criminal jurisdiction with few parallels in the early republic. Not only did they create a category of crimes punishable by fines, imprisonment, or even death, but they also provided that offenders could be tried in federal courts anywhere in the United States. And, if a U.S. citizen committed a crime in Indian country prohibited by the act, he or she could be arrested under military authority anywhere in the United States, even within state borders. Given these provisions, the statutes were read at the time as aggressive, and controversial, projection of federal power. Erstwhile Franklin governor John Sevier

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<sup>18</sup> Attorney General to Secretary of the Treasury, June 9, 1795, in *TP: Vol. II*, 520-21; Thomas Jefferson to William Carmichael and William Short, June 30, 1793, in *PTJ:MS*, 26:405-17.

<sup>19</sup> Treaty of Fort Harmar, U.S.-Wyandots et al., January 9, 1789, 7 Stat. 33; Treaty of Peace and Friendship, U.S.-Creeks, Aug. 7, 1790, 7 Stat. 35; Treaty of Holston, U.S.-Cherokees, July 2, 1791, 7 Stat. 39; Henry Knox to George Washington, February 22, 1791, in *PGW:PS*, 7:402-15.

denounced the law as “an infamous act” that “had given more umbrage” to the citizens of the Tennessee Country “than any act ever passed since the independency of America.”<sup>20</sup>

The original Trade and Intercourse Act was brief: seven sections, barely two printed pages long. But for the federal officials who crafted it, especially Henry Knox, it represented a foundational charter for asserting federal supremacy over Indian affairs. Federal officials distributed embossed parchment copies, in tin containers, to Native nations; Washington cited it to Native leaders as evidence of the “fatherly care the United States intend to take of the Indians.” Copies of the statute were freely distributed throughout the territories, reprinted in territorial newspapers, and read verbatim by territorial judges to grand juries. Despite its brevity, the Act authorized an expansive “legal coercive power” that reflected Knox’s vision for how federal law would replace the law of retaliation, as the federal government would separate Natives from U.S. citizens and arbitrate the crimes each committed against the other. Over the ensuing decade, federal officials—territorial governors, judges, and military officers—would struggle to implement these provisions.<sup>21</sup>

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<sup>20</sup> Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743. The Trade and Intercourse Act created one of only a handful of federal crimes in the early republic. The other major criminal statute was the Crimes Act, which created statutory provisions for the punishment of treason, for crimes committed within exclusive federal jurisdictions, and for crimes that obstructed the federal judiciary. Crimes Act, ch. 9, 1 Stat. 112 (1790). The most analogous provisions of the Crimes Act extended jurisdiction over the high seas, which, like Indian country, lay outside state jurisdiction. *Ibid.*, §§ 9-13. For the limited literature on early federal crimes, which omits discussion of the Trade and Intercourse Act entirely, see Kathryn Preyer, “Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic,” *Law and History Review* 4, no. 2 (1986): 223–65; Adam H. Kurland, “First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction,” *Emory Law Journal* 45 (1996): 94.

<sup>21</sup> George Washington to the Seneca Chiefs, December 29, 1790, in *PGW:PS*, 7:146-50; Thomas Jefferson to George Washington, March 13, 1793, in *PGW:PS*, 12:314-15; “Extract from ‘an Act to Regulate Trade and Intercourse with the Indian Tribes, Passed by the Congress of the United States, March 1, 1793,” *Knoxville Gazette*, November 1, 1794; Rufus Putnam, “Charge to the Grand Jury” [N.D.], Box 2, Folder 6, Local Government Records, Marietta College Library.

Knox's principle of separation never gained much traction in the territories. Part of the problem was simply that Native and whites were too entangled to be so easily divided; the clear lines that Knox and others envisioned had no basis in reality. Just as significantly, accounts of mutual hostility and implacable hatred fundamentally misunderstood, and even exacerbated, the problem. Much of the violence between Natives and whites did not consist of skulking, vengeful attacks. It began, rather, in taverns and houses, often in the heart of towns like Vincennes and Knoxville, and usually started with sociability, not hatred. But when these everyday encounters rapidly shifted from camaraderie to bloodshed, the ensuing violence was interpreted, especially by those outside the borderlands, in light of the fraught diplomatic and racial overtones that colored cross-cultural interactions.<sup>22</sup>

Throughout the territories, Natives and Euro-Americans had lived alongside one another for centuries before the United States arrived. Living in small isolated communities surrounded by Natives, Euro-Americans had forged extensive and intertwined ties of trade, debt, and sociability with their Native neighbors. The advent of U.S. sovereignty sometimes strained, but did not sever those relationships.

The French settlement of Vincennes in the Wabash Country in the Northwest Territory, for instance, remained a hub where Natives and non-Natives continued to intermingle throughout the 1780s and '90s. Because the town was a center of the fur trade, surrounding Native groups were "continually coming to and going from this place," trading their skins for liquors and remaining "eight or ten days." Court and

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<sup>22</sup> For a consideration of the significance of "cities"—broadly construed—as sites of encounter on the frontier, see Jay Gitlin, Barbara Berglund, and Adam Arenson, eds., *Frontier Cities: Encounters at the Crossroads of Empire* (Philadelphia: University of Pennsylvania Press, 2012).



church records suggest the close relationships that resulted, recording cross-cultural debts, Native baptisms, and Indian residents: when John Toulon passed away in 1797, he left behind items belonging to a Native “who used to lodge in the House.” Anglo-American visitors were often shocked at how freely Natives and local inhabitants mixed. Passing through Vincennes, the traveler George Hunter stayed with a man named Smalls. “Here is a considerable resort of Indians,” Hunter recorded, “they are constantly thro & about this house at all times, like as many pet Lambs, at present there is a Man, his Squa & child sitting by the kitchen fire.”<sup>23</sup>

Such mixing appeared in other long-standing settlements in the Northwest Territory. In Michilimackinac, a federal outpost in the heart of Anishinaabe territory in what is today northern Michigan, the federal commandant allowed Natives “free intercourse” to the village, allowing them to come “either by day or night . . . at pleasure.” In Detroit, Winthrop Sargent complained about the very “great Resort of Indians.” Legal records there also indicate ongoing commercial relationships.<sup>24</sup>

But Natives and non-Natives coexisted in newly founded Anglo-American towns as well as long-standing French settlements. In Cincinnati, Winthrop Sargent reported seeing “a number of Indians mixing with the Inhabitants of the Town.” Knoxville, created from whole cloth as a federal administrative center in 1791, rivaled Vincennes in

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<sup>23</sup> Robert Buntin to Winthrop Sargent, June 21, 1793, Reel 2, WSP; “A True and Perfect Inventory . . . of the Deceased John Toulon called Gamuchon,” October 26, 1795, Box 2, Knox County Probate Records, Knox County Public Library, Vincennes, Ind.; “Journal Kept by George Hunter of a Tour from Philada. to Kentucky by the Illinois Country” 14-10.15 1796, American Philosophical Society, Philadelphia, Penn. For baptismal records in Vincennes in the 1780s and ‘90s, see *St. Francis Xavier Catholic Church Records* (Bowie, Md.: Heritage Books, Inc., 1999). For account books, see Account of John Decker to Moses Henry, 1792, Box 1, Knox County Probate Records, Knox County Public Library; Account of Lewis Chatellereault, 1797, Box 1, Knox County Probate Records, Knox County Public Library. This version of Vincennes history is somewhat at odds with the account presented by Richard White, which presents post-war Vincennes as a place where the preceding “face-to-face world” was in decline. White, *The Middle Ground*, 421-33.

<sup>24</sup> Speech to the Indians, October 1799, Ayer MS 121, Newberry Library. In one suit from Detroit, a Detroit merchant sued Mrs. Rankin, described as an “Indian Woman” and “a sole Trader” (a woman authorized to transact business), for a substantial sum of money *Aiken v. Rankin*, September 12, 1797, No. 221, Box 2, Wayne County Court of Common Pleas Records, Michigan Supreme Court Records, Archives of Michigan, Lansing, Mich.

the intensity of relationships with neighboring Natives. Much of this collegiality occurred around what one early historian described as the “court” of William Blount. Blount spent an inordinate amount of time socializing with Natives, especially Cherokees. Entire days passed in recreation, “unalloyed with public cares”; the governor reported one Knoxville meeting with the Cherokee leader John Watts nearly entirely “devoted to eating, drinking and jocular conversation, of which Watts is very fond.” During the Treaty of Holston, another Cherokee named John Taylor “lived with Governor Blount as one of his family . . . ate and drank at his table as one of his family, and slept by his side.” Blount’s social ties to the Cherokees were especially strong, but such connections characterized Knoxville more generally. Blount’s successor, Tennessee governor John Sevier, reported from the city that, “as the Cherokee settlements are in our vicinity . . . they frequently resort among our inhabitants, and particularly at this place.”<sup>25</sup>

As had long been the case, intercultural sex accompanied, and paralleled, such commercial and social connections. French men had long had sexual relationships with Native women, but recently arrived Anglo-Americans often followed suit. In one instance, an army officer stationed at Fort Finney supplied a Wyandot woman, “Young Polly,” and her mother with stolen goods from the garrison; the women were to “remain in the neighborhood” until the officer’s enlistment expired and he could bring her to Pittsburgh. There were also alleged instances when white women became involved with Native men. In one case, the *Knoxville Gazette* reported that a Philadelphian woman had

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<sup>25</sup> Winthrop Sargent to Abner Prior, October 25, 1792, in *TP: Vol. III*, 386-89; “Minutes of the Conference at Coyatee with the Chiefs and Warriors of the Cherokees, in May, 1792, with the Incidental Circumstances Relative Thereto,” May 1792, in *ASP:IA*, 267; William Blount to Secretary of War, April 9, 1793, *TP: Vol. IV*, 249-51; “Information by Governor Blount, Respecting the Cherokee Chiefs Whose Names Are Mentioned in the Narrative given by Richard Finnelson,” September 26, 1792, in *ASP:IA*, 288-91; John Sevier to Secretary of the Department of War, July 20, 1796, in “Executive Journal of Gov. John Sevier,” 111-14. For a description of William Blount’s “court,” see J. G. M. Ramsey, *The Annals of Tennessee to the End of the Eighteenth Century* (Charleston: J. Russell, 1853), 645.

eloped with a Cherokee called “Young George”; the paper urged that she be taken up for vagrancy. Several years later, the *Gazette* published an account of a Mrs. Abbott, a military wife, who absconded with a Cherokee after he paid her “great attention.” The Cherokees, the newspaper stated, threatened to “continue to take [white settlers’] wives for pay” for their lands.<sup>26</sup>

These close ties that existed between Natives and non-Natives throughout the territories did not obviate questions of power. Rather, as a generation of scholars have emphasized, intimacy often reinforced, rather than mitigated, inequalities. Commercial ties ensnared Natives in debt, while officials like William Blount sought to use their relationships with Native leaders to bolster U.S. leverage. Cross-cultural sex was especially fraught. Even as white men’s relationships with Native women built on long-standing Native practices of using sex to forge ties with, and even control, outsiders, they also corresponded with Anglo-American men’s exploitative views of Native women as sexually available. Prior to becoming governor, for instance, William Blount wished travelers to the lower Cherokee towns “greate Choice and Great plenty of Cheekamagga Squaws.” As for accounts of sex between Native men and white women, it is hard to know whether they were real or mere projections of white men’s sexual panic.<sup>27</sup>

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<sup>26</sup>David Zeigler to Arthur St. Clair, June 1, 1791, Reel 3, ASCP; “For the Knoxville Gazette,” *Knoxville Gazette*, May 19, 1792; “Knoxville Gazette, Monday, May 8, 1797,” *Knoxville Gazette*, May 8, 1797. In Detroit, the employers of a French man named Lafond brought suit against him for expropriating company property to maintain an Indian woman, reputedly the “best Clad in the Village.” *Leith, Shepherd & Duff v. Lafond*, June 12, 1797, No. 194, Box 1, Wayne Cnty Court of Common Pleas Records, Michigan Supreme Court Records, Archives of Michigan.

<sup>27</sup>Quotation in William H. Masterson, *William Blount*, Southern Biography Series (Baton Rouge: Louisiana State University Press, 1954), 91. For an exploration of the implications of sexual relationships between Natives and Europeans, see Richard Godbeer, *Sexual Revolution in Early* (Baltimore: Johns Hopkins University Press, 2002), 154-89; Susan Sleeper-Smith, *Indian Women and French Men: Rethinking Cultural Encounter in the Western Great Lakes*, Native Americans of the Northeast (Amherst: University of Massachusetts Press, 2001). On intimacy and power in U.S. history, see the essays collected in Ann Laura Stoler ed., *Haunted by Empire: Geographies of Intimacy in North American History* (Durham: Duke University Press, 2006); see also Ann Laura Stoler, “Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies,” *The Journal of American History* 88, no. 3 (2001): 829–65.

But, as tense as these intimate links between Natives and whites were, they represented the antithesis of the “Chinese wall” that men like Washington, Knox, and, ironically, even Blount hoped to construct between Native and American societies. They also did little to prevent conflict. If anything, they heightened it—particularly when mixed with alcohol, which seemed to so easily blur the boundary between conviviality and violence.

Formally, selling alcohol to Natives was illegal, at the least in the Northwest Territory. But territorial law was openly flouted. The alcohol trade was also too profitable, and too engrained, to be prohibited; one of the participants in Vincennes was even a county official. Ultimately, federal officials capitulated to reality. Winthrop Sargent, acknowledging that Natives would get it “from some Quarter or other,” explicitly authorized its sale by a few trusted individuals. To the south, the federal government felt constrained to sell rum and whiskey at the federally run trading posts it opened in Cherokee and Creek country, because the “habits of the Indians in this respect could not be controuled.”<sup>28</sup>

The availability of liquor drew Natives into territorial towns, where they would trade their peltry for alcohol and go on extended benders. Vincennes residents regarded themselves as particularly plagued with roving bands of intoxicated Indians, who “destroy[ed] the peace and good order of the Village.” One local magistrate reported how a party of “drunken tho friendly Indians” had accidentally burned down the house of one of the village’s poorest residents; another house, inadvertently set ablaze three days

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<sup>28</sup> Lt. Prior to Arthur St. Clair, October 7, 1791, Reel 3, ASCP; John Francis Hamtramck to Secretary of War, March 31, 1792, in *TP: Vol. II*, 380-83; Winthrop Sargent to the Courts of Common Pleas et al. of Knox County, July 22, 1793, in *TP: Vol. III*, 412-15; Timothy Pickering, “Instructions to Edward Price,” November 25, 1795, Letter Book of the Creek Trade House, 1795-1816 (microfilm), M4, U.S. National Archives.

later, was saved only by the federal soldiers from the fort. “Our village is stained with blood every day,” Catholic missionary Jean Rivet reported to his superior from Vincennes. Alcohol was an “inexhaustible source of quarrels . . . thefts, murders, and disorders of all kinds,” Rivet related, before offering a lengthy catalogue of violence: the “son of a great chief” killed by a “negro”; a white man stabbed by an Indian, who was in turned stabbed by another white man; a mother and choir singer shot at twice by an Indian; a village elder attacked by an Indian armed with a knife. “All these horrors,” Rivet lamented, “are the sad consequences of the drunk[e]ness of the savages.”<sup>29</sup>

Criminal cases from Vincennes underscore Rivet’s link between alcohol and violence, though they make it clear that Rivet’s attribution of blame ignored the white residents’ own role in drunken mayhem. Vincennes resident Lambeir Burway, for instance, seemed to have a knack for finding himself in the midst of cross-cultural brawls. In 1796, his home was the scene of a battery against a Pottawatomie known as the brother of Grand Poo, for which Leno Burway (presumably a relative) was indicted before the county court. A year later, Lambeir was himself indicted before the General Court of the Northwest Territory for a battery against a “Certain Indian Caled the Leaf.” The affair began as yet another drunken tavern brawl, where the Leaf, after employing “a grate dale of insulting Language” against a village resident named Mr. Rambout, drew his knife and stabbed Rambout. Just as the Leaf was about to make a second stroke, Burway intervened to separate them, at which point the Leaf started attacking Burway and Burway “in defence of his Own Life struk the said Indian with His Knif nere about the

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<sup>29</sup> Robert Buntin to Winthrop Sargent, June 21, 1793, Reel 3, WSP; Jean Francois Rivet to Bishop Carroll, August 8, 1797, Correspondence--1796-1801 (typescript English translation of original French), Rivet Papers, RHC # 102, Byron R. Lewis Historical Library, Vincennes University, Vincennes, Ind.

sender of his Brest.” The Leaf collapsed to the ground and was carried to a nearby house by the other Indians, where he died.<sup>30</sup>

A similarly tangled skein of facts appeared in the prosecutions of James Cooney and Thomas Coulter in relation to the death of a Delaware named George Allen a couple years later. The alleged crime occurred at Thomas Coulter’s inn in Vincennes, where a Delaware and a Frenchman were scuffling over a tomahawk. Three or four more Indians rushed in to help their countrymen, prompting the “white people” to push them all out of the tavern. But the Natives began to attack the windows and doors of the house, leading Thomas Coulter to fire a gun at them; still their attack persisted. James Cooney then grabbed the gun, reloaded, and fired again, at which point “the people cried out that an Indian was killed.”<sup>31</sup>

Matters to the south were similar. In 1792, William Blount investigated complaints by the Cherokee leader White Man-killer that he had been attacked by Knoxville residents. Blount discovered that the Cherokee had been “drinking with some people, in a tavern.” A drunken White Man-killer insulted Mr. John White, also drunk, who struck the Cherokee, “but not with an intention to kill.” Blount concluded: “It was a drinking affair only, and I understood was so settled when the parties got sober.”<sup>32</sup>

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<sup>30</sup> “Testimony of Antoine Marchal” July 7, 1797, Box 1, Folder 10; “Testimony of Claude Coupin” July 7, 1797, Box 1, Folder 9; “Examination of Lambeir Burway” July 8, 1797, Box 1, Folder 8; “Recognizance Bond of Lambeir Burway” July 9, 1797, Box 1, Folder 8; “Recognizance Bond of Henry Rambout” August 29, 1798, Box 1, Folder 11; all in General Court Records, Indiana State Archives. Burway’s house had in fact been the scene of another battery against a Pottowatomie known as the brother of Grand Poo the year before, for which Leno Burway was indicted before the county court. *United States v. Leno Burway*, April 21, 1796, Box 2, File 83, Knox County Court Records, Knox County Public Library, Vincennes, Ind.

<sup>31</sup> “Jury Presentment,” August 4, 1800; “Examination of James Correy,” August 5, 1800; “Inquest for George Allen” August 5, 1800; “Examination of William Prince,” August 6, 1800; “Testimony of H. Hurd” August 6, 1800; “Presentment against Thomas Coulter,” September 1800; all in M98, William Hayden English Family Papers, Indianapolis, Ind. Allen’s name was at times spelled as Highland.

<sup>32</sup> William Blount to The Glass, September 13, 1792, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 2, no.1 (January 1, 1897): 72-74.

Another incident, from after the Southwest Territory gained statehood as Tennessee, demonstrates especially clearly how alcohol-fueled camaraderie could quickly turn deadly. As recounted in a lengthy letter by A.M. Hoar to federal interpreter James Carey, two Cherokees, one named Johny, the other Sammy, passed by Hoar's home on their way to return a horse to its white owner. Sammy was well-known to Hoar and his neighbors, and enjoyed a good reputation, so Hoar "Got Some Whiskey and treat[ed] them" as a reward for "So friendly an Act to the Whites." Soon, Hoar's house was full of people from the neighborhood, all "freely" drinking whisky; everyone was "friendly and in Good Humour."<sup>33</sup>

At this point in the impromptu party, a small white man with the odd name of Barefoot Runion, "Very Much Intoxicated," began to "Rastle or Scuffle" with Johny. Johny asked Hoar if Barefoot was not angry and a "bad man"; Hoar told him he had simply had "Too Much Whiskey." The wrestling continued, with Johny sometimes flinging Runion, and sometimes vice versa; they frequently paused to go up to the table to drink together. Everything appeared to Hoar to be "in freen[d]ship and Diversion . . . . Nor Neither did I in the Least Expect Any Mischief."<sup>34</sup>

At some point, however, the situation turned, and the two men began to "fight in Earnest." Hoar intervened to separate the two men, grabbing Johny. But at the same moment, Sammy, the other Cherokee, who had been lying drunk on the floor, awoke and began to fight with Runion. Runion threw Sammy onto the short leg of a stool. Sammy complained that his belly hurt; Hoar inspected it, but could see no outward mark. The

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<sup>33</sup> A.M. Hoar to James Carey, July 28, 1802, Records of the Hiwasee and Tellico Trading House, RG 49, U.S. National Archives.

<sup>34</sup> *Ibid.*

Cherokees spent the rest of the night at Hoar's house and began the journey back home the next morning. Samy left still complaining about pain; Hoar later learned that he died on the journey. Hoar was very contrite and "Much Troubled" by the affair; he particularly "Much Lament[ed] that Too Much Whiskey Was Amongst the people."<sup>35</sup>

Such instances of drunkenness, violence, and even manslaughter did not mean that Natives and Anglo-Americans were not neighborly. On the contrary, as judged by local court dockets, white neighbors in the territories behaved exactly the same way. Towns like Knoxville, Cincinnati, and Vincennes were hard-drinking, violent places where drunken men, and sometimes women, regularly slandered, assaulted, and even killed one another. Alcohol-fueled camaraderie could turn to murder just as quickly when whites drank among themselves as when they drank in mixed company.<sup>36</sup>

But if the violence that occurred between Natives and whites in territorial taverns was quotidian, the wider setting was not. Unlike much of the violence among whites, assaults and murders committed by and against Natives occurred against a broader background of low-level warfare, racial tension, and diplomatic negotiation. In this context, ordinary conflicts between neighbors could take on political and diplomatic importance. Often it was difficult to tell whether a particular death should be regarded as an ordinary crime, the product of happenstance, or an act of war. In Vincennes, for

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<sup>35</sup> *Ibid.* The subsequent history of this incident is tangled, and speaks to a period later than the subject of this study. But as related by the federal Indian agent, a Cherokee council accepted the conclusion that Samy's death was an accident, and forbade his relatives from seeking retaliation, which they did regardless, killing Runion's son. The Council arrested the killer and turned him over the federal authorities pursuant to treaty; the federal government then turned the Cherokee over to the state of Tennessee, which tried and executed him. See McLoughlin, *Cherokee Renaissance*, 50-51.

<sup>36</sup> For some examples of criminal law in the Territory, see "William Goforth's Court Records," Box 12, Armstrong Papers, M6, Indiana Historical Society; "Minutes of Special General Court of Sessions of the Peace" November 11, 1789, Box 1, Folder 2: 1789, Local Government Records, Marietta College Library; *Government v. Alexander McMullin*, October 1793, Docket 4/7, Hamilton District Superior Court Records, Knox County Archives, Knoxville, Tenn. On the local concerns of territorial county courts more generally, including criminal law, see Michael Toomey, "'Doing Justice to Suitors': The Role of County Courts in the Southwest Territory," *Journal of East Tennessee History* 62 (1990): 33-53.



instance, a local magistrate investigated the death of one Laviollette, killed “by the Savages.” At first it appeared that Laviollette was the victim of an Indian attack, a common occurrence on a frontier in the midst of war; but it turned out that killing stemmed from a local Piankashaw’s “personal resentment” against Laviollette due to a “dispute about a Perogue” (a canoe-like boat). In other instances, the line between a “drinking affair” and warfare proved blurry. At Hays station, near Nashville, two Cherokees were drinking with the inhabitants when, “a little intoxicated,” they “boasted of their war exploits,” including killing two white men. The two Cherokees were found in their camp the next morning, “both dead, and shot through their bodies.” Officials regarded their death at the hands of unknown white assailants as murder, but the surrounding events also made it a plausible wartime killing.<sup>37</sup>

The situation was complicated, too, by the rise of a widespread anti-Indian rhetoric throughout much of the territories. As Peter Silver has traced, years of warfare in places like Virginia and Pennsylvania had produced societies where the ritual appeal to Indian atrocities and the rhetorical parade of suffering victims made Indian-hating a staple of shared political culture. As migrants from these places moved west, and faced more warfare, they brought these views with them. Such rhetoric was arguably strongest in Kentucky, which suffered Native attacks but where few white residents encountered Natives in everyday contexts, but it was also widespread in both the Northwest and Southwest Territories, where anti-Indian language infected territorial print culture, especially newspapers. Though often read in class terms, as a trait of the impoverished

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<sup>37</sup> Henry Vanderburgh to Winthrop Sargent, November 28, 1792, Reel 3, WSP; John Sevier to Andrew Jackson and William Claiborne, November 19, 1797, in *PAJ*, 1:153-54.

intruders on the public domain, these views' foremost proponents were often local elites vying for political prominence who supposedly sought to pander to popular prejudice—men like Henry Hugh Breckenridge in Kentucky, or William Cocke in the Southwest Territory, a rival of William Blount whom the governor excluded from office. Anti-Indian rhetoric proved, too, to have widespread currency among the middling sort: the citizens of Cincinnati, for instance, who banded together to offer a scalp bounty during the Northwest Indian War, or army officers whose correspondents casually dismissed Indians as “Copper faced Sons of whores.”<sup>38</sup>

Yet these views never entirely dominated the territories. The pages of the *Knoxville Gazette*, for instance, the Southwest Territory's only newspaper, were a battleground where writers under adopted Indian identities such as the Cherokee Hanging Maw not only rebutted the arguments offered by Breckenridge and Maw but mocked them for not enjoying any actual political power or authority. William Blount even borrowed explicitly from earlier fights when he had the *Gazette* reprint Franklin's pamphlet condemning the Paxton Boys' attacks on the Conestoga Indians thirty years earlier in Pennsylvania. And anti-Indian views were more likely to translate into political fighting—or, as we shall see, mass action—than private murders. But federal officials, particularly in Philadelphia, often wrote and spoke as if all territorial citizens shared these views and acted on them. Those who live “remote from the seat of government,”

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<sup>38</sup> F. Johnston to John Armstrong, July 15, 1790, Box 2, Folder 7, Armstrong Papers, M6, Indiana Historical Society; Silver, *Our Savage Neighbors*. For the spread of anti-Indian rhetoric westward, especially to Kentucky, see Griffin, *American Leviathan*. For Cocke's views, see “For the Gazette,” *Knoxville Gazette*, December 29, 1792. On the private subscription to offer scalp bounties, see *SCP*, 328-330 n.

Secretary of War Timothy Pickering wrote, “do not deem Indians entitled to the common rights of humanity,” and so “murder & plunder Indians whenever they can.”<sup>39</sup>

An incident in Vincennes, from 1791, underscores especially clearly how outsiders, fixated on these racial and class divides, could quickly escalate local, drunken disputes into full-blown diplomatic and diplomatic incidents. According to the report of the county magistrates, the affair began as yet another drunken argument. A number of Natives in the village routinely received whiskey from a man named Simpson. One night, the Natives returned to Simpson’s and became “intoxicated.” Also at Simpson’s was Lieutenant Dirck Schuyler, a soldier stationed at Fort Knox known to his commanders as a bad egg given to “continual drunkenness” and “other base conduct.” Schuyler was drinking with several companions, other young white men whom the magistrates deemed “unworthy” companions. Simpson refused to give the Natives liquor without payment in furs, “whereon some disputes arose altho’ they did not understand each other, and Simpson struck the Indian.” Schuyler and his companions then seized the Native and took him prisoner, parading him through the streets “in a riotous manner.” But the Indian soon escaped from the drunken men.<sup>40</sup>

The matter might have ended here, yet another drunken fight over debts between Indians, a shopkeeper, and the soldiers. But Schuyler and his companions pressed on. The arrival of Anglo-American newcomers such as Schuyler, many of whom could barely conceal their disdain for both Natives and the French settlers, had riven Vincennes

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<sup>39</sup> “For the Gazette,” *Knoxville Gazette*, October 20, 1792; William Blount, “For the Gazette,” *Knoxville Gazette*, June 1, 1793; Timothy Pickering to David Campbell, August 28, 1795, Folder 2, Timothy Pickering Letters, Ayers 926, Ayer Collection, Newberry Library. Silver argues that the political deployment of the “anti-Indian sublime” against opponents was its “most crucial[]” function. Silver, *Our Savage Neighbors*, xviii-xxvi.

<sup>40</sup> John Francis Hamtramck to Josiah Harmar, February 18, 1791, in Thornbrough, ed., *Outpost on the Wabash*, 277-79; Magistrates of Knox County to Arthur St. Clair, July 29, 1791, Reel 3, ASCP. Simpson’s culpability, the magistrates noted, could not “be proved but by the Testimony of Indians.” *Ibid.*

with racial and ethnic tensions. Schuyler and his companions used the brawl as an excuse to uncork these discontents. After the unknown Indian escaped, they proceeded to attack the house of a Frenchman named Joseph Andre, where one of the men beat Andre's pregnant wife, fired a pistol into the door, and seized Andre's son. Andre pleaded that they were Frenchmen—presumably insisting on their difference from the Indians—but, when asked if they had come to kill the French, Schuyler and his companions shouted, “Yes, kill them, kill them.” Schuyler and company then proceeded to the neighboring house of Jean Baptiste Constant, a local Indian interpreter, where they seized “an Indian and his Wife and Children,” and conveyed all of them to the guardhouse.<sup>41</sup>

At this point, town residents intervened. Their primary concern was how the surrounding Natives would interpret the affair. Pointing to the “extreme Weakness of the Village” and the need to “conciliate as much as possible the affections of the Indians, who . . . might in a great measure effect our ruin,” the magistrates pleaded with Schuyler to release the captured Native. Indeed, “alarmed” local Natives had already begun to mass ominously on the opposite bank. Eventually, Schuyler released the Indian. The villagers dispatched a prominent local to inform the Natives that Schuyler and his companions had been indicted before a special session of the general quarter court of the peace, and would “endeavor to prevail on them to forget the whole Affair.” In the end, Schuyler was punished—but not by the civil courts. Because of his military post,

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<sup>41</sup> Magistrates of Knox County to St. Clair, July 29, 1791.

Schuyler was cashiered and threatened with court martial; he opted to resign instead. A precarious peace persisted in Vincennes.<sup>42</sup>

The Schuyler incident helps illustrate why Knox's vision of a strictly enforced separation—a "Chinese Wall"—between Natives and whites could not be realized. In part, this reflected the shortcomings of formal law: a neat boundary line could not undo the commercial, social, and sexual entanglements that bound together Natives and U.S. citizens. Indian country and the U.S. territories bled imperceptibly together; ostensibly American towns like Vincennes, Nashville, and Knoxville were also central sites of Native diplomacy and trade. Not only could the federal government not simply separate the groups by fiat, but, as William Blount's close ties to the Cherokees demonstrate, federal officials also relied on, encouraged, and benefitted from such intermixing.

But the Schuyler incident also underscores the flaw in Knox's belief that only federal jurisdiction, untainted by the biases of both Natives and territorial citizens, could supply justice. Distance had a cost as well as a benefit. Local Natives and whites were not color-blind; they well understood the racial and cultural barriers that divided them, and did not always like one another. But they also knew the local connections that bound them together, and recognized that cross-cultural violence, like violence in the territories more generally, often resulted from a potent mix of alcohol, personal disagreements, and happenstance. Those who witnessed such crimes often argued, as A.M. Hoar insisted in the death of Samy, that there was no intention of killing.<sup>43</sup>

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<sup>42</sup>*Ibid.*; Arthur St. Clair to Lt. Prior, August 15, 1791, Reel 3, ASCP; Arthur St. Clair to Henry Knox, August 17, 1791, Arthur St. Clair Papers, Burton Historical Collection, Detroit Public Library; Henry Knox to George Washington, August 28, 1792, in *PGW:PS*, 11:49-50.

<sup>43</sup> Hoar to Carey, July 28, 1802.

Yet that first-hand knowledge was often lost as reports of the violence spread to those further removed from the territories, especially federal officials. Preoccupied with broader concerns about diplomacy and Indian affairs, these men fixated on divisions between opposing national and racial categories, and, because they saw the world that way, they assumed that all borderland residents did, too. On several occasions, St. Clair and Sargent quickly interpreted instances of cross-cultural violence in light of this narrative, only to discover that they had misread a local dispute as a racially motivated killing. Yet once this narrative of borderland violence as a product of racial hostility was established, it was remarkably durable. Violence became evidence of racial hatred, while the existence of racial hatred in turn allowed intent in any cross-cultural crime to be inferred. But as a result, more and more people like Lieutenant Schuyler—strikingly, both an outsider *and* a federal officer—came into the territories. Dividing the world into separate and hostile racial groups, men like Schuyler increasingly transformed the violence of everyday life into political violence intended to convey overt racial meaning, turning their narrative into a self-fulfilling prophecy.

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Knox's second principle, the establishment of federal jurisdiction over crimes between Natives and whites, proved equally fruitless. The problem was not lack of effort: territorial officials took Knox's admonition that "justice" should govern Indian affairs very seriously, and intervened in dozens of instances of cross-cultural crime in the territories. And like Knox, they advanced a vision of colorblind justice, under which both territorial citizens and Natives would be liable under federal law for the harms they

committed on the other. As Winthrop Sargeant told Ottawas and Chippewas gathered at Michilimackinac, “[W]e are determined to obtain the same Rule and make no Difference between Red and White People.”<sup>44</sup>

In the end, however, the federal government largely failed in its efforts, both to punish Natives for crimes committed on U.S. citizens, and to punish citizens for crimes they committed against Natives. The two circumstances were very different, yet the fundamental cause of failure was, in broad strokes, similar: the formal limitations built into the scope and reach of federal law.

These institutional constraints checked territorial officials’ power to exercise the federal jurisdiction they ostensibly enjoyed.

On July 24, 1794, an unknown group of Natives killed and scalped John Ish, a white settler, while he was at his plow on his farm eighteenth miles below Knoxville on the south side of Holston River, in the Southwest Territory. The killing, William Blount stated, “much exasperated the Frontier People.” Eight days later, on August 1, a territorial Court of Oyer and Terminer in Knoxville tried, and a territorial jury convicted, a Creek Indian named Apongphohigo for Ish’s murder. He hanged three days later, at four in the afternoon. “Your Muscoga acquaintance took a civil swing,” a territorial resident wrote to Indian agent John McKee upon witnessing the execution. “[H]e died with firmness.”<sup>45</sup>

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<sup>44</sup> Winthrop Sargeant, “Speeches to Chippewas and Ottawas,” September 6, 1796, Ayer MS 790, Newberry Library.

<sup>45</sup> William Blount to John Gray Blount, July 29, 1794, in *JGBP*, 2:420-21; Willie Blount to John McKee, August 5, 1794, Folder 2, John McKee Papers, Manuscript Division, Library of Congress. Two accounts of Ish’s trial exist: a printed account in the *Knoxville Gazette* and a manuscript record in the territorial court records. “Knoxville, Monday, August 4,” *Knoxville Gazette*, August 4, 1794; United States v. Apongphigo, August 1, 1794, Minutes of Oyer and Terminer Court, Hamilton District Superior Court (typescript

Apongphonhigo's trial and hanging was likely the first time the federal government exercised criminal adjudicatory jurisdiction over an Indian. Federal officials celebrated it as "an example, worthy of imitation, of how federal criminal jurisdiction could replace retaliation in punishing Natives accountable for their attacks. John McKee argued the Creek's conviction would "spare the innocent from the rage of the exasperated frontier inhabitants." In a grand jury charge, territorial judge Joseph Anderson insisted that "the late punishment of the Creek Indian, for the murder of Ish," showed citizens that they must "not be your own avengers . . . but rest your hope on the due administration of the laws." And Treasury Secretary Alexander Hamilton praised the proceeding as "an example of justice and fair dealing" in urging the Governor of Georgia to adopt similar measures to prevent citizen attacks on Natives.<sup>46</sup>

Yet *United States v. Apongphigo*, as the case was officially captioned, was also the *only* recorded prosecution of a Native in the Southwest Territory. The Northwest Territory situation was similar: records survive of a single capital prosecution, *United States v. Wapikinomouk*, that occurred just as Vincennes was transitioning from an outpost of the Northwest Territory to the capital of the newly created Indiana Territory.

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copy, 1942), pp. 12-14, Tennessee State Library and Archives. Ish left little trace in surviving archives, appearing in a single local court case over debts. *George Bowerman v. John Ish*, September 9, 1793, Docket 77/97, Knox County Court of Common Pleas Records, Knox County Archives, Knoxville, Tenn.

<sup>46</sup> Alexander Hamilton to George Mathews, September 25, 1794, in Harold C. Syrett, ed., *Papers of Alexander Hamilton* (New York: Columbia University Press, 1972), 17:270-75; "Knoxville, Monday, August 4," *Knoxville Gazette*; "A Charge Delivered by Judge Anderson, to the Grand Jury of the District of Hamilton, in the Territory South of Ohio, at October Term, 1794," *Knoxville Gazette*, November 1, 1794. Apongphonhigo's prosecution was, of course, not the first time Anglo-Americans had asserted criminal jurisdiction over Indians, which had a long history throughout the colonial period and afterward. See, for instance, Yasuhide Kawashima, *Igniting King Philip's War: The John Sassamon Murder Trial* (Lawrence, Kan: University Press of Kansas, 2001). But those prosecutions had rested in the hands of the colonies and states; because Apongphonhigo was tried in the territories, it was held under federal authority.



Understanding why events federal officials believed so worthy of emulation occurred so rarely requires digging more deeply into the circumstances of the two cases.<sup>47</sup>

The accounts of Apongphigo's trial—a brief court record and a slightly fuller newspaper version—reveal a court that adhered scrupulously to the legal process that would have been afforded a non-Native defendant in a murder case. Apongphohigo—“an Indian of the Creek Nation late of the Town of Tookcaucaugee; or Punk Knot on Oakfuskry River”—was indicted by a grand jury for murdering Ish “feloniously willfully and with malice aforethought.” James Carey, the federal Indian interpreter, explained the indictment to the Creek, who reportedly “confessed the fact.” But the court, “willing to afford the prisoner the benefit of trial by a jury, (permitted him to withdraw his plea) and plead not *guilty*.” A petit jury was then sworn, and Apongphohigo had John Rhea assigned him as counsel by the court. (Rhea was an “early settler” on the Cherokee lands south of the French Broad River.) The jury heard the “fullest testimony” on the case, which does not survive, although the witness list does: it included James Carey, the federal interpreter, as well as four other territorial citizens, including Joseph Sevier, John Sevier's son. The jury voted to convict, and Judge Anderson, who oversaw the proceeding, pronounced the sentence of death in the “usual form.”<sup>48</sup>

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<sup>47</sup> Both of these claims are, of course, subject to the limitations of the surviving court records. Most of the records of the Southwest Territory survive; Apongphohigo's prosecution is the only instance I have found where the territorial courts exercised criminal jurisdiction over Indians. The records in the Northwest Territory, especially of the General Court, are much patchier. I have found only one other instance where territorial courts there exercised quasi-criminal jurisdiction over an Indian. In 1798, Antoine Marchall, a Vincennes resident, filed suit against “John a Delaware Indian, with the advantage of only one Eye” for an assault and battery, seeking \$700 in damages. But the case was dismissed after the parties failed to appear. “Antoine Marchall v. John (A Delaware Indian)” 1798 in *Minutes of Common Pleas Court* (Indianapolis, IN: Indiana Historical Records Survey, 1940), 132; Warrant, May 14, 1798, Antoine Marchall v. John (A Delaware Indian), Knox County Court Records, Knox County Library, Vincennes, Ind.

<sup>48</sup> “Knoxville, Monday, August 4,” *Knoxville Gazette*, August 4, 1794; United States v. Apongphigo, Minutes of Oyer and Terminer Court. Since Carey was the only witness who could converse with Apongphohigo, it was unclear what the other witnesses testified to. They may have been eyewitnesses, although the accounts seemed to indicate that Ish was alone when he was killed.

Given Apongphohigo's confession, the most interesting legal issue in the case was jurisdiction. The indictment had stated that the Creek's crime had been "contrary to the laws of the United States and Treaties of peace made with the Creek Nation and against the peace and dignity of the United States." Carey further explained to Apongphohigo that in the Treaty of New York "it was agreed that if any Creek Indian or Indians should commit a murder upon any citizen of the United States, he or they should be given up, and tried according to the laws of the United States." Apongphohigo replied that he was "well acquainted with the talk that was held at New York, for it was well sung in their ears by the chiefs after their return to the nation: But that the Upper Towns had thrown away that talk, and taken up the hatchet." Apongphohigo's reply was, perhaps, an implicit jurisdictional rebuke to the court; it implied that the Upper Creeks, at least, had never ratified the treaty, and so could not bind them. But this jurisdictional wrinkle did not attract any attention.<sup>49</sup>

Even absent the Treaty of New York, however, Apongphohigo would likely have been subject to federal prosecution. Apongphohigo's killing of Ish had happened within lands that the Cherokees had ceded the United States at the Treaty of Holston, and so within the jurisdiction of the federal territorial courts. Here, the international-law principle, documented in Vattel, that a nation's courts presumptively enjoyed jurisdiction over all persons within their jurisdictional limits regardless of nationality seemed to operate. Two years after Apongphohigo's execution, section 14 of the 1796 Trade and Intercourse Act would specifically codify what it implied was preexisting legal authority

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<sup>49</sup> "Knoxville, Monday, August 4," *Knoxville Gazette*, August 4, 1794; United States v. Apongphigo, Minutes of Oyer and Terminer Court.

by specifically reaffirming the power of “legal apprehension or arresting, within the limits of any state or district, of any Indian” who had “come over or across the [] boundary line, into any state or territory” and stolen from or killed inhabitants there. Section 17 of the same act, which allowed the arrest within the states or territories of “any person” who had violated the statute, also plausibly warranted Indians’ arrest and trial, as one official argued.<sup>50</sup>

Apongphonhigo’s trial, then, presented a pageant of the triumph of federal law and jurisdiction. But this appearance was only a facade. In fact, Apongphonhigo’s subjection to federal criminal jurisdiction was due almost entirely to Cherokee law. The most important legal issue was not what happened to Apongphohigo in the Knoxville courtroom, but how he got there in the first place.

After Ish’s death, two territorial militia leaders, Major King and Lieutenant Cunningham, set off to pursue the killers. They followed the trail into the Cherokee Nation, but they proved incompetent woodsmen. Arriving in the Cherokee town of Willstown, where the influential Cherokee leader Hanging Maw lived, they learned from the Indian trader William Springston that he had seen Ish’s scalp and the party of Creeks that had taken it. Though the Creeks had not gotten far, Springston reported, King had missed his chance to capture them.<sup>51</sup>

Here, Hanging Maw intervened, offering assistance on how to “overtak[e] and punish[] the Murderers of Ish.” Maw in fact dispatched eleven Cherokee warriors, including Willoe, his own son, to assist King and Cunningham in their pursuit. Their

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<sup>50</sup> Vattel, *The Law of Nations*, Book II, §§ 101-103, pp. 312-13; Act of May 19, 1796, ch. 30, 1 Stat. 469, 472-74; John Sevier to Benjamin Hawkins and Andrew Pickens, April 19, 1797, in “Executive Journal of Gov. John Sevier,” 149-51.

<sup>51</sup> Samuel R. David to John McKee, August 1, 1794, Folder 5, John McKee Papers, Manuscript Division, Library of Congress.

hunt led them south, to the Cherokee town of Hiawassee, where the residents told them that the killers were indeed Creeks who had recently passed through the town, and who would likely camp the night at the town of “Wocoee” (Ocoee, further down the Hiwassee River). Continuing their pursuit, they thought they had the killers in sight, when a runner from Hiawassee arrived and alerted them that one of the killers had remained behind. The party turned around, found the Creek—Apongphonhigo—and quickly surrounded him.<sup>52</sup>

The question then became what to do with Apongphonhigo. No one seemed to think of his apprehension in criminal-law terms—there was no warrant, and no civil officer present to arrest him. Blount himself, in his instructions to the Cherokees, had been indifferent as to the murderers’ fate, as long as they were punished: either the Cherokees could kill the murderers “and their Hair brought in fresh,” or they could be “taken alive and delivered . . . to be by my order put to death at this place [Knoxville].” But the issue became who would take the Creek prisoner. For their part, the Cherokees urged King to “kill or take him.” The reason for this insistence was not specified, but the Cherokees likely considered the Creek as the enemy of the United States and so deferred to the Anglo-Americans. But King refused to do so, instead arguing the “propriety of *their* doing one or the other.”<sup>53</sup>

Although he offered no explanation for his actions, King’s hesitancy and deference to the Cherokees are illuminating. In refusing to arrest Apongphonhigo, King was following federal law as it then existed, which did not extend criminal jurisdiction

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<sup>52</sup> William Blount to John McKee, N.D., Folder 1, John McKee Papers, Manuscript Division, Library of Congress; Major King to William Blount, July 30, 1794, in “Knoxville, Monday, August 4,” *Knoxville Gazette*, August 4, 1794.

<sup>53</sup> King to Blount, July 30, 1794. On Native ideas of personal jurisdiction, see Katherine A. Hermes, “Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance,” *The American Journal of Legal History* 43, no. 1 (January 1999): 62–69.

over Natives within Native territory. For most purposes, the federal government regarded Native lands as a foreign and autonomous jurisdiction, a result that the Washington Administration believed derived from the customary law of nations as long practiced in North America. Most of federal legal practice with respect to Native nations—the emphasis on diplomatic negotiation, the codification of the relationship in treaties, the preemption of state law—reflected this legal position. Territorial citizens sometimes attempted to use Native territory’s foreign status to their own advantage. Robert Slaughter, charged with the 1798 murder of Joseph Hardin, argued that the alleged crime had occurred “on the Indian Lands, without the jurisdiction of this Court and within the limits of another nation at the time the offence is charged to have been committed”; his success is unclear. In 1794, when Zachariah Johnson sued Charles Raygan for an assault that happened in the French Broad region of the Southwest Territory before the Cherokees had ceded it to the United States, Raygan’s attorney argued that the lands where the tort occurred were “out of the protection of the United States.”<sup>54</sup>

As Raygan discovered, there was an important exception to the lack of federal criminal jurisdiction within Indian country: the United States could exercise personal jurisdiction over its citizens even within Indian country, a power codified in the Trade and Intercourse Act. Thus, in Raygan’s case, the court and the jury seemingly agreed with Johnson’s attorney’s argument that the assault and battery “is [a] personal action and

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<sup>54</sup> United States v. Robert Slaughter, September 1804, Box 1, Folder 17, General Court Records, Indiana State Archives; Zachariah John by Joseph Johnson v. Charles Raygan, April 1794, Minutes of Oyer and Terminer Court, Hamilton District Superior Court, 28-30. I discuss the legal status of Native nations during this period in Gregory Ablavsky, “Beyond the Indian Commerce Clause,” *Yale Law Journal* 124, no. 4 (2015): 1012–90.

always follows the person, is not local”—the territorial court, in other words, could exercise personal jurisdiction over Raygen.<sup>55</sup>

But Apongphohigo was neither within ordinary territorial jurisdiction of the United States nor a U.S. citizen; King had no legal basis to exercise criminal jurisdiction over him. In the end, it was Willioe, Hanging Maw’s son, who bound Apongphohigo and brought him to federal Indian agent John McKee at the Tellico Blockhouse, a federal outpost within Cherokee territory.

What followed conformed to Native, not Anglo-American, legal norms. McKee recounted that the Cherokees met the prisoner’s arrival with the firing of guns and shouts of the “*death whoop*”; “joy,” McKee asserted, “seemed to be diffused in the countenance of every description of the Cherokees.” Both McKee and King recorded how Middle Striker, “a distinguished chief from Will’s Town,” grabbed the prisoner, lifted him up “as high as he could, [then] dashed him with great violence on the ground, exclaiming, ‘That is the way I shake hands with my enemy!’” When McKee managed to dissuade Hanging Maw from scalping the prisoner alive, the Cherokees snatched Apongphohigo’s warlock instead, “with which they danced the scalp-dance all night, and used all the ceremony of exultation commonly practiced among Indians on the death or capture of an enemy.” The

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<sup>55</sup> John v. Raygan, April 1794. Early American law generally disfavored extraterritorial application, though application of federal law to Indian country was complicated by the reality that it was not, in a formal sense, extraterritorial. See Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* (Oxford ; New York: Oxford University Press, 2009), 31-58. Vattel, however, condoned punishing citizens for crimes committed against another sovereign, and suggested that the home country could punish citizens for such acts committed in a foreign jurisdiction. See Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Indianapolis, IN: Liberty Fund, 2008), Book II, §§ 72-76, pp. 298-300. The idea that jurisdiction attached to people, rather than places, also had deep roots in imperial legal thought. See Lauren A Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400--1900* (Cambridge [UK]: Cambridge University Press, 2010), 2-39.

next day, McKee, along with the Cherokees and local militia, escorted the prisoner to Knoxville. Only then did the legal machinery of territorial law begin to operate.<sup>56</sup>

The Cherokees had their own reasons to assist the United States. William Blount had adopted a preemptory tone in demanding Cherokee cooperation, giving Hanging Maw ten days to apprehend the killers—an action that at once acknowledged the Cherokees as an autonomous jurisdiction while also demeaning their independence. But the Cherokees did not behave as though they were coerced; as Major King reported, they “appeared to breath the keenest spirit of revenge for the death of Ish.” This eagerness likely reflected Cherokee, rather than American, agendas. The upper Cherokees had little love for the Creeks, with whom Hanging Maw was “highly exasperated on account of the many injuries he has received.” The Cherokees also recognized that they could use the affair to solidify their relationship with the United States. Afterwards, Hanging Maw repeatedly cited the case to remind officials of Cherokee service, and, equally significant, his own importance within the Cherokee nation. In his next meeting with Blount, Maw stated, “I ordered the Creek seized . . . & I will kill my own People if they kill white people.” When Blount began distribute goods to the Cherokees, Maw asked whether they would go to the Cherokees who killed whites or to those “who had given proof of their friendship to the United States by taking [a] Creek.” Blount got the message, ensuring that loyal allies among the Cherokees received “the greatest share.”<sup>57</sup>

The elaborate display of federal legal supremacy in the Knoxville courtroom sought to erase all this history, obscuring federal dependence on Native jurisdiction and

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<sup>56</sup>King to Blount, July 30, 1794.

<sup>57</sup>Blount to McKee, N.D.; “Conference at Tellico Blockhouse,” November 7, 1794, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 3, no. 4 (October 1, 1898): 367-72; William Blount to Secretary of War, November 10, 1794, in *TP: Vol. IV*, 364-70.

law. But Aponphonhigo knew that the real legal work had been done on the Cherokee path to Ocoee, not in Knoxville. Asked whether there was any reason the judgment of the court should not be pronounced upon him, the Creek replied:

he had not any thing; that he come out with an intent of killing and stealing or being killed; that he had killed the man for which he had been tried; and that it had been his misfortune to fall into the hands of the whites; but that he should escaped them if it had not been for the Cherokees; and that if he was now put to death there was plenty of his nation remaining to revenge his death.

Apongphonhigo's comments also suggest why his trial was the last instance an Indian was prosecuted in the Southwest Territory. As Apongphonhigo threatened, the cooperation Maw and the Cherokees offered the United States had costs as well as benefits; it made the Cherokees liable under Native law for his death. Sure enough, mere weeks after the killing, the Creeks appeared at Willstown, demanding that Middle Striker and Willioe be "delivered up in satisfaction for the Creek, who they apprehended." The Cherokees had known that that their support would "draw the Creeks upon them," and had asked McKee for protection from the United States. Yet Blount and others did not seem to take any special efforts in response. The evidence on this question is lacking, but the Cherokees, perhaps, made their own calculation that the costs of aiding the United States outweighed the benefits.<sup>58</sup>

It is tempting to read Apongphonhigo's arrest, trial, and execution as evidence of how the realities of the borderlands, particularly Native power, undermined federal assertions of legal supremacy. The affair certainly underscored how dependent the often inept and incompetent territorial government was on Native support. But fitting the trial

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<sup>58</sup> "Knoxville, Monday, August 4," *Knoxville Gazette*, August 4, 1794; William Blount to James Robertson, August 31, 1794, in "The Correspondence of Gen. James Robertson" (October 1, 1898), 356.



into a narrative of federal weakness ignores the fact that, as arrogant as the United States and its representatives could be, formal federal law disclaimed criminal jurisdiction over Native lands. As King's refusal to exercise authority within Cherokee territory suggests, the Southwest Territory and the Cherokee Nation formally remained separate and distinct jurisdictions.

The trial for *United States v. Wapikinimouk* was held in Vincennes.

Wapikinomouk, a Delaware, was accused of murdering a white man named Harrison, first name unknown. As in the case of Apongphohigo, the Delaware was prosecuted before a specially called Court of Oyer and Terminer. Wapikinomouk's proceeding, however, was briefer and more cursory than Apongphohigo's trial. He was indicted by a grand jury on the testimony of a fellow Delaware, Johny, who had been "Sworn with an uplifted hand after the Custom and manner of the Indians." Although both Wapikinomouk and Johny were presumably well acquainted with Euroamerican society—the indictment described them as "late of Kaskaskia," a French settlement in the Illinois country on the American side of the Mississippi—they spoke through Joseph Baron, the federal Indian interpreter. It is unclear whether Wapikinomouk had counsel. His indictment charged with murder with malice aforethought in violation of territorial law. Treaty law was not mentioned, although the Treaty of Greenville contained a provision stipulating that Delawares who killed citizens of the United States would be punished according to the laws of the United States. After the indictment was translated to Wapikinomouk, he pleaded not guilty; a jury was empaneled and convicted him.

Having nothing to say, Wapikinomouk was sentenced to be hanged on Monday, November 23.<sup>59</sup>

Unlike in Apongphohigo's prosecution, however, extensive testimony about the crime survives, in the form of two recorded, likely pretrial interrogations of Johny and Wapikinomouk, conducted by two judges of the court. These statements likely echoed the testimony offered at trial, and offered a largely consistent account of the killing.<sup>60</sup>

In their telling, the crime, like much of the cross-cultural violence in the region, reflected both the close ties that could arise between Natives and whites, and the capriciousness and seeming irrationality of many killings. Wapikinomouk, Johny, and a third Delaware named Matashikan had been traveling together from the Kentucky side of the Ohio River when they encountered Harrison. Harrison asked to purchase some venison which Wapikinomouk had recently caught; Wapikinomouk hospitably shared the meat for free, at which point Harrison "gave them all a drink of Wiskey & then a Second & third," until they all "got drunk." Around noon, the four men decided to take the ferry to the north side of the Ohio River; Wapikinomouk stated that Harrison wanted to join them on their way to "the Spanish Country," on the other side of the Mississippi, "to see what kind of country it was." While they waited for the ferry, Harrison and Wapikinomouk "jumped & wrestled," just as had been done at the gathering at A.M. Hoar's house; Johny testified that it had been done "in good humour & [with] no

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<sup>59</sup> "Presentment Against Delaware Indians" September 1801, Box 30, Folder 4, M98, William Hayden English Papers, Indiana Historical Society; "Court of Oyer and Terminer," November 10, 1801, Box 30, Folder 4, William Hayden English Papers. Since Vincennes did not yet have a newspaper, there was no public announcement of the execution. Vincennes would not have a newspaper until 1804. Note that the Johny discussed here, a Delaware, is distinct from the Johny, a Cherokee, present at the incident at A.M. Hoar's house.

<sup>60</sup> "Examination of Johny," October 29, 1801, Box 30, Folder 4, William Hayden English Papers; "Examination of Wapihinomock," October 29, 1801, Box 30, Folder 4, William Hayden English Papers; "[Alternate] Examination of Wapihinomock," October 29, 1801, Box 30, Folder 4, William Hayden English Papers. A brief account of the trial can also be found in James Joseph Buss, *Winning the West with Words: Language and Conquest in the Lower Great Lakes* (University of Oklahoma Press, 2013). Buss misstates that the records indicate trial, rather than pre-trial, testimony.

Appearance of Disgust or Resentment.” On the other side of the river, the four mounted men proceeded single file, with Johny in front, then Harrison, followed by the two other Delawares. At some point someone shouted “Let’s kill him” in Delaware. Johny whipped around to hear two rifle shots and see Harrison fall from his horse.<sup>61</sup>

The crime was remarkable for its seeming lack of motive. As a robbery, it offered a poor yield: Wapikinomouk took four silver dollars from Harrison and divided them among his party, though Johny refused to accept any. The Delawares took Harrison’s horse, saddle, bridle, and rifle, but left his body on the ground; both Johny and Wapikinomouk stressed that they had neither scalped nor stripped Harrison. Asked whether there had been any cause for “Quarrel or misunderstanding,” both Johny and Wapikinomouk insisted that there was not. Wapikinomouk, perhaps self-interestedly, testified that Harrison “was killed when they were drunk and without any Cause of hatred or ill will.” But Johny confirmed Wapikinomouk’s account. The murder, he told the judges, was entirely unplanned. Right after the shooting, he had “upraided” the other Delawares, noting that Harrison had “used them well and gave them to eat & drink with him.”<sup>62</sup>

But it was what happened after the killing that was perhaps most relevant to how the two Delawares ended up in the Vincennes courtroom. All three Delawares had proceeded to Cape Girardeau, which was a town on the Spanish side of the Mississippi in present-day Missouri. When they arrived, Johny went to his uncle Captain Allen, a

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<sup>61</sup> Examination of Johny,” October 29, 1801; “Examination of Wapihinomock,” October 29, 1801; “[Second] Examination of Wapihinomock,” October 29, 1801. The only meaningful discrepancy between the testimony of Johny and Wapihinomock was that Johny testified that Harrison asked to accompany them toward Kaskaskia, while Wapihinomock testified that Harrison planned to accompany them toward the Spanish lands.

<sup>62</sup> Examination of Johny,” October 29, 1801; “Examination of Wapihinomock,” October 29, 1801; “[Second] Examination of Wapihinomock,” October 29, 1801.

Delaware chief, relaying the account and handing over Harrison's rifle. Allen seems to have informed Louis Lorimier, the town's Spanish commandant, who demanded that Wapikinomouk hand over the horse and bridle. It was the Spanish and the Delawares who handed over Wapikinomouk for prosecution. But the third Delaware, Matyikan, remained at Cape Girardeau, in Spanish territory, "not delivered up," in Johny's phrase. The territory's attorney general ordered that a writ be issued for his arrest, but, by its own terms, the writ had no force in Spanish territory, and Matayhikan never seems to have been captured.<sup>63</sup>

In short, Wapikinomouk's prosecution, just like Apongphohigo's, demonstrated how much the exercise of federal criminal jurisdiction over Natives depended on the cooperation of other jurisdictions. Wapikinomouk faced federal law only because the Delawares and the Spanish decided that he should; Matayhikan, on the strength of the testimony equally culpable for the same crime, escaped punishment, similarly on based solely on Delaware actions. Territorial officials' scrupulous adherence to their vision of the rule of law—more dubious in this instance, where the lack of intent might arguably undermine a murder conviction—was entirely beside the point.

The problem with Knox's vision of forcing Natives to submit to federal law was not that informal law defeated the formal authorization of federal criminal jurisdiction. The more substantial issue was that, on its own terms, federal law did not govern foreign territory, including Indian country. As long as the territories were borderlands that Natives and others could easily traverse, the formal as well as practical reach of federal

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<sup>63</sup> Examination of Johny," October 29, 1801; "Examination of Wapihinomock," October 29, 1801; "[Second] Examination of Wapihinomock," October 29, 180.; "Court of Oyer and Terminer," November 10, 1801.

jurisdiction would be limited. The consequence of this reality was that the federal government could only get its hands on Natives to prosecute when Natives themselves were willing to cooperate.

If prosecutions against Natives in territorial courts were rare, prosecutions of territorial citizens for crimes committed against Natives were not. Dozens of such prosecutions occurred, in both the Northwest and Southwest Territories. Given that historians have correctly emphasized the early American state's commitment to imperialism and the inability of Anglo-American courts to deliver justice to Native peoples, this discrepancy is unexpected. Much of the difference, of course, reflected the fact that the territorial courts could get their hands on their own citizens to prosecute much more easily. But many territorial officials proved just as dedicated as trying to use the courts to punish cross-cultural crimes as Henry Knox was. In many ways, territorial officials acted just as Knox had hoped they would, using federal jurisdiction to try to bring what they regarded as justice to Native peoples.<sup>64</sup>

But few of these prosecutions ever produced a conviction. Crime against Natives was rife in the territories: citizens of the Northwest Territory had “abused, cheated,

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<sup>64</sup> An older debate in the historiography, centered in New England, focuses on the extent to which Anglo-American courts treated Indians “fairly,” with Alden Vaughan emphasizing an impartial legal system, Alden T Vaughan, *New England Frontier: Puritans and Indians, 1620-1675*, 3rd ed (Norman: University of Oklahoma Press, 1995), 185–210. while Yasuhide Kawashima convincingly argued that, even as Anglo-American judges strove to treat Indians impartially, cultural barriers prevented a neutral application of justice. Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763* (Middletown, Conn: Wesleyan University Press, 1986). More recent work has stressed both the failures of justice as well as the imperialist aspects of the extension of jurisdiction over Natives. For a focus on New England, see Jenny Hale Pulsipher, *Subjects Unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: University of Pennsylvania Press, 2005); for mid-eighteenth century imperial governance, see Gregory Evans Dowd, *War Under Heaven: Pontiac, the Indian Nations & the British Empire* (Baltimore: Johns Hopkins University Press, 2002), 174-211. In several articles, Katherine Hermes adopts a middle path that stresses legal colonization as a “gradual process.” Katherine A. Hermes, “‘Justice Will Be Done Us’: Algonquian Demands for Reciprocity in the Courts of European Settlers,” in *The Many Legalities of Early America* (Chapel Hill: Published for the Omohundro Institute of Early American History and Culture, Williamsburg, Virginia, by the University of North Carolina Press, 2001); Katherine A. Hermes, “The Law of Native Americans, to 1815,” in *The Cambridge History of Law in America* (Cambridge, UK: Cambridge University Press, 2008).

robbed, plundered, and murdered [Indians] at pleasure,” Arthur St. Clair fulminated. But these crimes also went unpunished: “I have never heard that any person was ever brought to due justice and punishment,” St. Clair continued. South of the Ohio, federal Indian agent Silas Dinsmore was equally frustrated. “[O]ur own people are the aggressors, & we suffer the guilty to pass . . . unpunished,” Dinsmore complained. He continued: “Let us no longer boast of our civilization, of an equitable government and salutary laws, if we cannot adduce one fact to authenticate the theory.”<sup>65</sup>

That federal officials could not enforce federal law within a region where the federal government enjoyed “sole and exclusive” jurisdiction is, perhaps, surprising. But federal officials had a ready explanation that historians have readily credited: bias. “It is the prevailing opinion of the people in general upon the frontiers, that it is no harm to kill an Indian,” a federal military officer informed Henry Knox. Knox himself complained that the “frontier people generally” not only “lessen the criminality” of “killing of peaceable Indians” but in fact “confer a degree of merit” on the crime. George Washington, for his part, blamed “jealousies and prejudices” for forestalling “efficient measures” in redressing harms to Indians.<sup>66</sup>

Federal officials were not wrong to place blame on territorial citizens. But their pat explanation obscured how the complicated institutions and politics that characterized the territories had also acted to undermine federal authority.

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<sup>65</sup> “Address of Governor St. Clair to the Territorial Legislature, at the Opening of the Second Session, at Chillicothe” November 5, 1800, in *SCP*, 501-10; Silas Dinsmore to John Sevier, March 8, 1797, Box 2, Folder 2, John Sevier Papers, 1796-1801, First Administration, Governor’s Papers, Tennessee State Library and Archive.

<sup>66</sup> Josiah Harmar to Henry Knox, March 18, 1787, Vol. 28, Letterbook B, pp. 55-59, JHP; Henry Knox to George Washington, December 27, 1790, in *PGW:PS*, 7:121-27; Washington to Pendleton, January 22, 1795.

There was only a single court system within the “ordinary jurisdiction” of the territories: the federally created territorial courts. In structure, the territorial courts resembled the two-tier systems that existed in most states: local county courts and an appellate court created by the Northwest Ordinance known as the “General” or “Supreme” Court. (In the Southwest Territory, rather than a single General Court, there were three regional Superior Courts, a holdover from North Carolinian practice.) But in other respects, the territorial courts were more like Article III federal courts, which did not exist in the territories. The judges were all federal appointees: General Court judges were selected by the President and confirmed by Congress, while county judges, as well as local clerks, sheriffs, and other officials, were all chosen by federally appointed governor. In that sense, federal authority reached deep into territorial governance. And, except for the congressionally appointed appellate judges, who enjoyed lifetime tenure, every other federal official in the territory, from the governor on down, served at the pleasure of the President, and could be dismissed at will.<sup>67</sup>

For men like Henry Knox, the federal nature of these courts was important. As national institutions, the federal courts were supposed to transcend local bias, a vision expressed in the creation of diversity jurisdiction over suits by citizens of different states, and the right to remove such suits from state to federal courts, in the Constitution and

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<sup>67</sup> Northwest Ordinance, ch. 8, 1 Stat. 50 (1789). Literature on the territorial courts is relatively sparse. Some exceptions include Andrew Cayton, “Law and Authority in the Northwest Territory,” in *The History of Ohio Law*, ed. Michael Les Benedict and John F. Winkler (Athens, Ohio: Ohio University Press, 2004), 13–39; Michael Toomey, “‘Doing Justice to Suitors.’” In the 1950s, William Blume published a series of law review articles on the territorial courts focused specifically on Michigan. See William Wirt Blume, “Civil Procedure on the American Frontier a Study of the Records of a Court of Common Pleas of the Northwest and Indiana Territories (1796-1805),” *Michigan Law Review* 56 (1958): 161; William Wirt Blume, “Legislation on the American Frontier: Adoption of Laws by Governor and Judges: Northwest Territory 1788-1798; Indiana Territory 1800-1804; Michigan Territory 1805-1823,” *Michigan Law Review* 60, no. 3 (1962): 317–72; William Wirt Blume and Elizabeth Gaspar Brown, “Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions: Part I. Establishment of a Standardized Judicial System,” *Michigan Law Review* 61, no. 1 (1962): 39–106; William Wirt Blume and Elizabeth Gaspar Brown, “Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions: Part II. Influences Tending to Unify Territorial Law,” *Michigan Law Review* 61, no. 3 (1963): 467–538.

1789 Judiciary Act. The Washington Administration similarly looked to the federal courts to secure justice to Natives free from local prejudice. George Washington referred a group of Senecas from upstate New York to the federal courts for justice, just as Arthur St. Clair argued that Pennsylvanians who attacked some Haudenauonee traveling under federal protection “should be prosecuted in the Federal Court.” From 1793 onward, the Trade and Intercourse Acts codified this approach. Though the first version of the statute had merely required that crimes against Natives be adjudicated in the “same manner” as crimes against whites, the 1793 statute explicitly ceded jurisdiction over capital crimes under the Act to the federal circuit courts, while jurisdiction over all other offenses would be in federal district courts. In an acknowledgment of the parallels between the Article III courts and the territorial courts, the statute provided that, in the territories, capital jurisdiction would lie with the General Court, while lesser offenses would be tried in the county courts.<sup>68</sup>

Many territorial judges, as well as territorial officials, did prove assiduous in their efforts to punish crimes against Natives. Judges like Rufus Putnam and Joseph Anderson in the Northwest and Southwest Territories respectively specifically called for the legal protection of Natives in their charges to grand juries, while Governors St. Clair and Blount and Secretaries Sargent and Smith constantly pressed for the prosecution of crimes against Indians.<sup>69</sup>

In many ways, this result occurred precisely for the reasons Knox and others thought the federal courts would be more reliable in executing federal policy. Unelected

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<sup>68</sup> Gov. Arthur St. Clair to Secretary of War, April 19, 1791, in *SCP*, 203-05; Act of July 22, 1790, § 5; Act of March 1, 1793, § 10.

<sup>69</sup> “Charge to Grand Jury, General Court,” Box 1, Folder 1, Local Government Records, Marietta College Library (This document is dated July 1788 in the archival collection, but internal evidence suggests that it dates from 1794 or 95, as Putnam references the 1793 version of the Trade and Intercourse Act [replaced in 1796] as well as the 1794 Whiskey Rebellion);



territorial judges and executives had little dependence on the local populace; they were far more oriented toward their superiors in Philadelphia. Judge Campbell even sought to ingratiate himself with Secretary of State Jefferson by sending the Secretary copies of his grand jury charges urging prosecution of those who harmed Natives. But officials' insulation from local pressures also allowed them, at least in their view, to assess the situation impartially. Prosecuting and executing Indian killers was not only "humane," they stressed, but also "political," in the eighteenth-century meaning of good policy: by "convinc[ing] the Indians that we mean to do justice," federal punishment would "prevent retaliation upon some innocent persons."<sup>70</sup>

Not unrelatedly, federal officials' commitment to protect Native peoples had a substantial class component. These men were hardly egalitarians; rather, they tended to regard Natives through a haze of patronizing pity that the well-born felt for the weak and helpless. "As we are now powerful and more enlightened than [the Indians] are," Knox wrote, "there is a responsibility of national character, that we should treat them with kindness and even liberality." This feeling of noblesse oblige translated into a sense of official duty. As Natives "are less capable of Seeking Legal redress for wrongs don them then other people," Northwest territorial judge Rufus Putnam charged a Marietta grand jury, "it is the more incumbent on all officers of Government and Courts of Justice, ex officio, to seek out and bring to punishment those who may have ben guilty of Trespasses against them."<sup>71</sup>

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<sup>70</sup> David Campbell to Secretary of State, February 25, 1792, in *TP: Vol. IV*, 121-28; David Campbell to President, November 9, 1791, *TP: Vol. IV*, 101-02; Josiah Harmar to Henry Knox, March 18, 1787, Vol. 28, Letterbook A, pp. 55-59, JHP.

<sup>71</sup> "Report of Henry Knox to President Washington" December 29, 1794, Reel 2: Territory SW of the Ohio River, M200, Senate Territorial Papers, U.S. National Archives; "Charge to Grand Jury, General Court."

This same class prejudice led federal officials to distance themselves from virulent anti-Indian views, which they disdained as vulgar. In contradistinction to the lawless white rabble they believed perpetrated crimes against Natives, these officials believed themselves as members of the “dispassionate and enlightened part of mankind,” which embraced “justice and moderation” towards the Indians; it was their peers, they felt, whose approval they had to secure. This commitment made officials immune to the torrents of anti-Indian rhetoric spilled in territorial newspapers and political broadcasts. “[T]hough we hear much of the Injuries . . . committed by the Indians upon the Whites,” St. Clair wrote, that “equal if not grate Injuries are done to the Indians by the frontier settlers of which we hear very little.” George Washington similarly noted that the Natives, “poor wretches, have no press through which their grievances are related.”<sup>72</sup>

If early American law had simply been the enactment of the will of officialdom, then, many crimes against Natives would have received swift and decisiveness punishment. But, even in a place where law ostensibly rested in the hands of a single sovereign, these federal officials found that the checks on governmental authority, both formal and practical, constantly thwarted their aims.

One challenge was that territorial law was geographically bounded. Like Natives, U.S. citizens readily took advantage of their borderland location to hop between jurisdictions. Many alleged criminals either came from or fled to places outside territorial officials’ authority; Kentucky, sandwiched between the territories, was an

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<sup>72</sup> Gov. Arthur St. Clair to Henry Knox, January 27, 1788, in *SCP*, 2:40-42; George Washington to Edmund Pendleton, January 22, 1795, *Writings of George Washington*, 13:32. Henry Knox used the “dispassionate and enlightened” phrase repeatedly to describe what the U.S. sought to accomplish. See Secretary of War to William Blount, April 22, 1792, in *TP: Vol. IV*, 137-42; “Instructions to General Israel Chapin, Deputy Temporary Agent to the Five Nations of Indians – the Stockbridge Indians Included,” April 28, 1792, in *ASP:IA*, 231-32; Secretary of War to James Seagrove, April 29, 1792, in *ASP:IA*, 250. For more discussion of federal officials’ embrace of civility in their treatment of Natives, see David Andrew Nichols, *Red Gentlemen & White Savages: Indians, Federalists, and the Search for Order on the American Frontier* (Charlottesville: University of Virginia Press, 2008).

especially common destination. In those instances, notwithstanding that the states were ostensibly part of the same polity as the territories, federal officials became just as dependent on the whim of another jurisdiction's officials as when Natives fled to Indian country or Spanish territory. All St. Clair, Winthrop Sargent, or Blount could do was appeal to states' governors to assist in apprehending criminals. The Constitution ostensibly mandated extradition, but popularly elected officials in places where neither Natives, nor the federal government, nor Arthur St. Clair were held in high esteem crafted legal theories around this requirement. So, despite formal requests, it seems that the sought-after criminals were rarely extradited.<sup>73</sup>

Federal and state jurisdictions could, in fact, prove quite hostile. In one instance when federal soldiers entered a Kentucky town directly to try to apprehend a criminal for an alleged murder of a Native, a near riot resulted, with the Kentuckians' loud complaints prompting a court-martial for expedition's commanding officer. In another case, some North Carolinians killed two Cherokees peaceably trading there. They then dispatched a Cherokee woman they had captured back into Cherokee country with a letter that blamed the killing on "the people of the territory south of Ohio," in an avowed effort, William Blount believed, to bring the Cherokees' wrath on the Territory. But, because the offenders were outside the Southwest Territory, Blount could not punish them directly.<sup>74</sup>

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<sup>73</sup> Arthur St. Clair to Governor Shelby, June 20, 1795, Reel 1: Territory Northwest of the River Ohio, M200, Senate Territorial Papers (microfilm), U.S. National Archives; Winthrop Sargent to Governor of Kentucky, January 3, 1798, in *TP: Vol. III*, 495-96; Winthrop Sargent to Harry Toulman, Secretary of Kentucky, April 20, 1798, in *TP: Vol. III*, 505; U.S. Const. Art. IV, § 2. According to William Leslie, it was, in fact, Virginia's refusal to comply with Pennsylvania's request for extradition in the so-called Big Beaver Creek Murders, where Virginians murdered several Delawares, that helped prompt the enactment of the first federal law governing interstate rendition of fugitives. William R. Leslie, "A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders," *The American Historical Review* 57, no. 1 (1951): 63-76. As Leslie notes, this issue became entangled with the issue of fugitive slaves, so that the 1793 Fugitive Slave Act regulated the extradition of both fugitives from justice and runaway slaves. Act of February 12, 1793, ch. 7, 1 Stat. 302.

<sup>74</sup> William Blount to Secretary of War, December 26, 1793, Reel 2: Territory Southwest of the River Ohio, M200, Senate Territorial Papers (microfilm), U.S. National Archives; "Apprehension of Lewis Weitsel," August 26, 1789, in Thornbrough, ed., *Outpost on the*

Another challenge was the legal bar on Native testimony, which restricted most Natives from testifying in court against non-Natives. Neither federal nor territorial law mandated this prohibition; it stemmed rather from the long-standing common-law proscription against non-Christian testimony, which itself was shifting during the period. Territorial officials often complained about this restriction, particularly with respect to illegal sales of liquor to Indians, and occasionally resorted to official fiat to avoid its constraints. And officials did not apply its strictures to Natives who could plausibly claim to be Christian, as in the case of the Cherokee Richard Finnelson, who was allowed to swear a deposition “[a]fter having the nature of an oath explained, and declaring that he believed in the doctrines contained in the New Testament, and its divine authority.” But despite these frustrations and circumventions, neither Congress nor the territorial legislatures abolished the restriction. In the territories, this may have stemmed from an ongoing controversy over whether the Northwest Ordinance obligated the territorial legislature to adopt preexisting statutes from the states or whether it empowered them to craft wholly new laws—a position urged by the territorial judges, who pointed for the need for regulations that would protect “the natives.” But it also stemmed from a deep and widespread veneration for the common law, which was enshrined in the Northwest Ordinance and described by the territorial judges as “the birth-right of the citizen.”<sup>75</sup>

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*Wabash*, 208-09. A similar riot occurred in Kentucky in 1802, in which an extradition request from Governor Harrison of the Indiana Territory of an alleged murderer of an Indian provoked a mass resistance and prompted a constitutional debate over the scope and nature of federal criminal jurisdiction. See Thomas Jefferson, “Observations on the Common Law and Hardin’s Case,” November 11, 1802, in *PTJ:MS*, 38:668-71; “Albert Gallatin’s Opinion on the Common Law and Hardin’s Case,” c. November 11, 1802, in *PTJ:MS*, 38:672-74.

<sup>75</sup> “Information by Richard Finnelson,” November 1, 1792, in *ASP:JA*, 288-91; Rufus Putnam, “Draft Notices to the Inhabitants of Vincennes,” September 16, 1792, Box 2, Folder 4, RPP; Judges Parsons and Varnum to Arthur St. Clair, July 31, 1788, in *SCP*, 2:69-72; G. Turner to Arthur St. Clair, October 25, 1790, Reel 3, ASCP. On debates over non-Christian testimony during this period, see Wesley J. Campbell, “Testimonial Exclusions and Religious Freedom in Early America,” *Law & History Review* (forthcoming 2016); Ronald P. Formisano and Stephen Pickering, “The Christian Nation Debate and Witness Competency,” *Journal of the Early Republic* 29, no. 2 (2009): 219–48. For a discussion of the restrictions of Native testimony focused on Indiana, where the territorial legislature

Territorial officials were also far more focused on the consequences of another common-law right, one explicitly enshrined in the Northwest Ordinance: the requirement that territorial inhabitants “shall always be entitled” to a trial by jury. In the territories, juries seemed to foil all federal officials’ efforts to punish crimes against Natives. “A Jury will hardly be found” in the Southwest Territory, William Blount reported, that would convict for killing an Indian. “There had never been one instance of a white man condemned and hanged by white men, on the frontier, for the murder of an Indian, since the first landing in America,” Connecticut Representative Jeremiah Wadsworth hyperbolically informed Congress in 1795. “No jury would bring the criminal in guilty.”<sup>76</sup>

The failure of jurors to indict and convict criminals for crimes against Natives was a particular *bête noir* for Governor Arthur St. Clair. In one especially glaring instance in 1795, two Pottomattomies in federal custody were being transported to jail in Cahokia, in the Illinois country, escorted by a militia guard and the county sheriff, when they were killed “in open Day Light.” After St. Clair issued a proclamation against the crime, two inhabitants of St. Clair County were arrested and brought before the grand jury in the local court in Kaskaskia. But even though the “most positive testimony was adduced,” the jury refused to indict. St. Clair specifically instructed the prosecutor to try again when the court moved to Cahokia, also in the county, where the judge made a “very pathetic charge” to the jury. Still, St. Clair bemoaned, the grand jury failed to cooperate.

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would later adopt an affirmative bar on Indian testimony, see Ryan T. Schwier, “‘According to the Custom of the Country’: Indian Marriage, Property Rights, and Legal Testimony in the Jurisdictional Formation of Indiana Settler Society, 1717-1897” (MA Thesis, University of Indiana–Bloomington, 2011), 227-259. On the controversy over the power to enact laws, see Cayton, “Law and Authority in the Northwest Territory.”

<sup>76</sup> Act of August 7, 1789, ch. 8, 1 Stat. 50; Blount and Pickens to Secretary of War, August 6, 1793; 4 Annals of Cong. 1254 (1795)

The prosecutor then tried to indict the men for manslaughter, but the jury similarly refused to acquiesce. Secretary of War James McHenry sought to console St. Clair. It was “deeply regretted” that such crimes were “connived at by a jury,” but, he lamented, juries were “only medium thro’ which the Culprits can be punished.” St. Clair was not convinced. Though he did not propose eliminating juries altogether—even for a man as hierarchical as St. Clair, juries were too sacred to be abolished—he did suggest that they be heavily controlled. The government, he urged, should “compel jurors to do their duties” by prosecuting them for violating their oaths and by levying a “heavy” fine on counties that allowed perpetrators to go free—a proposal the higher-ups never adopted.<sup>77</sup>

Federal officials did not deeply ponder why juries seemed to acquit these crimes so freely. They found no mystery: jurors were irredeemably prejudiced against Natives and so incapable of doing justice. But their insistence that juries never punished offenders who harmed Indians, or that the local population always sanctioned such violence, was overbroad. In Nashville, for instance, even before the advent of territorial government, a local jury convicted David Wallace for beating the Chickasaw chief William Glover. In 1793, when unknown assailants killed the “well known and esteemed” Chickasaw chief John Morris only six hundred paces from William Blount’s Knoxville home, local residents were outraged: thirty of them joined a (fruitless) posse to hunt for the killers. The previous year, when Southwest Territory resident James Hubbard shot at four Cherokee women and a Cherokee man, the *Knoxville Gazette* had mocked Hubbard and stressed that his actions were “generally held in abhorrence.”

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<sup>77</sup>Henry Vanderburgh to Winthrop Sargent, April 3, 1795, Reel 4, WSP; St. Clair, “Report of Official Proceedings in the Illinois Country,” 1796; James McHenry to Arthur St. Clair, March 29, 1799, Reel 4, ASC Papers; Gov. Arthur St. Clair to Secretary of State, January 1796, in *TP: Vol. II*, 542. For another instance when St. Clair bemoaned a jury acquittal, see St. Clair, “Address of Governor St. Clair.”

Clearly targeting elite opinion, the newspaper had thought this statement “necessary,” “[I]est it should be supposed by such as are unacquainted with the frontier settlers, that such conduct meets their approbation.” And as discussed earlier, grand jurors in Vincennes indicted multiple white defendants for violence against Natives even in cases where the testimony seemed to support credible claims for self-defense; the final verdicts in these cases are unknown.<sup>78</sup>

What seemed to distinguish these incidents from the acquittals that St. Clair and others lamented was context. Glover and Morris were Chickasaws, a nation widely known for its firm allegiance to the United States. By contrast, the acquittal of the murderers of the Pottawatomies took place on a war-scarred frontier, where peace had not yet been officially declared and where memories of Native attacks were quite fresh. The Pottawatomies, in fact, had been jailed “on suspicion of their being a war party.” In these circumstances, the jurors may have interpreted the killing less as an unjustified murder and more as a legitimate act of war.<sup>79</sup>

St. Clair and Sargent did not view it that way; since the Natives were in federal custody, they regarded the crime as an affront to government. In a sense, St. Clair and Sargent were likely right. The early American judiciary, and especially juries, had long

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<sup>78</sup> Davidson County Court Minutes (microfilm), Vol. A, p. 38, Reel 1597, Tennessee State Library and Archives; Davidson County Court Minutes (microfilm), p. 41, Reel 1602, Tennessee State Library and Archives; William Blount to Secretary of War, June 4, 1793, in *TP: Vol. IV*, 268-69; “Knoxville, May 5,” *Knoxville Gazette*, May 5, 1792; “Knoxville, Saturday, June 1,” *Knoxville Gazette*, June 1, 1793.

On the Vincennes indictments, see “Testimony of Antoine Marchal” July 7, 1797, Box 1, Folder 10; “Testimony of Claude Coupin” July 7, 1797, Box 1, Folder 9; “Examination of Lambeir Burway” July 8, 1797, Box 1, Folder 8; “Recognizance Bond of Lambeir Burway” July 9, 1797, Box 1, Folder 8; “Recognizance Bond of Henry Rambout” August 29, 1798, Box 1, Folder 11; all in General Court Records, Indiana State Archives; “Jury Presentment,” August 4, 1800; “Examination of James Correy,” August 5, 1800; “Inquest for George Allen” August 5, 1800; “Examination of William Prince,” August 6, 1800; “Testimony of H. Hurd” August 6, 1800; “Presentment against Thomas Coulter,” September 1800; all in M98, William Hayden English Family Papers, Indianapolis, Ind.

<sup>79</sup> Vanderburgh to Sargent, April 3, 1795. James Robertson opined, “Never was a people more attached to a nation, than the Chickasaws are to the United States.” “Extract of a Letter from General James Robertson, of Mero District, to General Smith, Dated Nashville,” July 20, 1793, in *ASP:IA*, 465. For recent work on Chickasaw support for the United States, see Wendy St. Jean, “How the Chickasaws Saved the Cumberland Settlement in the 1790s,” *Tennessee Historical Quarterly* 68, no. 1 (April 1, 2009): 2–19.

been conceived as a bulwark of resistance against governmental overreach. Judicial politics were particularly intense in the territories, where the avenues to express popular disapproval of governmental action that existed elsewhere—elections, legislatures, town and county governance—were largely foreclosed.

Jury verdicts thus became one of the only vehicles for territorial citizens to register their discontent with federal policy, particularly toward Indians. Territorial citizens facing Native attacks felt themselves neglected and abandoned by the federal government, a view only reinforced when arrogant men like St. Clair and Sargent seemed more committed to protecting Indians than the nation's own citizens. William Blount, far more concerned about popular support than St. Clair or Sargent, interpreted jurors' acquittals for crimes against Indians as a rebuke to governmental inaction. "The Indians have killed in the most cruel and inhuman manner our nearest and dearest Friends," William Blount imagined jurors stating when asked to convict an Indian killer, "and Government has made no demand of Blood in Satisfaction." Given these facts, "why should we by our Verdict give Blood either to satisfy the Government or the [Indian] Nation[?]"<sup>80</sup>

This conflation between federal authority and justice for Natives played out especially clearly in Cincinnati. Though the town was the capital of the Northwest Territory, neither Arthur St. Clair nor Winthrop Sargent, with their seemingly imperious demands for obedience, was held in high regard there. Sargent in particular, recollected by territorial residents as a "proud, haughty man" who wanted "to make every Person submit to his will," had been at odds with territorial inhabitants since his arrival. After

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<sup>80</sup> Blount and Pickens to Secretary of War, August 6, 1793.



trying, and failing, to get a grand jury to indict several young men who had mocked him in Marietta, Sargent moved to Cincinnati, where he found himself in near open warfare with local residents. Twice he confronted near-riots as residents fired off guns in reckless disregard, Sargent thought, of territorial law. But his efforts to compel justice were ineffective. In Hamilton County, which encompassed Cincinnati, Sargent complained, “the great invaluable blessing of Trial by Juries . . . is perverted to a Curse.” The county’s veniremen were characterized by “uncountroled Licentiousness,” and any magistrate who attempted to enforce the law would “become the Object of their highest Displeasure.” Sargent’s judgment was only confirmed when, several years later, a Hamilton County grand jury indicted him on a trumped-up charge of usurpation.<sup>81</sup>

These preexisting tensions prompted and colored what amounted to an anti-Indian riot that broke out in Cincinnati in September 1794, right at the end of the Northwest Indian War. The riot began, once again, as a drinking affair. A number of Choctaws and Chickasaws, serving at William Blount’s behest as Native allies in the federal campaign against the Ohio nations, had passed through Cincinnati on their return to the Southwest Territory. According to subsequent testimony, the Natives were at the store of Major Zeigler, a former army officer, drinking whiskey “& Diverting themselves in their way,” when a Mr. Findley came up and demanded that the Indians go away, claiming they were disturbing a sick person. As the “intoxicated” Choctaws and Chickasaws dispersed, one

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<sup>81</sup> “Copy From a Manuscript in the Hand Writing of Major Horace Nye (son of Ichabod) of Putnam Ohio prepared about 1847 for Dr. Hildreth” (typescript copy), Box 2, MS 210, Marietta, Ohio Collection, Ohio Historical Society; Griffin Greene to “Peter,” c. 1791, Northwest Territory Collection, Clements Library, University of Michigan; Winthrop Sargent to Arthur St. Clair, February 7, 1793, *TP, Vol. II*, 432-33; John Cleves Symmes to Winthrop Sargent, January 7, 1793, Reel 3, WSP; Winthrop Sargent to Arthur St. Clair, January 20, 1793, Reel 4, ASCP. For information on Sargent’s abortive efforts to prosecute residents in Marietta, see “Journal of Colonel Ichabod Nye (typescript),” p. 97, Folder 2, Box 3, MS 210, Marietta, Ohio Collection, Ohio Historical Society. As territorial secretary, Sargent was tasked with acting as governor during St. Clair’s frequent absences. Sargent had been filling this role when, unbeknownst to him, St. Clair returned to another part of the territory. The grand jury indicted Sargent for unconstitutionally exercising St. Clair’s duties. See Winthrop Sargent to Secretary of State, September 30, 1796, in *TP: Vol. III*, 456-68.

who spoke English told Findley, “me Major Gen’l”—presumably alluding to his military service. Findley did not take this assertion of rank by a Native well. He responded, “you may go to hell,” and then said it again. A scuffle ensued—the testimony disagreed about who began it—but knives were drawn, and Findley and his accomplices beat several of the Choctaws.<sup>82</sup>

But in a town at war, the matter did not end there. A rumor spread that the Choctaws had captured a white female child, “naked, bound, and suffering.” The story was poppycock; in fact, it fit so well with the tropes of anti-Indian rhetoric, and was so well calculated to appeal to Cincinnatians’ racial and gender anxieties, that Sargent suspected it was invented solely to justify what followed—a “very general Muster of armed men,” including some who arrived from neighboring towns. The men paraded through the streets firing guns, and approached the camp multiple times, insisting that they would take an Indian’s scalp. There, they faced off against the federal soldiers that Sargent had hurriedly posted to protect the Choctaws, who safeguarded the Natives until their departure several days later. But the Indians were not the only target of the riots’ wrath: unknown assailants fired two bullets into Winthrop Sargent’s house.<sup>83</sup>

Sargent was a whirlwind in response to the riots, marching out to demand that the residents disperse, dashing off orders to the fort’s commandant and local magistrates, issuing an official proclamation promising that “every legal exertion” would be used for

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<sup>82</sup> Freeman Atty for County, “A True Abstract of the Testimony Offerd to the Grand Jury at a Special Court, as Taken down by the Clk,” September 18, 1794, Reel 7, ASCP; N.R. Hopkins, “Deposition,” September 19, 1794, Reel 7, ASCP. Another account of the riot can be found in Cayton, *The Frontier Republic*, 66-67; Cayton, “Law and Authority,” 28-29. Cayton stresses the importance of the riot in the conflict between Cincinnati residents and territorial officials, though he misstates that the target of the riots were Christian Indians.

<sup>83</sup> Winthrop Sargent to Secretary of State, September 13, 1794, in *TP: Vol. III*, 423-25; “Enclosure in Winthrop Sargent to Rufus Putnam,” October 6, 1794, Reel 4, ASCP; “A True Abstract of Testimony,” September 18, 1794; Hopkins, “Deposition,” September 19, 1794; “Testimony of James Leonard” September 19, 1794, Reel 7, ASCP.

punishment. But his hopes were disappointed: a grand jury indicted only two of the perpetrators for assault and battery, one of whom was acquitted because the principal witness was absent, another who, “by Delay of Process,” escaped. Sargent wrote a scathing letter to the district attorney in response, accusing him of a litany of errors and mistakes in bringing the perpetrators to justice. In the end, Sargent concluded in a letter to the Secretary of State, “the civil authority in Hamilton County is inadequate to afford protection to the Indians.” The reason he ascribed was revealing. The grand jury, Sargent lamented, was neither “generally disposed (I believe) to do justice to the red people, or sufficiently sensible of their Dependence upon, and Obligation to the general Government.” Hostility toward Indians, in short, twinned with contempt for federal authority, which were increasingly coming to be seen as the same thing.<sup>84</sup>

As Sargent implied, the problem of resistance to federal aims was not confined to jurors, but pervaded the territorial judiciary. The power of appointment, it turned out, provided only limited control, especially in thinly populated places where the territorial governors were hard-pressed to find prominent local citizens with the requisite legal knowledge: it was “impossible,” St. Clair proclaimed, to find judges who would act “in a strictly legal manner.” So, particularly in the territorial county courts—many of which had merely shifted from North Carolinian or Virginian control to federal jurisdiction with a simple caption change in the minute book—the territorial governors had had little choice but to continue the same local notables as judges and justices of the peace. As a result, St. Clair, Sargent, and Blount found themselves relying on local judges who were

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<sup>84</sup> Winthrop Sargent, “Proclamation” September 10, 1794, Reel 1: Territory NW of the Ohio River, M200, Senate Territorial Papers (microfilm), U.S. National Archives; “[Inquiries of Winthrop Sargent],” October 8, 1794, Reel 7, ASCP; Winthrop Sargent to Secretary of State Randolph, November 1, 1794, in *TP: Vol. III*, 426-31.

often no more sympathetic to federal policies than local jurors. In fact, St. Clair and Sargent got into a bitter struggle over federal authority with Cincinnati judges who refused to accept appointments at pleasure, citing the Declaration of Independence for support. District attorneys were no different. Governor Blount sent instructions to the federal district attorney for the Mero District—a young and rising Andrew Jackson—to make “Examples of the first Violators” of the Treaty of Holston by public prosecution, at the same moment Jackson was fulminating in his own correspondence about the useless of Indian treaties.<sup>85</sup>

High federal officials hoped for better things from the judges of the General Court, selected directly by Congress and the President, but here, too, they were often disappointed. In the Southwest Territory, federal officials had felt constrained to appoint prominent locals who did not necessarily agree with Knox’s larger vision. Even as he was lecturing juries on the need to prosecute criminals who harmed Indians, for instance, Judge Campbell of the Southwest Territory was living in what he dubbed an “intrusion castle” on unceded Cherokee lands in explicit violation of the Trade and Intercourse Act.<sup>86</sup>

In the Northwest Territory, the problem was less territorial judges’ dislike of federal policy than their distaste for its representatives, in the form of St. Clair and Sargent. Judge Symmes had fought with the two executives upon first arriving in the Territory, when they had differed over law and land matters. He quickly set himself up as the champion of the people of Cincinnati against Sargent, refusing to help the

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<sup>85</sup> Gov. Arthur St. Clair to Judge Turner, May 2, 1795, in *SCP*, 348-50; William Blount to James Robertson, January 2, 1792, in *TP: Vol. IV*, 108-09; Andrew Jackson to John McKee, January 30, 1793, in *PAJ*, 1:40-41.

<sup>86</sup> Benjamin Hawkins to Thomas Butler, November 9, 1797, in C. L. Grant, ed., *Letters, Journals, and Writings of Benjamin Hawkins* (Savannah, Ga.: Beehive Press, 1980), 148-49;

Secretary reestablish order during the town's repeated convulsions. "The strength of government consists not in the will of the magistrate but in the support given him by the people," Symmes didactically informed Sargent. Sargent grumbled that Symmes was taking "an active part to Sedition—popularity is his Aim," and was convinced that the judge would "attempt to stab me in the Back" with the President. But in the end, it was St. Clair whom Symmes tried to dispatch: when St. Clair's reappointment was on the line, Symmes wrote to the President to inform him that St. Clair's dismissal would elate "thousands" in the Territory. In his litany of complaints, Symmes singled out St. Clair's Indian policy for attack. "Outrageous, if a citizen charged with the murder of an Indian, be acquitted by a jury of the country," Symmes stated in a sarcastic tone, "he [St. Clair] can calmly look on and see citizens Murdered by Indians, without one effort of the executive to bring the murderers to a trial." As we have seen, Symmes was no Indian-hater, but he was happy to adopt their rhetoric—especially the assertion that St. Clair's efforts were biased against territorial citizens—to undermine his political enemy.<sup>87</sup>

A particularly outré case was Northwest Territorial Judge George Turner, who was close friends with Symmes until they fell out over lands. Turner had had his own disagreements with Sargent and St. Clair, and even with a "surprized, and mortified" President Washington, who had had to peremptorily order Turner to his territorial post when the judge lingered too long in Philadelphia. Despite his apparent dislike for the territories, Turner nonetheless seemed sympathetic to frontier complaints against Indians.

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<sup>87</sup> John Cleves Symmes to Winthrop Sargent, January 7, 1793, Reel 3, WSP; Winthrop Sargent to Arthur St. Clair, January 20, 1793, Reel 4, ASCP; Judge Symmes to Thomas Jefferson, January 23, 1802, in *TP: Vol. III*, 205-07.

When two Pottawomaties were killed in the Illinois country while in federal custody, rumor had it that the “the most Excellent Judge approved of the Deed, and took no measures to apprehend the murders.”<sup>88</sup>

But Turner *was* willing to enforce the Trade and Intercourse Act, bringing one of the few recorded prosecutions under the law in the Northwest Territory. Yet his motives did not seem to include upholding federal policy, and the suit did little to convince territorial citizens of federal goodwill. Turner traveled to Vincennes in summer 1794 to hold a special session of the General Court, even though a single judge likely lacked the authority to convene such a session. From the moment he arrived on the dock on the Wabash—allegedly “so drunk he could not ascend without assistance”—Turner stirred controversy. Based on slim testimony, he charged the operators of a barge with trading with the Indians without a license in violation of the Trade and Intercourse Act. As provided under the Act, the sheriff seized the men’s goods—which Turner then kept for his own use, reportedly using an oil cloth for a tent cover, and transferring the silver, red blankets, knives, and other items on his own boat in the Wabash. Turner’s actions caused a tremendous uproar in Vincennes, and led to an indictment by the grand jury in St. Clair County, as well as complaints to Congress of his “tyranny and oppressions,” including the “forfeitures” of “property of citizens quietly travelling on the Ohio.” Because of the distance, the Attorney General recommended that Turner be indicted before the General Court of the Northwest Territory rather than be impeached. Ultimately, Turner resigned.

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<sup>88</sup> President to Secretary of State, April 5, 1793, in *TP: Vol. II*, 450; Henry Vanderburgh to Winthrop Sargent, April 3, 1795, Reel 4, WSP. On the friendship between Symmes and Turner, see John Cleves Symmes to Robert Morris, June 22, 1790, in CJCS, 287.

A jury, meanwhile, acquitted the defendants of the charges under the Trade and Intercourse Act.<sup>89</sup>

Like many of the struggles over justice in the territories, the controversy provoked by Turner, with nary a Native involved, makes it easy to forget that actual Native peoples were the original cause for these disputes. But this absence is revealing. Even for would-be humanitarians like Knox, the abstract insistence on justice for Natives was as much about these officials' own self-conceptions as about real Natives. And in the territories, aligning justice for Natives with federal authority almost completely subsumed Native issues within contentious struggles over federal power, even as the testimonial rules literally silenced Native voices from court proceedings. Legal wranglings ensued: despite its formal reliance on a single federal sovereign, the territorial legal system allowed judges, governors, juries, and even other jurisdictions to all jockey for power. But this was what early American courts did. In many ways, it was this proliferation of institutional checks and independence from direct governmental control that conferred legitimacy on the courts. But precisely because early Americans courts were envisioned as institutions to limit executive power, tying justice for Natives to a model of law as the command of the President, his cabinet, and power-hungry territorial officials ensured that lengthy and protracted court battles would ensue.

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<sup>89</sup> "Deposition of Christopher Wyant Esq. Sheriff of Knox County," May 9, 1795, Box 30, Folder 2, William Hayden English Family Papers, Indiana Historical Society; "Depositions of Christopher Wyant & Paul Pierre" September 7, 1795, Box 1, Folder 6-6A; General Court Records, Indiana State Archives; "Recognizance Bond" September 10, 1795, Box 1, Folder 4, General Court Records, Indiana State Archives; Gov. Arthur St. Clair to Winthrop Sargent, April 28, 1795, in *SCP*, 340-43; *Letter from the Attorney General, Accompanying His Report on the Petition of Sundry Inhabitants of the County of St. Clair* (Philadelphia: n.p., 1796); "Circuit Court, October Term, 1795," Northwest Territory Archives, Burton Historical Collection, Detroit Public Library.

Knox's vision that the federal government would intervene as impartial arbiter in disputes between Natives and white settlers presaged later efforts both to subjugate Natives to federal criminal jurisdiction and to use federal judicial power to protect the rights of unpopular local minorities—processes that would reach their zenith nearly a century later. In the late eighteenth century, however, efforts to hold Natives and territorial citizens legally accountable for crimes against each other failed, and for similar reasons. The law proved a poor implement to achieve Knox's goals. In part, the challenge was jurisdictional: territorially bounded legal spheres proved ineffectual at policing a fluid borderland, where people could easily pass across boundaries that laws could not. But it was also because formal law and territorial institutions severely limited what territorial officials could accomplish. Knox's vision of Olympian justice delivered from on high simply did not acknowledge the realities of the early republic, in which decentralized institutions--treaties, juries, and local judges—limited the reach of federal authority even in places ostensibly under the federal government's sole control.

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Failure is in the eye of the beholder. Knox's efforts did not stop violence between Natives and white settlers. But in the long term, Knox's three principles arguably succeeded, albeit in tragic ways distant from Knox's brand of imperialist benevolence. Federal law did not restrain both Natives and white settlers, as Knox had envisioned. Rather, the quest for separating Natives from whites helped produce the ethnic cleansings of the nineteenth century, as the United States forcibly removed Natives behind what seemed like the most unambiguous boundary of all, the Mississippi River. The desire to



punish cross-cultural violence as crime resulted in increasingly aggressive assertions of Anglo-American, and ultimately federal, jurisdiction over Natives, including within Indian country, where federal and Native jurisdiction became ever more entangled.

But in the 1790s, all this lay in the future. At the time, the federal government lacked the power to exercise the jurisdiction it ostensibly enjoyed, unable to compel either Natives or its own citizens to obey federal laws. As we have seen, this resulted as much from the tensions within federal law and governance—their failure to understand the roots of cross-cultural violence, their institutional structures, and their own internal ambiguities—as from the long-standing entrenchment of contrary laws and practices.

## Chapter 5: Laws of War or Peace

In 1794, territorial judge Joseph Anderson lectured the grand jury of the Hamilton District, Southwest Territory on the civic duty. “Confidence in the general government—an adherence to the principles of the constitution—a due observance of its laws, are the true characteristics of a good citizen.” These, for Anderson, were not simply abstract principles, but pointed remarks directed toward a crisis in the Territory. “Should any citizen be so hardy, as to overleap the bounds of duty, and in defiance of the laws, unwarrantably attack the friendly Cherokees,” Anderson instructed, “this Territory will not only be involved in war with them, but the whole frontier will be again exposed to the wanton depredations of the perfidious and barbarous Creeks.” Anderson summed up: “Upon ourselves, it now depends, whether to choose peace or war.”<sup>1</sup>

War and peace were ubiquitous terms in the early American borderlands. All parties professed to desire peace, and yet war seemed to be the perpetual condition west of the Appalachians: one commentator observed that frontiers had not “had six years of peace since the first settlement of the country, or shall have for fifty years to come.” Natives and Anglo-Americans seemed trapped in endless cycles of raids and counter-raids. Henry Knox believed federal supremacy offered a solution here as well. As enshrined in the Constitution’s provision granting Congress the power to declare war, the federal government would now possess the sole authority to legitimate and authorize organized violence against Natives.<sup>2</sup>

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<sup>1</sup> “A Charge Delivered by Judge Anderson, to the Grand Jury of the District of Hamilton, in the Territory South of Ohio, at October Term, 1794,” *Knoxville Gazette*, November 1, 1794.

<sup>2</sup> “Marcus IV,” *Norfolk and Portsmouth Journal*, March 12, 1788, in Merrill Jensen and John P. Kaminski, eds., *The Documentary History of the Ratification of the Constitution* (Madison: State Historical Society of Wisconsin, 1976-2013).16:387.

The effect of this federal assertion in the territories was neither acquiescence nor defiance, but a roiling debate over the scope and authority of federal law. Everyone in the territories—federal officials, Natives, territorial citizens—had a view about the meaning and legitimacy of the federal efforts. The discussion quickly became a legal controversy—a fight over the meaning and application of the very categories of war and peace. In one sense, the struggle seemed yet another conflict between custom and formal law. On one side were the long-standing borderland practices of violence that blurred the boundaries between conflict and its absence, and between state and non-state violence. On the other side were the new, centralized, formal definitions that would be decided in Philadelphia and imposed on the territories. But this sharp contrast is misleading. At the core of the debate, as Anderson’s charge to the jury suggested, loomed the U.S. Constitution; even Native peoples learned about, and discussed, the Constitution’s implications for borderland violence. But the Constitution was ambiguous; it did not define war and peace. The debates over violence in the territories took place in that gap, which officials, citizens, and Natives all sought to fill; it also became a hotly contested struggle over who, exactly, was empowered to make this judgment between war and peace.

For all that borderland violence and, recently, the laws of war have fascinated historians, this early debate over definitions has largely passed unnoticed, with such arcana left to the pages of law reviews, which treat the subject as a question that never left the confines of Congress or the President’s House. But if anything, the controversy flowed the other way: the contentions in the borderlands came to infect Congress, which

seemed equally unable to resolve who was authorized to exercise violence, and when. But the resulting confusion was consequential. It helped ensure that, Knox's hopes notwithstanding, the lines between war and peace, between authorized violence on behalf of the national state and what early Americans labeled "unauthorized expeditions," remained vague and unsettled on the borderlands well into the nineteenth century.<sup>3</sup>

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As we have seen, the threat of war—of organized violence between the United States and Natives as nations—lurked behind all violence in the borderlands, which was one reason federal officials struggled so hard to prevent it. But beyond the secretive or impromptu murders that fell under the purview of the criminal law, there was another, more organized form of violence in territories explicitly cast as a form of warfare. This consisted of what government officials termed "irregular and unauthorized expeditions"—self-organized military campaigns of territorial citizens into Indian country. For federal officials like Knox, such expeditions arrogated to citizens the right to decide questions of war and peace that legally rested with the federal government, and so had to be suppressed.<sup>4</sup>

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<sup>3</sup> For a small sampling of the works that emphasize violence in the early American borderlands, see Ned Blackhawk, *Violence Over the Land: Indians and Empires in the Early American West* (Cambridge, Mass: Harvard University Press, 2006); Peter Rhoads Silver, *Our Savage Neighbors: How Indian War Transformed Early America*, 1st ed (New York: W.W. Norton, 2008); Karl Jacoby, *Shadows at Dawn: A Borderlands Massacre and the Violence of History* (New York: Penguin Press, 2008); James Brooks, *Captives & Cousins: Slavery, Kinship, and Community in the Southwest Borderlands* (Chapel Hill [N.C.]: University of North Carolina Press, 2002). Legal literature has largely focused on the division of the war power between the President and Congress; the issue of state authority to engage in conflicts notwithstanding the constitutional provision barring state declarations of war has been much less discussed. For representative works, see William Michael Treanor, "Fame the Founding and the Power to Declare War," *Cornell Law Review* 82 (1997): 695; John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," *California Law Review* 84, no. 2 (1996): 167–305; John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, N.J. : Princeton University Press, 1993); Adam Mendel, "The First AUMF: The Northwest Indian War, 1790-1795, and the War on Terror," *University of Pennsylvania Journal of Constitutional Law* 17 (forthcoming 2016). I am indebted to Adam Mendel for several of these citations. On the laws of war, especially as applied to Indians, see John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012); Deborah A. Rosen, *Border Law: The First Seminole War and American Nationhood* (Cambridge: Harvard University Press, 2015), 40-70.

<sup>4</sup> Secretary of War to Gov. Arthur St. Clair, December 19, 1789, in *TP: Vol. II*, 224-26.

These expeditions institutionalized the doctrine of retaliation. In the wake of Native attacks, frontier settlers would gather and march into Indian country, seeking revenge against the tribes they believed responsible. Though rarely formally sanctioned by the government, these expeditions often claimed quasi-official status--the participants were frequently mustered as militiamen, and they were usually led by a prominent local leader who assumed the title of “colonel” or “general.” Such self-organized operations had a long pedigree on both the southwestern and northwestern frontiers. During the Revolution, when many Natives allied with the British, North Carolinian and Kentuckian militia had destroyed Cherokee and Shawnee villages with little outside aid or oversight. In the context of brutal, disorganized violence of the borderlands, these expeditions represented a potent way for decentralized and cash-strapped governments to wage war.<sup>5</sup>

But with the Treaty of Paris in 1783, such violence outside governmental control became a threat to the tenuous peace that officials sought to create in the territories. Despite their military trappings, the expeditions more closely resembled the era’s urban mobs than a military campaign. Their participants were gangs of ill-disciplined and refractory armed men, over whom their purported leaders enjoyed only nominal control. And like rioters, they enforced their own norms of justice and legality, which held Natives collectively responsible for frontier violence. As a result, their attacks were often

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<sup>5</sup> On the Revolution in Shawnee and Cherokee territory, see Colin G. Calloway, *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities* (Cambridge [England]: Cambridge University Press, 1995), 158–212; Richard Gildrie, “Tennessee In The American Revolution: A Reconsideration,” in Kristofer Ray, ed., *Before the Volunteer State: New Thoughts on Early Tennessee, 1540-1800* (Knoxville: University of Tennessee Press, 2015), 110-22; Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York: Hill and Wang, 2007), 125–50; Patrick Griffin, *America’s Revolution* (New York City: Oxford University Press, 2012), 157–190; Tom Hatley, *The Dividing Paths: Cherokees and South Carolinians Through the Revolutionary Era* (New York : Oxford University Press, 1995), 192-228.

indiscriminate in selecting their victims, falling on whichever Native village they found heedless of culpability.<sup>6</sup>

Two attacks in the 1780s epitomize these expeditions' weak structures of authority and their brutal willingness to seek revenge against all Indians. In 1786, in response to Native attacks, roughly two thousand Kentucky militia crossed into the Northwest Territory in two columns under the commands of General George Rogers Clark, a Revolutionary War hero, and Colonel Benjamin Logan. Clark's men mutinied, returning to Kentucky "in vile Disorder." But while the Shawnee warriors were away defending against Clark, Logan's men marched into Shawnee territory largely unopposed, where they proceeded to burn seven Shawnee towns. At one town, Logan was met by Melonthy, a Shawnee chief who attended the Treaty of Fort Finney. Well known as a "Friend to the United States," Melonthy raised the American flag on the column's approach and came out bearing a copy of the treaty. Taken prisoner, Melonthy was then shot down in defiance of orders by an officer named McGeery. Having killed a half-dozen other Shawnees and taken several dozen women and children prisoner, Logan and his men returned to Kentucky, where they displayed Melonthy's flag as a trophy at the Lexington court house.<sup>7</sup>

Logan's campaign had its echo in an attack led by John Sevier, the erstwhile governor of abortive secessionist state of Franklin in the Tennessee Country, against the

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<sup>6</sup> On mobs in early America, see Pauline Maier, "Popular Uprisings and Civil Authority in Eighteenth-Century America," *The William and Mary Quarterly*, Third Series, 27, no. 1 (January 1970): 4-35; Paul A. Gilje, *Rioting in America* (Bloomington, Ind.: Indiana University Press, 1999), 12-84.

<sup>7</sup> Capt. W. Finney to Josiah Harmar, October 31, 1786, Vol. 4, JHP; Josiah Harmar to John Francis Hamtramck, November 14, 1786, Vol. 28, Letterbook B, p. 5, JHP; "Information from Mr. Lewis Westell," November 14, 1786, Vol. 4, JHP; Josiah Harmar to Henry Knox, November 15, 1786, in *SCP*, 18-19; Josiah Harmar to Thomas Hutchins, December 5, 1786, Vol. 28, Letterbook B, pp. 11-12, JHP; Arthur Campbell to Edmund Randolph, March 9, 1787, Cherokee Collection (microfilm), Tennessee State Library and Archives. The precise numbers in the accounts varied, positing somewhere between twenty-seven and thirty-six prisoners, seven to eleven Shawnees killed, and the militia suffering one to three casualties of their own.

Upper Cherokees in 1788. Receiving word that Cherokees from the town of Chilhowee were responsible for the recent killing of the Kirk family, Sevier led his men deep into Cherokee territory, destroying several Cherokee towns and killing nearly thirty Cherokees. According to depositions from participants, when they arrived in Chilhowee, the Cherokee leader Old Tassel, well known to the North Carolinians, raised a white flag. Some of the militia pushed to kill Tassel anyway, leading Sevier to intervene: “Shurly Not,” he reportedly exclaimed, “Would you be so Cruel as to Kill Any person that Submitted to our Mercy?” Sevier then posted a guard and ordered the prisoners not to be hurt “by any means.” But as Sevier walked away, a party of the militia swarmed the guard. One of them pointed a cocked gun at him, demanding that either the guard move “or he would make daylight shine through him.” When the guard gave way, John Kirk, whose mother, brother, and sisters had all been killed in Indian attacks, rushed in and killed the prisoners, including Tassel.<sup>8</sup>

On Sevier’s return several minutes later, he was outraged, declaring how “disgracefull And inhuman it Was to put prisoners to death.” But Sevier then had to intervene to prevent his men from killing a Cherokee woman as well as a “half breed indian” named Charles Murphy, “beg[ging]” his men, “for god Sake they would not kill him.” Murphy was spared, but only after much grumbling: Sevier’s plea for mercy gave “great umbridge to the whole Army and some said it would be Well done to kill any Man that would Save an Indian.” If leaders like Sevier were not willing to enforce these

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<sup>8</sup> “Depositions from Greene Co. in Defense of John Sevier, Concerning the Murder of Certain Indians,” October 25, 1788, Petitions Rejected or Nor Acted Upon Folder, GASR Nov-Dec 1788, Box 1, North Carolina State Archives. Additional accounts of the attack appear in Richard Winn to Henry Knox, August 5, 1788, in *ASP:IA*, 28; “Deposition Apparently Enclosed with Letter from Alex. Drumgoole to Governor Johnston, April 4, 1789 (enclosure Only),” November 5, 1789, Joint Standing Comm., Committee on Indian Affairs, GASR Nov-Dec 1789, Box 1, North Carolina State Archives; Joseph Martin to Henry Knox, January 15, 1789, in *ASP:IA*, 46.

norms, other men would. Mere days after Sevier's attack, another expedition led by a man named Alexander Outlaw destroyed the Cherokee town of Citio, "where he found a few helpless women and children, which he inhumanely murdered, exposing their private parts in the most shameful manner, leaving a young child, with both its arms broke, alive, at the breast of its dead mother."<sup>9</sup>

Such expeditions horrified both state and federal governments, who sought to hold the participants legally accountable. Successive governors of Virginia sent instructions to Kentucky to institute "all proper legal inquiries" for punishing such "unjust violences." In response to Sevier's "most cruel and unjustifiable" attack, North Carolina's governor issued a proclamation that "strictly enjoin[ed]" all state citizens from entering Cherokee territory; the Continental Congress similarly issued a proclamation condemning the attacks and contemplating using federal forces to expel intruders on Cherokee lands. But these efforts were ineffectual: reports soon reached North Carolina's governor that two more attacks on Cherokees had occurred in defiance of his proclamation. The norms sanctioning such expeditions were too powerful to be counteracted by distant state and federal governments.<sup>10</sup>

Preventing expeditions unsanctioned by government was a principal goal for Henry Knox as he recrafted Indian affairs. "If so direct and manifest contempt of the authority of the United States be suffered with impunity, it will be vain to attempt to extend the arm of Government to the frontiers," Knox wrote President Washington in

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<sup>9</sup> "Depositions from Greene Co. in Defense of John Sevier, Concerning the Murder of Certain Indians," October 25, 1788; Joseph Martin to Henry Knox, January 15, 1789, in *ASP:IA*, 48.

<sup>10</sup> Edmund Randolph to Henry Innes, May 1, 1787, Folder 1, Harry Innes Papers, Manuscript Division, Library of Congress; "Proclamation of the Governor," July 29, 1788, Committee on Ind Affairs Folder, GASR Nov-Dec 1788, Box 1, North Carolina State Archives; JCC, 34:368-71.



response to Sevier's "disgraceful violation" of federal Indian treaties. "The Indian tribes can have no faith in such imbecile promises, and the lawless whites will ridicule a government which shall, on paper only, make Indian treaties, and regulate Indian boundaries."<sup>11</sup>

The Constitution was central to this project. Knox and the Washington Administration interpreted the document, especially the provisions vesting the power to declare war in Congress and explicitly barring states from levying war, as placing all power over organized violence in federal hands. "[T]he paragraphs of the Constitution, declaring that the general government shall have, and that the particular ones shall not have, the rights of war," Thomas Jefferson reported to Washington, "are so explicit that no commentary can explain them further, nor can any explain them away." Many others shared this view. When a citizen appealed to Governor Pinckney of South Carolina for the state's support of an expedition against the southeastern nations, the Governor declined. "[H]aving always determined to make the federal Constitution my guide," he wrote to President Washington, "I should not feel myself by any means justified in sanctioning a measure of that kind, even from its necessity." Pinckney feared that such an action would ripen into "precedent."<sup>12</sup>

These restrictions mattered because, as Pinckney's experience suggests, the "unauthorized expeditions" often claimed the authority of state law by virtue of their militia commissions. A band of Kentuckians seeking to attack Natives near Vincennes tried this gambit in 1788, citing a state law that they claimed warranted their actions in

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<sup>11</sup> Knox to President of the United States, July 7, 1789; Secretary of War to Gov. Arthur St. Clair, December 19, 1789, in *TP: Vol. II*, 224-26.

<sup>12</sup> Thomas Jefferson, "Opinion on Certain Georgia Land Grants," May 3, 1790, in *PTJ:MS*, 16:406-07.

federal territory. A federal military officer informed them, “I did not know any authority but that of Congress who could order a war with the Indians.” But federal law went even further. Fearing that citizens claiming the right to levy war would “involve the United States in an unjust war,” Henry Knox urged a law subjecting the expeditions’ participants to a federal court martial. Instead, the anxiety over unauthorized expeditions provided a major impetus for the extension of federal criminal jurisdiction over U.S. citizens in Indian country in the Trade and Intercourse Act, which made it possible to prosecute the perpetrators in federal court. Knox followed with explicit instructions to Governors St. Clair and Blount to both prevent such attacks and, if that failed, to prosecute the violators.<sup>13</sup>

Taken together, the Constitution and the Trade and Intercourse Act reflected a vision in which the federal government alone held the power to legitimate violence by deeming it war. The federal government would seek to deny that title to long-standing practices of violence in the borderlands, the practices of military self-help with dubious official sanction. Such unauthorized acts would now be considered crimes.

This restriction extended beyond territorial citizens to encompass Native nations, as well, whose ambiguous status under federal law made it unclear whether they enjoyed the power held by other sovereign nations to engage in war rather than simply to commit “attacks.” This was because the brutal, isolated, and intensely personal nature of borderlands violence diverged from elite expectations of the legal norms that supposedly governed war. This was especially true with respect to non-combatants. Though the

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<sup>13</sup> John Francis Hamtramck to Josiah Harmar, August 31, 1788, in Gayle Thornbrough, ed., *Outpost on the Wabash, 1787-1791: Letters of Brigadier General Josiah Harmar and Major John Francis Hamtramck, and Other Letters and Documents Selected from the Harmar Papers in the William L. Clements Library* (Indianapolis: Indiana Historical Society, 1957), 114-20; Henry Knox, “Draft of President’s Address,” November 19, 1793, in *PGW:PS*, 14:393-95; Knox to Washington, July 7, 1789.

Declaration of Independence castigated the “undistinguished destruction of all ages, sexes and conditions” as the “known rule of warfare” only of Indians, federal officials recognized and acknowledged that borderlands violence involved both whites and Natives in indiscriminate slaughter.<sup>14</sup>

But federal officials did not argue that borderland customs freed the United States from the obligation to follow the laws of war that applied in conflicts among Europeans in its struggles against Indians. On the contrary, even though they recognized that Natives would not obey these legal norms, federal officials in the territories repeatedly ordered their own military and militia to adhere to the “rules of war” and the “custom and usage of civilized nations” in their fights against Indians. They embraced this one-sided adherence to legal rules because they believed vigorous restraint of the wanton violence of territorial citizens would serve to inculcate the same values of humanity in Natives. Sparing women and children and treating prisoners “with humanity,” as the laws of war required, “must teach even savages to follow them” and lead the Indians to “spare the citizens of the United States, under similar circumstances.” At another point, William Blount demanded that the Cherokees inform him and explain the causes before they “went out for war”: he instructed them, “such is the custom among nations.” In short, federal officials embraced a vision of tutelary warfare, in which their “examples” would remake borderland violence, both white and Indian.<sup>15</sup>

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<sup>14</sup> “Declaration of Independence—1776,” in *United States Code* (Washington: Government Printing Office, 2013), 1:xlvii-xlviii. For an acknowledgment that white settlers similarly abandoned the laws of war in their indiscriminate killings, see William Blount to James Robertson, March 8, 1794, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 3, no. 3 (July 1, 1898): 267, 288-91.

<sup>15</sup> William Blount to James Robertson, September 12, 1792, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 2, no.1 (January 1, 1897): 59, 71-72; “General Robertson’s Order to Major Ore,” September 6, 1794, in *ASP:IA*, 530; William Blount to Major Beard, April 18, 1793, in *ASP:IA*, 453; Blount to Robertson, March 8, 1794; William Blount to Little Turkey, Chief of the Cherokees, September 13, 1792, in *ASP:IA*, 280. Here, the evidence diverges slightly from the accounts offered

But until that point was reached, the violence of both territorial citizens and Natives was too haphazard to deserve the formal status of “war.” “I presume we are not to be deemed in a state of war whenever any Indian hostilities are committed on our frontiers,” one Federalist author wrote during the debate over the ratification of the Constitution, when the question of the legitimacy of a standing army in peace was debated. “A distinction between peace and war would be idle indeed, if it can be frittered away by such pretences as those.” After ratification, the casual dismissal of Indian violence became the preserve of the opponents of the Washington Administration and its seeming militarism. Bemoaning the army raised to serve in the Northwest Territory, Thomas Jefferson complained that “[e]very rag of an Indian depredation” could be exploited “as a ground to raise troops with those who think a standing army and a public debt necessary for the happiness of the U.S.” What united these views was the insistence that Indian attacks diverged too far from legitimated and accepted forms of violence to constitute actual war, whatever that meant. In this view, only the federal government—*not* Native nations and *not* territorial citizens—possessed the authority to sanction violence by declaring it “war.”<sup>16</sup>

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Native peoples, of course, had their own views on authority over war and peace, which they, too, were debating alongside the Anglo-American neighbors. Just as Congress ostensibly possessed sole authority over the war power, Natives had long

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by John Witt and Deborah Rosen, which suggests that Anglo-Americans largely wrote Natives out of the laws of war: see Witt, *Lincoln's Code*, 88-108, and Rosen, *Border Law*, 102-21. But this apparent discrepancy is largely an artifact of chronology: Witt and Rosen both focus on later debates, when Anglo-Americans had abandoned efforts to adhere to the laws of war in Indian conflicts, and leaders like Andrew Jackson had replaced William Blount.

<sup>16</sup> “Marcus IV,” *Norfolk and Portsmouth Journal*, March 12, 1788; Thomas Jefferson to James Monroe, April 17, 1791, in *PTJ:MS*, 20:234-36.

resolved these issues through lengthy deliberations: one set of commissioners informed Henry Knox of how the Creeks had an annual meeting to resolve such issues in “a great council,” where they could “deliberate with freedom.” In theory, these lengthy sessions, with much discussion, would slowly move toward consensus. If the decision were for war, the council would then dispatch symbols—often black wampum or a hatchet—to convey their decisions both to potential allies and to their adversaries.<sup>17</sup>

In their negotiations with the United States, Native leaders, like their federal counterparts, portrayed themselves as possessing the power over war and peace. “I Love peace, I Formerly Loved War,” proclaimed the Cherokee leader Tuskegetchee, who stated that he “Command[ed] Seven Towns, thirteen others Listen to my talk.” For six years, Tuskegetchee noted, he worked with the Indian agent Joseph Martin, “Assist[ing] him in keeping peace,” turning back both hostile Creeks and the lower Cherokee towns known as the Chickamaugas. “I stand up Like a Wall between Bad people and my Brothers the Virginians.” At another diplomatic meeting, the Cherokee leader Hanging Maw had made explicit the analogy between Anglo-American and Native authority in emphasizing his power over war and peace. “I am the Head man of my Nation,” he asserted, “as Governor Blount is of the white people.”<sup>18</sup>

Anglo-Americans negotiating with these Native representatives relied on these claims of authority. They needed men like Hanging Maw and Tuskegetchee to enforce the treaties and agreements reached with the Cherokees and other nations. But many

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<sup>17</sup> The Commissioners to Secretary of War, November 20, 1789, in *ASP:IA*, 79. On Native deliberations on war and peace, and their use of symbols, see John Phillip Reid, *A Law of Blood; the Primitive Law of the Cherokee Nation* (New York: New York University Press, 1970), 153-61, 173-84, 201-28.

<sup>18</sup> Tuskegetchee, “Talk,” June 12, 1787, Item #27, Box 1, Reel #1, Cherokee Collection (microfilm), Tennessee State Library and Archives; “Conference at Tellico Blockhouse,” November 7, 1794, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 3, no. 4 (October 1, 1898), 367-72.

Anglo-Americans also suspected that Natives leaders possessed far less power than they asserted. The problem, many Anglo-Americans believed, was that the Natives existed “[w]ithout government,” as Thomas Jefferson described it, where “public opinion is in the place of law.” Jefferson romanticized this condition, believing that the people who lived under it likely possessed “an infinitely greater degree of happiness” than “under European governments.” But for those charged with governing Indian affairs, this decentralized and seemingly anarchic method of rule made maintaining the peace with Natives through negotiations with their leaders an endless chore. It was “vain,” Patrick Henry wrote to his state’s congressional delegates, to hope that “great number of Nations among whom the Restraints of Law & order are unknown” could keep the peace. Since “[e]very Individual amongst them claims a right of gratifying his revenge, his avarice, or ambition in the time & manner he pleases,” even the “most vigilant agency” could not prevent violence.<sup>19</sup>

In part, what Anglo-Americans attributed to lawlessness reflected the complicated organization of Native polities. The idea of Native nationhood had always masked a more involved politics in which authority centered in villages, which then combined in complicated and decentralized ways to exercise control on a regional and national basis. Many observers also noted a general sense of Native leaders’ waning power: “the chiefs, once absolute among them, did not have any more authority over their minds,” reported a Catholic missionary among the Illinois Country tribes. When, in 1792, a group of Cherokees, agitating for war, began dancing and shooting through a flag of the United

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<sup>19</sup> Thomas Jefferson to Edward Carrington, January 16, 1787, in *PTJ:MS*, 11:48; Thomas Jefferson to James Madison, January 30, 1787, in *PTJ:MS*, 11:92-97; Patrick Henry to Virginia Delegates, July 5, 1786, in *The Papers of James Monroe*, eds. Daniel Preston and Marlena C. DeLong (Westport, Conn: Greenwood Press, 2003), 2:315-18.

States raised by the Cherokee leader Bloody Fellow, he tried to “order them to desist,” even threatening to “kill some of them.” But the Cherokees continued to war anyway.<sup>20</sup>

This seeming disruption in Native governance was a consequence of colonial encounter: it resulted largely from the increasing intrusion of Euro-American authority into Indian country, in the form of talks, goods, agents, and traders, which produced complicated webs of influence and power within Native politics. The 1792 journey of Anthony Forster into Chickasaw and Choctaw territory on behalf of William Blount is illustrative. When Forster arrived at a Chickasaw “convention,” he discovered that the Chickasaw leader the Hair-lipped King was “disgusted and chagrined” because Blount’s letter had not mentioned his name and seemed to favor the King’s rival, Piamingo; Blount, the King complained, did not know “his power and authority within the nation.” When Forster continued to the Choctaws bearing a white wampum belt and an invitation to a meeting in Nashville, a Choctaw council deliberated for over three hours. Just as they were nearing “one uniform point of decision,” what Forster described as a “mob of drunken Indians” stormed the council and “tore the *peace belt* in pieces.” It turned out, at least according to Blount, that an Indian trader named Brassheart, purportedly in the “Spanish interest,” had plied the dissenting Choctaws with rum to spur them on. As a result, Blount argued, what seemed to be an “insult . . . to the United States” should not “be attributed . . . to the Nation.” But the incident underscored how increasing factionalism within Indian Country, and Euroamerican influence, worked to undermine

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<sup>20</sup> Jean Francois Rivet to Bishop Carroll, 1796 (typescript English translation), Correspondence--1796-1801, Rivet Papers, RHC # 102, Byron R. Lewis Historical Library, Vincennes University, Vincennes, Ind.; “Information by Richard Finnelson,” November 1, 1792, in *ASP:IA*, 288-91.

traditional deliberations over war and peace, and made it hard to interpret what a nation's true intentions were.<sup>21</sup>

For federal and state officials, perhaps the direst consequence of this crisis of authority was that, through the 1780s and into the 1790s, Native raids continued unabated against Anglo-American settlements in the borderlands. Kentucky, Cumberland, the Washington District in eastern Tennessee Country—all became the sites of constant attacks. According to “respectable evidence,” between 1783 and 1790 Natives killed, wounded, or took prisoner 1500 U.S. citizens along the Ohio, as well as stealing \$50,000 worth of property. South of the Ohio was similar: William Blount asserted the nearly all the land around Nashville “has been stained with the blood of the Inhabitants since my arrival in this Country.” Few of these attacks were the sort of massed pitched battles Anglo-Americans associated with warfare. They were, rather, incursions by “small parties of Savages” on remote settlements that Henry Knox deemed as “difficult to be guarded against, as a single wolf.” Brutal, swift, and isolated, these attacks, which Anglo-Americans termed “depredations,” usually left behind only victims.<sup>22</sup>

Worst of all, from the perspective of federal officials, these attacks seemed to continue unabated notwithstanding promises of peace and restraint on the part of Native leaders, and even regardless of the formal treaties of friendship that Native nations had entered with the United States. Territorial citizens began to mock these broken agreements as a “paper Peace.” Federal Indian agent John McKee lectured the

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<sup>21</sup> Anthony Forster to William Blount, July 29, 1792, in *ASP:LA*, 283-84; William Blount to Secretary of War, September 20, 1792, in *TP: Vol. IV*, 172-74; William Blount to Secretary of War, September 20, 1792, in *ASP:LA*, 282-83.

<sup>22</sup> “The Causes of the Existing Hostilities Between the United States, and Certain Tribes of Indians North-West of the Ohio, Stated and Explained From Official and Authentic Documents, and Published in Obedience to the Orders of the President of the United States,” January 26, 1792, in *TP: Vol. II*, 359-66; William Blount to Secretary of War, November 10, 1794, in *TP: Vol. IV*, 364-70; Henry Knox to Josiah Harmar, June 10, 1789, p. 70, vol. 10, JAH.



Cherokees: “Peace does not consist in writing or Beads, but in one and all your people leaving off to kill the Citizens of the United States and steal their property.”<sup>23</sup>

In explaining these ongoing attacks, Anglo-Americans offered two interrelated accounts, one generational, the other anthropological. The generational explanation focused on the divide between Native leaders and their “young fellows,” whom Native leaders complained were “always wanting war.” “It is well known how strong the passion for war exists in the mind of a young savage, and how easily it may be inflamed, so to disregard every precept of the older and wiser part of the tribes who may have a more just opinion of the force of a treaty,” Henry Knox reported to President Washington. Elsewhere Knox described young Native warriors as “headlong” and “impetuous,” incapable of being “retrained by the feeble advice of their Chiefs.” Knox sought to send a representative to the tribes responsible for the attacks to insist that they “must devise some mode for the punishment of their guilty young men.” The United States, he told William Blount, “cannot and will not suffer the depredations of any part of the Indian tribes, with whom we have treaties.”<sup>24</sup>

The anthropological explanation, tinged with a good deal of racist disdain, was that Natives were simply too enamored of violence and bloodshed for them to cease. Anglo-Americans who claimed expertise on Indian matters pointed out the role that the “shedding of blood” played in propelling Natives to honor and authority within their nations. As long as the “scalp of an innocent white man,” or “of a woman, or child,”

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<sup>23</sup> William Blount to Alexander Kelley and Littlepage Sims, December 1, 1795, in *TP: Vol. IV*, 408-10; John McKee to Glass and Other Chiefs of the Lower Terms of the Cherokees, July 14, 1794, in “The Correspondence of Gen. James Robertson,” (October 1, 1898), 352.

<sup>24</sup> “Information by Richard Finnelson”; “Report from H. Knox, Secretary of War, to the President of the United States, Relative to the Northwestern Indians,” June 15, 1789, in *ASP:IA*, 12-14; Henry Knox to George Washington, in *PGW:PS*, 5:140-47; Henry Knox to William Blount, August 18, 1791, NWTC.

would grant Natives “honor,” Indian agent John McKee wrote, “so long there would be war.” The *Knoxville Gazette* put it more bluntly: “Rapacity, infidelity, and love of war, are prominent features in the character of uncivilized nations.”<sup>25</sup>

What united both these explanations was their attribution of the causes of war to something inherent in Native “character,” rather than viewing them as a response to events on the ground. When Natives proffered explanations for their violence—most frequently the Anglo-Americans’ rapacity for Native lands, as well as retaliation for Anglo-American attacks against them—many Anglo-Americans dismissed these complaints as mere pretext. “It is little matter with them, what the pretense for going to war may be,” an Anglo-American emissary observed in an ethnographic report on the Creeks. “They think that force constitutes right, and victory is an infallible proof of justice on their side.” Anglo-Americans even sought to produce evidence, as in a spurious letter reprinted in the *Knoxville Gazette* from the Creek Alexander McGillivray disclaiming any right of revenge against Cumberland, that purported to undermine the legitimacy of Native complaints.<sup>26</sup>

By contrast, Native leaders, though they sought to control the unruly young men, acknowledged that the warriors were acting in response to legitimate grievances. For Natives, negotiations with the federal government often represented the triumph of hope over experience. At the Treaty of Holston, for instance, the Cherokee leaders pointed out that at the earlier Treaty of Hopewell, federal representatives had come claiming “full power and authority” to treat, only for the treaty to be freely “violated.” “[S]hould we

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<sup>25</sup> William Blount to Secretary of War, November 8, 1792, in *TP:Vol. IV*, 208-16; “Mr. McKee’s Report to Governor Blount,” March 28, 1793, in *ASP:LA*, 444-46; “Knoxville, Saturday, June 15,” *Knoxville Gazette*, June 15, 1793.

<sup>26</sup> Caleb Swan, “Report from Caleb Swan to Henry Knox,” May 2, 1791, Mss.B.B284.d.vol.32, American Philosophical Society; “Nashville, March 13, 1795,” *Knoxville Gazette*, April 10, 1795.

now make another it may still be the case,” the leaders argued, “it may still be the case until they take all our towns from us.” In their statements to federal representatives, Native leaders pleaded with them to fulfill promises and affirm the faith the Natives had placed in them, if only to avoid giving further support and encouragement to the war-mongers who insisted that diplomacy was pointless. “We shall look to you to see it done,” the Cherokee leader Bold Hunter wrote to Secretary Daniel Smith of the Southwest Territory in response to a promise to punish an attack on the Cherokees, “and not to our young warriors to say that you told them lies.” But for Natives, lies, it seemed to them, was often all they got.<sup>27</sup>

The debates over war and peace in Indian Country thus paralleled in important ways the controversies in the territories. As other scholars have suggested, both Natives and the federal government confronted crises of authority that created similarly “unauthorized expeditions.” But the challenge ran even deeper. To maintain the peace, both sides relied on negotiations and the promises enshrined in treaties. But when neither side could uphold the promises made there, it obviated their agreements and cast them toward violence, as both Natives and Anglo-Americans interpreted these failures as demonstrations of the other side’s fundamental untrustworthiness. Their respective weakness cast them into mutual cycles of blame and recrimination: even as Kentuckian Henry Innes told Henry Knox that the “Indians have always been the aggressors,” Bloody

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<sup>27</sup> “Treaty of Holston--June & July, 1791. Between Gov. Wm. Blount & the Cherokees,” June 26-July 3, 1791, 15U1-59, Draper Manuscripts, Reel 58, Wisconsin Historical Society, Madison, Wis; Bold Hunter and Others to Secretary Smith, June 18, 1793, in *ASP:IA*, 462.

Fellow argued it was “more the White People’s fault than theirs that these disturbances happen.”<sup>28</sup>

In their more candid moments, both Native and Anglo-American officials acknowledged these parallel barriers to peace. “I was convinced it was not the wish of them [the government officials] or my self to go to War,” the Cherokee leader John Watts wrote, “but was afraid that the Lawless Men living on our lands & the frontiers, Would be the occasion of all Mischief.” Watts’s interlocutor, the Tennessean John Sevier, voiced similar sentiments when he acknowledged that it “would be as difficult for the chiefs to prevent those disorders in every instance, as it would be for the rulers in Philadelphia to restrain murders and robberies often committed within that and neighboring cities.” George Washington, too, argued the United States could not achieve frontier peace “[u]ntil we can restrain the turbulence and disorderly conduct of our own borderers.” The United States, he concluded, could not expect from the Indians “that they will govern their own people better than we do our’s.”<sup>29</sup>

The parallel failures of governance and control also produced a similar challenge of interpretation. Because of the question of authority, whenever an attack happened, or a talk arrived, or rumors trickled in, it was never quite certain whether these actions were the voice of the entire nation or merely spoke for isolated and discontented individuals. In this circumstance, neither side could discern the true motives and intent of the other. “From all quarters, we receive speeches from the Americans, and not one is alike,” the

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<sup>28</sup> Harry Innes to Henry Knox, July 7, 1790, Folder 4, Harry Innes Papers, Manuscript Division, Library of Congress; Extracts of Correspondence on Indian Affairs, October 1792, in *PGW:PS*, 11: 291-315. On the parallel challenges for Native and federal leaders to control their “unruly young men,” see David Andrew Nichols, *Red Gentlemen & White Savages: Indians, Federalists, and the Search for Order on the American Frontier* (Charlottesville: University of Virginia Press, 2008), 57-75.

<sup>29</sup> John Watts to John Sevier, March 4, 1797, Box 2, Folder 2, John Sevier Papers, 1796-1801, First Administration, Governor’s Papers, Tennessee State Library and Archive; John Sevier to James McHenry, June 6, 1797, in “Executive Journal of Gov. John Sevier,” 2:136; George Washington to Tobias Lear, April 3, 1791, in *PGW:PS*, 8:49-50.

Shawnee leader Blue Jacket informed a federal emissary in 1790. “We suppose that they intend to deceive us.” Several years later, when James Robertson of Nashville sent a threatening talk to the Cherokees, they were understandably alarmed. William Blount claimed they should disregard it as coming from an unauthorized source, and yet Natives had good reason to wonder whether Blount could actually exercise the authority over Robertson that he claimed.<sup>30</sup>

If anything, it was even harder for Anglo-Americans to discern the meanings behind Native attacks, both because of the political divisions within Indian country and because of the ignorance of most federal officials. “Truth in all enquiries is hard to obtain, and in none in which I have been engaged, so much so as in what respects Indians,” William Blount grumbled. The information that filtered to Blount from Indian country, derived from a network of both Native and non-Native informants, was “imperfect and contradictory.” Much of it was little more than rumor: vague reports that the Cherokee leader Hanging Maw opposed war while the leader Double-Head supported it; tales of the “bloody club”—a call to war—being offered the Creeks by the Cherokees, or vice versa, and being accepted, or maybe refused; whispers of warriors from one town, or perhaps another, setting out for an attack, or third-hand tales of traders spying white scalps in the town’s square.<sup>31</sup>

Affixing responsibility for Indian attacks was equally difficult. Territorial citizens had only a vague sense of Native identities, pleading inability to “distinguish

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<sup>30</sup> “Report of Antoin Gamelin,” May 17, 1790, in *SCP*, 155-60; William Blount to The Glass, September 13, 1792, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 2, no.1 (January 1, 1897): 72-74.

<sup>31</sup> William Blount to Secretary of War, March 20, 1793, in *TP: Vol. IV*, 244-47; William Blount to Secretary of War, November 8, 1792, in *TP: Vol. IV*, 208-16; James Seagroove to Secretary of War, September 17, 1793, in *ASP:LA*, 409-10. On the role of rumor in Native relations during this period, see Gregory Evans Dowd, *Groundless: Rumors, Legends, and Hoaxes on the Early American Frontier* (Baltimore: Johns Hopkins University Press, 2015).

between Cherokees & Creeks,” let alone among the nations’ myriad subdivisions. To determine the identity of the perpetrators of some of the attacks, William Blount took to scouring the scene of frontier killings for clues like a detective. When pressed, Native leaders usually disclaimed responsibility for the attacks, attributing them to other nations, other towns within the same nation, or “what the chiefs are apt to call a few bad men.”<sup>32</sup>

A stock phrase began to be used to describe this confusing and ambiguous state of affairs: “half peace & half war.” William Blount observed that such a war had raged in the region since the Revolution and described it as the “worst of all wars.” The people “would prefer an open war to such a situation,” a correspondent reported to Blount. “The reason is obvious; a man would then know, when he saw an Indian he saw an enemy, and be prepared and act accordingly.” Instead, with neither Native nations nor the United States able to restrain their own citizens, the territories existed in a vague neverworld between war and peace marked by ambiguous, secretive, and yet organized violence outside of governmental control.<sup>33</sup>

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In both the Northwest and Southwest Territories, the federal government sought to end such self-justified, extralegal violence by decisively asserting its constitutional supremacy over war and peace. But the process played out very differently in the two territories.

North of the Ohio, the federal government ultimately co-opted frontier violence to serve its own ends. Though the United States had entered peace treaties with many of the

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<sup>32</sup> Silas Dinsmore to David Henley, March 18, 1795, Folder 3, Silas Dinsmore Papers, Ayer MS 241, Newberry Library; William Blount to Secretary of War, May 28, 1793, in *TP: Vol. IV*, 262-64; Daniel Smith to Timothy Pickering, October 1, 1795, in *Letter from the Secretary at War*, 6-8.

<sup>33</sup> Blount to Kelley and Sims, December 1, 1795; William Blount to Secretary of War, May 16, 1792, in *ASP:IA*, 267.

nations of the Ohio and Illinois Countries, depredations continued. Knox attributed to these attacks to “banditti” consisting of renegades from the what Knox termed the “regular tribes,” as well as the Miamis and Wabash Confederacy, who, Knox complained, had “refus[ed] to treat with the United States when invited thereto” because of their “inveterate and incurable habits of enmity” toward the U.S. In the end, the Washington Administration reluctantly turned toward force as the solution, securing congressional authorization for a targeted expedition. “[T]he vengeance of the Union is to be pointed only against the perpetrators of the mischief,” Knox stressed, “and not against the friendly nor even neutral tribes.” The Administration cast the action as consistent with its vision of the federal government as the impartial arbiter of justice on the frontier, depicting the attack as a police action. “The aggressors should be made sensible that the Government of the Union is not less capable of punishing their crimes,” President Washington informed Congress, “than it is disposed to respect their rights and reward their attachments.” As the conflict escalated, Knox and President Washington published a widely reprinted and self-justifying statement of the war’s causes that emphasized how the federal government had been “compelled to resort” to force and cited the treaties with the Cherokees and Creeks as evidence of the “pacific and humane disposition of the General Government toward the Indian tribes.”<sup>34</sup>

What was supposed to be simple exercise that would demonstrate to the Indians “the absolute necessity of submitting to the justice and mercy of the United States,” in Knox’s words, transformed into a bitter, costly, five-year-long war against the united

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<sup>34</sup> Henry Knox to Gov. Arthur St. Clair, September 14, 1790, in *SCP*, 2:181-83; Henry Knox to Gov. Arthur St. Clair, June 7, 1790, in *SCP*, 2:147-48; “To the United States Senate and House of Representatives,” December 8, 1790, in *PGW:PS*, 7:45-49; “The Causes of the Existing Hostilities Between the United States.”

force of thousands of Natives from throughout the Ohio and Illinois Countries and up into the Great Lakes. Ultimately, there were three campaigns into Indian country: one expedition led by Josiah Harmar in 1790, one by Arthur St. Clair in 1791, and one by Anthony Wayne in 1794. Though commanded by federal officers and built around a core of federal soldiers, the federal army was far too small to conduct the war on its own. All three relied heavily on assistance from the militia of Pennsylvania, Virginia, and especially Kentucky to conduct their campaigns.<sup>35</sup>

In essence, this action granted unauthorized expeditions the sanction of law. Many of the Kentucky militia who marched under Josiah Harmar and Arthur St. Clair in 1790 and 1791 were the same men who had earlier served Logan and Clarke. And, to the dismay of federal officers, the militia proved just as fractious and disdainful of federal authority as they had of their commanding officers on the unauthorized expeditions. They were, one investigation subsequently found, “totally ungovernable, and regardless of military duty or subordination.” When both the 1790 and 1791 expeditions subsequently suffered catastrophic defeats at the hands of the Ohio country nations, many federal military officers attributed the losses to the disorder caused by the militia.<sup>36</sup>

Anthony Wayne’s 1794 victory at the Battle of Fallen Timbers—with a much expanded and better trained regular force, though still extensively supplemented by

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<sup>35</sup> Henry Knox, “A View of the Present State of the Military Force of the United States,” March 19, 1791, NWTC. For additional discussion of the causes and course of the Northwest Indian War, see Colin Calloway, *The Victory with No Name: The Native American Defeat of the First American Army* (Oxford: Oxford University Press, 2014); William H. Guthman, *March to Massacre; a History of the First Seven Years of the United States Army, 1784-1791* (New York: McGraw-Hill, 1974); R. Douglas Hurt, *The Ohio Frontier: Crucible of the Old Northwest, 1720-1830* (Bloomington: Indiana University Press, 1996); Fred Anderson and Andrew Cayton, *The Dominion of War: Empire and Liberty in North America, 1500-2000* (New York: Viking, 2005).

<sup>36</sup> Harry Innes to Henry Knox, July 7, 1790, Folder 4, Harry Innes Papers, Manuscript Division, Library of Congress; Arthur St. Clair to Henry Knox, January 26, 1790, Reel 2, ASCP; John Edwards to Arthur St. Clair, May 25, 1791, Reel 3, ASCP. For discussions of the role of the militia in U.S. military defeats, see Ebenezer Denny, “Copy of Lieut. Denny’s Report to the Secretary at War” January 1, 1791, Reel 3, ASCP; “Report of a Special Committee of the House of Representatives on the Failure of the Expedition Against the Indians,” March 27, 1792, SCP, 286-99.



militia—and the 1795 Treaty of Greenville ending the conflict largely put an end to the problem of unauthorized expeditions in the Northwest Territory. Ironically, the Washington Administration had accomplished this goal by aligning itself with many of the expeditions' aims. The Northwest Indian War, it turned out, was highly controversial, for the same reason that the Washington Administration had sought to quell the unauthorized expeditions. Some turned Knox's favorite word on its head, observing the war's "justice . . . is at least doubtful in my mind." These qualms were strongest in the Northeast, especially in New England. When Washington's secretary Tobias Lear traveled there in 1792, he was "surprised to find that the Indian War is extremely unpopular." As Lear informed Washington, "I have not heard it mentioned by a single person who did not consider it as arising rather from a wish on the part of the United States to obtain lands to which they have no just claim, than as a war of necessity, as it really is." In the end, the New Englanders proved arguably more right about the war's aims than the self-deluding Washington Administration. Though the Administration had disclaimed to all that would listen, both Native and non-Native, that it had no interest in Native lands, it ended up purchasing most of present-day Ohio from the defeated nations. With the Natives dispossessed and removed far from the scenes of their depredations along the Ohio River, it is hard to imagine a result more pleasing to Logan and his disorganized militia.<sup>37</sup>

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<sup>37</sup> Tobias Lear to George Washigton, July 21, 1792, in *PGW:PS*, 10:556-59; Paine Wingate to President Bartlett, March 24, 1792, Vol. 69, Manasseh Cutler Papers, Special Collections, Northwestern University Library.

The legacy of the Northwest Indian War cast a long shadow over the Southwest Territory. By 1792, it was apparent that the Treaties of New York and of Holston had not brought peace to the southwestern borderlands. Reports of the “murder of some of our fellow-citizens” at Cherokee and Creek hands filled a biweekly column in the *Knoxville Gazette*, the Territory’s only newspaper. Yet the Washington Administration viewed “the extension of the Northern Indian War to the Southern Tribes” with “extreme reluctance.” Many of their hesitations were practical. Knox knew well that the Creeks and Cherokees were even more numerous and powerful than the Ohio Country nations. Moreover, with public support for the Northwest Indian War at a nadir in the wake of St. Clair’s defeat, a call to broaden the conflict would be viewed “by the mass of the citizens of the middle and eastern States as an insupportable evil.” The Northwest Indian War had also taught the Administration that what was conceived as limited and targeted expedition could expand into a much broader conflict. The President, Henry Knox reported, was “exceedingly apprehensive that the flame of War once kindled in that [southern] region upon the smallest scale, will extend itself, and become general.” And, because the federal government had no soldiers in the region, it would be forced to rely on the fractious and insubordinate local militia to achieve its ends.<sup>38</sup>

But the Washington Administration, especially Henry Knox, also had moral qualms about the possibility of a southwestern war. In contrast with the situation north of

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<sup>38</sup> “Copy of a Letter from John McKee to His Excellency Governor Blount,” *Knoxville Gazette*, June 19, 1794; Secretary of War to William Blount, November 26, 1792, in *TP: Vol. IV*, 220-26; Secretary of War to William Blount, August 15, 1792, in *TP: Vol. IV*, 162-64. One study of the *Knoxville Gazette* found 190 notices of deaths at Cherokee and Creek hands in the newspaper between November 1791 and September 1795. See George F. Bentley, “Printers and Printing in the Southwest Territory, 1790-1796,” *Tennessee Historical Quarterly* 8, no. 4 (December 1, 1949): 332, 336. For a convincing argument that the divergent federal policies toward the two regions stemmed from federal officials’ assessment of comparative Native power, see David Andrew Nichols, *Red Gentlemen & White Savages: Indians, Federalists, and the Search for Order on the American Frontier* (Charlottesville: University of Virginia Press, 2008), 188.

the Ohio, the United States had entered solemn treaties with the southern nations, which Henry Knox was loathe to abandon simply because these tribes, like the United States, could not govern their own people. “[I]t is very questionable, while we are unable, in many cases, to execute our own laws,” Knox argued, “whether we ought, in justice, to levy a general war upon the Creeks, for the criminality of an individual.” Knox was also extremely concerned about the nation’s “general reputation in the judgement of the world,” and felt anxious to ensure that the justice of the war was so obvious as to preclude any interpretation of the United States as the aggressor. “[I]f a war must inevitably ensue,” he argued, it had to be under circumstances that would demonstrate “to all the world that the government or citizens of the United States have not been the cause of bringing it on.”<sup>39</sup>

The citizens and government of the Southwest Territory did not share the Administration’s reservations. By the middle of 1792, public and elite opinion in the territory had reached consensus in favor of war. “DELEND A EST CARTHAGO,” the *Knoxville Gazette* started to taking to printing incessantly in its columns, repeating the famous Roman cry to destroy Carthage. Unlike the Administration, the territorial citizens placed no faith in further diplomacy. “Experience teach[es] us that Treaties answer no other Purpose,” a young Andrew Jackson wrote, “than opening an Easy door for the Indians to pass through to Butcher our Citizens.” Unlike Knox, Jackson was also untroubled by the prospect of punishing an entire nation for the acts of a few. If the nations failed to deliver up the murderers who attacked the Territory, he argued, “it is an

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<sup>39</sup> Secretary of War to Governor of Georgia, July 11, 1792, in *ASP:IA*, 256; Henry Knox to George Washington, February 22, 1791, in *PGW:PS*, 7:402-15.

infringement of the Treaty and a cause of war.” In fact, by condoning these acts, Jackson argued, the nations were accomplices: they were giving “Tacit acknowledgement of their Consent to the Commission of the Crime therefore all consenting are Equally guilty.” Much of the first sitting of the territorial legislature in 1794 was devoted to drafting a memorial conveying these views to Congress and urging it to punish the “faithless and bloodthirsty nations, the Creeks and Cherokees, according to the usage and custom of nations.” In their view, war was the only path to peace. “Fear, not love, is the only means by which Indians can be governed.” Until Natives “are made to feel the horrors of war,” it insisted, “they will not know the value of peace, nor observe the treaties they may form with the United States.”<sup>40</sup>

The territorial leadership agreed with this call to war. “I know how earnestly the United States wish for peace, no man can be more sincere in that wish than I am,” Secretary Smith wrote to Henry Knox. But Smith had come to conclude “peace is not to be had without a war to convince them of the strength and dignity of our government-- that they are not to be violators of treaties with impunity.” Viewed in this light, Smith argued, a targeted war would constitute a “mercy,” as “it would check the evil before it becomes too general.” Blount, too, had become an ardent proponent for war. “The Creeks must be scourged and well too and the Cherokees deserve it,” he wrote to a congressman. Moreover, against Knox’s concerns, Blount argued that the war would not be “such a bitter Pill as the War NorthWest of the Ohio.” With the widespread support of

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<sup>40</sup> “Mr. Roulstone,” *Knoxville Gazette*, August 13, 1793; Andrew Jackson to John McKee, May 16, 1794, in *PAJ*, 1:48-49; “Memorial to Congress,” September 18, 1794, in *TP: Vol. IV*, 354-55 n.21; *Journal of the Proceedings of the Legislative Council, of the Territory of the United States of America, South of the River Ohio. Begun and Held at Knoxville the 25th Day of August, 1794* (Knoxville: Printed by George Roulstone, printer to the Territory, 1794).

the Virginia, the two Carolinas, Georgia, and the territorial citizens, “the total Destruction of the two Nations” would merely be a “a Party of Pleasure.”<sup>41</sup>

In August 1793, Blount traveled to Philadelphia to press the case for war to Washington and Knox. He did so “with great earnestness,” apparently pushing war with such “ardor” that observers believed that the governor was “interested for that Purpose”—that is, biased in favor of war, perhaps to profit from it. But despite Blount’s heartfelt pleadings, the Washington Administration ultimately punted on the question. Blount was authorized to call out the militia to protect the territory, but they were to be strictly limited to defensive operations, which did not encompass retaliatory attacks against the Indians. The more aggressive campaign that Blount sought was, the President, proclaimed out of his power: after lengthy discussion, Knox, Washington, Hamilton, and Jefferson had “unanimous[ly]” concluded that “measures of an offensive nature” could be sanctioned only by Congress, “who solely are vested with the powers of War” under the Constitution. In part, this was a dodge for the Administration to avoid a politically tricky issue. But the Administration also seemed highly conscious of the precedent it was setting for the separation of powers. If, “by sad necessity,” so grave a measure as war with the southern nations were to become inescapable, Knox thought it of “the highest importance” that it be “a constitutional and legislative act.”<sup>42</sup>

This outcome hugely disappointed Blount, who now had to wait while a contentious Congress slowly deliberated on the proposal. Congress, a frustrated Blount argued at one point, should be “gullatined if they do not declare war.” But, perhaps

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<sup>41</sup> Secretary Smith to Secretary of War, October 27, 1792, in *TP: Vol. IV*, 198-99; William Blount to John Steele, November 8, 1792, Vol. 1, John Steele Papers, North Carolina State Archives.

<sup>42</sup> James White to William Blount, March 19, 1795, in *TP: Vol. IV*, 385-86. Secretary of War to President, October 9, 1792, in *TP: Vol. IV*, 194.

because he was so dependent on the Administration, he largely accepted its verdict and rationale. “It is Congress not the President have the power of declaring war,” he told James Robertson, the Nashville militia commander. “Those who are bound must obey. Patience is a virtue which must yet be exercised.”<sup>43</sup>

With their neighbors and friends dying around them, territorial citizens did not feel patient. The defensive measures urged on them by the Administration were totally inadequate, they insisted. It was impossible to carry on a “defensive war with Indians,” who were “so wolfish in their manner.” The only way to end the attacks would be invade Indian country directly and destroy the Cherokee and Creek towns. With no federal aid forthcoming, they began to pursue self-help. Throughout 1792 and into 1793, small clagues would gather after Native raids. Incensed by the attacks, sometimes spurred on by the relatives of the deceased, they proposed marching on the nearest Cherokee towns to obtain “satisfaction.” One planned expedition of roughly fifty was thwarted after John Sevier ordered them to disperse. William Blount managed to forestall another planned campaign of nearly one hundred men by dispatching an officer to read a proclamation. In a third instance, Blount had a warrant issued against John Tipton and his conspirators when they plotted an attack. But despite these successes, Blount told Knox he was “hourly in fear that [the people’s] thirst for revenge . . . will lead them to break through the Bounds of good order and government, notwithstanding what can be said or done to prevent it.”<sup>44</sup>

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<sup>43</sup> William Blount to James Robertson, 1795, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 4, no. 1 (January 1, 1899), 93; William Blount to John Gray Blount, September 19, 1793, in *JGBP*, 2:314-15.

<sup>44</sup> Robert Anderson to Governor of South Carolina, September 20, 1792, in *ASP:IA*, 317-18; William Blount, “Order to Lieutenant Colonel Kelly,” January 23, 1793, in *ASP:IA*, 435; “Proclamation of Governor Blount,” January 28, 1793, in *TP: Vol. IV*, 235-36;

The “break” that Blount and others feared happened in the summer of 1793—at the same moment, ironically, that Blount was in Philadelphia pleading the case for an offensive campaign. Before he left, Blount had ordered Captain John Beard and fifty-six militia to pursue the Cherokees reportedly responsible for the death of a man named Gilham and his son outside Nashville. Blount had emphatically instructed Beard not to cross the Tennessee River, the most unambiguous boundary between the Southwest Territory and the Cherokee Nation. But, claiming to be following the track of the murderers, Beard defied the orders and continued south of the river, to Hanging Maw’s town.<sup>45</sup>

Hanging Maw was among the most prominent Cherokee leaders, and Blount had assiduously cultivated a relationship with him. In fact, Blount had recently invited Hanging Maw and a number of other Cherokee leaders to visit Philadelphia, and the chiefs had gathered in Maw’s village with two of Blount’s representatives to consider the invitation. None of this dissuaded Beard and his men. At dawn on June 12, 1793, the militia attacked, reportedly targeting Blount’s white representatives and the Cherokees indiscriminately. They killed eight or nine people, including Hanging Maw’s wife and a white man named William Rosebury, and shot Hanging Maw in the arm. Running through the hail of bullets, Blount’s representatives convinced the attackers, “by hard

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William Blount to Secretary of War, November 8, 1792, in *TP: Vol. IV*, 208-16; Lieutenant Colonel White to William Blount, January 30, 1793, in *ASP:LA*, 435; William Blount to Secretary of War, March 20, 1793, in *TP: Vol. IV*, 244-47.

<sup>45</sup> *Letter from the Secretary at War, Inclosing His Report on the Petition of Hugh Lawson White. 26th December, 1796. Read, and Ordered to Be Committed to a Committee of the Whole House, on Wednesday Next.*, 33092 (Philadelphia: William Ross, 1797).

pleading,” to spare the rest of Hanging Maw’s family and abstain from burning his house.<sup>46</sup>

Beard’s expedition was followed the subsequent summer by a much larger expedition under the command of Major James Ore, a man with extensive trading ties to Indian country. Ore’s expedition of somewhere between 550 and 600 militia was authorized by militia commander James Robertson in Nashville, who had received word from a Chickasaw whom he trusted that the Cherokees were attacking Cumberland in three columns. Robertson ordered Ore and his men to intercept the invasion, and, if they did not encounter the invaders, to cross the Tennessee and “destroy the Lower Cherokee towns”—an order that exceeded his directives from Blount.<sup>47</sup>

On September 14, 1794, Ore and his men snuck up on the Cherokee town of Nickajack and surprised its residents while they were eating breakfast. After briefly resisting, the Cherokees made a “precipitate retreat” to the river. Ore and his men then attacked the largely abandoned neighboring town of Running Water and returned to Nashville. Ore suffered only a couple casualties, one when a militiaman fell out of a tree. By contrast, fifty Cherokees were reported killed, many of them slaughtered in the Tennessee River as they fled for safety; Ore also took nineteen prisoners. Robertson’s explicit orders to the contrary notwithstanding, reports indicated that the “greatest portion

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<sup>46</sup> *Ibid.*; “Knoxville, Saturday, June 15,” *Knoxville Gazette*, June 15, 1793; “Major King and Daniel Carmichael’s Report to Secretary Smith, Referred to in the Foregoing Letter.,” June 12, 1793, in *ASP:IA*, 459; ; James Davis and The War Club to John McKee, January 10, 1794, Folder 5, John McKee Papers, Manuscript Division, Library of Congress.

<sup>47</sup> “General Robertson’s Order to Major Ore,” September 6, 1794, in *ASP:IA*, 530; James Robertson to William Blount, October 1, 1794, in “The Correspondence of Gen. James Robertson” (October 1, 1898), 360-62; James Robertson to William Blount, October 8, 1794, in *TP: Vol. IV*, 358-59.



of the victims were women and children”; an eyewitness reported that the first person killed in the attack was a Cherokee woman.<sup>48</sup>

Beard’s and Ore’s indiscriminate attacks convulsed the Southwest Territory. “[I]n no period of my life have I seen the public mind more agitated,” one observer reported after Beard’s attack. There was a sharp divide between disapproval and support. Those most outraged were, of course, the Cherokees themselves, whose letters to federal officials in the attacks’ aftermath conveyed only a hint of their deep grief and despair. “I am still among my people, living in gores of blood,” the Cherokee leader Doublehead wrote after Beard’s attack. But, in Philadelphia, President Washington and Henry Knox also responded to the attacks with alarm. Washington expressed “extreme concern” at such “violent and lawless inroads.” Knox saw Beard’s attack as an assault on the most basic foundation of his vision for the federal government as arbiter between Natives and frontier settlers. “Unless such crimes shall be punished in an exemplary manner,” he told William Blount, “it will be in vain for the government to make further attempts to establish any plan or system for the administration of Indian Affairs founded on the principles of moderation and justice.” He continued: “Treaties will be at an end and violence and injustice will be the Arbiters of all future disputes between the whites and the neighbouring tribes of indians; and of consequence much innocent blood will be shed, and the frontiers depopulated.”<sup>49</sup>

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<sup>48</sup> James Robertson to William Blount, October 1, 1794, in “The Correspondence of Gen. James Robertson” (October 1, 1898), 360-62; James Ore to Governor Blount, September 24, 1794, in *Letter from the Secretary of War, Inclosing His Report on the Petition of Stephen Cantrill* (Philadelphia: Printed by Joseph Gales, 1798), 7-8; “Nickajack Expedition, Sept. 1794,” n.d., 6XX72a, Draper Manuscripts, Reel 117, Wisconsin Historical Society, Madison, Wis; Henry Knox to Governor Blount, December 29, 1794, in *Letter from the Secretary of War*, 19-23.

<sup>49</sup> A Fellow Sufferer, “For the Gazette,” *Knoxville Gazette*, June 15, 1793; Doublehead to Secretary Smith, June 15, 1793, in *ASP:IA*, 460, Secretary of War to William Blount, August 26, 1793, in *TP: Vol. IV*, 299-300.

Unsurprisingly, territorial citizens did not share Knox's views. Most strongly supported such measures, especially in the face of seeming federal passivity. Ore's expedition "is spoken of by all ranks as the most brilliant thing that has happened or could have happened for this Country," one resident reported. Already, this observer claimed, the Cherokees were pleading for peace, and attacks on the Territory had abated.<sup>50</sup>

Mediating between these conflicting views of the Cherokees and high federal officials on the one hand and territorial citizens on the other fell to territorial officials—men like William Blount, Territorial Secretary Daniel Smith, and Nashville militia commander and federal Indian agent James Robertson. Though they attempted to fulfill Knox's demands to bring the perpetrators to "immediate tryal," their efforts to enforce federal law in the Territory were fruitless. Smith, in charge of the Territory while Blount was in Philadelphia, had ordered that Beard be court-martialed for his role and prosecuted under the Treaty of Holston. But Smith discovered, "to my great pain," that "to punish Beard by law just now is out of the question." Despite explicit orders, Smith could not even prevent Beard from organizing another attack while the court martial was pending.<sup>51</sup>

In the eyes of many, the unauthorized expeditions demonstrated just how powerless territorial officers were over the people they ostensibly governed. "[F]rom the prejudice against Indians on the frontiers," Henry Knox lamented, "it is but too probable that the perpetrators of these violences will escape unpunished." The strongest critiques came from the Cherokees, who were understandably skeptical of federal promises that

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<sup>50</sup> Abishai Thomas to John Gray Blount, October 26, 1794, in *JGBP*, 2:447-48.

<sup>51</sup> Secretary of War to William Blount, August 26, 1793, in *TP: Vol. IV*, 299-30; Acting Governor Smith to Secretary of War, June 13, 1793, in *TP: Vol. IV*, 271-72; Acting Governor Smith to Secretary of War, June 22, 1793, in *TP: Vol. IV*, 276-77.

the President would secure them justice. “Why do you talk of sending to the President to ask advice?” Doublehead asked Secretary Smith. “These people did not ask any advice when they came and killed our people.” Hanging Maw mocked Secretary Smith for his impotence. “Surely you are no head-man nor warrior,” he wrote, “I think you are afraid of these bad men . . . I think they are making fun of you, and won't listen to your talks.”<sup>52</sup>

Much of the challenge facing territorial officials was that, unlike Knox or Washington, they had to confront the political unpopularity of federal policy in the Southwest Territory. “[W]hoever should attempt to preserve peace with Indians,” Blount complained, “was instantly denounced as an Indian Friend and the Cry accordingly raised against him.” Robertson, for one, received hostile anonymous letters when he attempted to bar unauthorized expeditions; one letter writer wished Robertson “gone hence and a better in your room.” Such opposition made capitulating to popular sentiment, as Robertson later seemed to do in authorizing Ore’s attack, politically advantageous. Though their political position temporarily rested solely with the federal government, these officials knew that both their current influence and their political prospects after statehood, which loomed not too far on the horizon, depended on popular support. Secretary Smith observed that, for these reasons, many territorial officers had actively supported the expeditions, and others remained silent, “countenancing disorder.” One newspaper account observed that Captain Beard himself had previously been a staunch

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<sup>52</sup> “Report of Henry Knox on the Southwest Frontiers,” December 13, 1793, in *ASP:IA*, 363; Doublehead to Smith, June 15, 1793; Hanging Maw to Secretary Smith, June 15, 1793, in *ASP:IA*, 460.

opponent of unauthorized expeditions but alleged that he had abandoned this position once he “perceive[ed] that *that* was not the [path] to popularity.”<sup>53</sup>

Governor Blount engaged in an especially complicated political calculus around the expeditions. As we have seen, though Blount’s support for invading the Creek and Cherokee Territory was unwavering, he felt obligated to follow and enforce federal law. But he sought to fulfill his duties in ways that minimized the political cost to him. He deliberately delayed his return trip from Philadelphia after Beard’s expedition and allowed Smith to flounder, which served, Blount reported, to “highten my Character.” “I left and returned . . . in good Time,” he observed. And, though Blount did not sanction either Beard’s or Ore’s expeditions, he did secretly authorize to John Sevier to carry out a more targeted expedition in his absence, but with orders to make it seem as if it happened “on the Spur of the Occasion.”<sup>54</sup>

Blount’s complicated triangulation between his official duties and his desire to maintain popularity in the Territory led some to believe that, in his heart of hearts, Blount supported the actions taken by Ore and Beard. “[T]he Governor is restricted to *defensive* measures, & therefore as *Governor* is bound to disapprove it,” one observer wrote after Ore’s expedition, “[but] as W.B. [William Blount] I dare believe that he is highly gratified.” In fact, Blount seemed genuinely and sincerely outraged when he learned of the expeditions. After receiving word of Ore’s attack, Blount dashed off a blunt and harsh secret letter to Robertson expressing “surprise and mortification” that the general

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<sup>53</sup> William Blount to Alexander Kelley and Littlepage Sims, December 1, 1795, in *TP: Vol. IV*, 408-10; Anonymous to James Robertson, July 10, 1792, in “The Correspondence of Gen. James Robertson” (January 1, 1897), 68-69; Acting Governor Smith to Secretary of War, July 19, 1793, in *TP: Vol. IV*, 280-83; P.Q., “For the Gazette,” *Knoxville Gazette*, July 13, 1793.

<sup>54</sup> William Blount to John Gray Blount, September 19, 1793, in *JGBP*, 2:314-15; William Blount to John Gray Blount, October 22, 1793, in *JGBP*, 2:323-26; William Blount to John Sevier, June 16, 1793, 4XX32, Draper Manuscripts, Reel 116, Wisconsin Historical Society, Madison, Wis.

had “countenanced” such “lawless” actions, and forced Robertson to resign his federal positions. “No good consequences can arise from such unauthorized expeditions,” Blount informed Robertson.<sup>55</sup>

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Why, given Blount’s explicit support for war, did he condemn Ore and Beard’s expeditions, both publicly and privately? The answer lay in a roiling debate over federal law and the unauthorized expeditions that sharply divided territorial citizens.

Unlike Knox or Washington, few in the Southwest Territory felt much humanitarian concern for the expeditions’ victims; particularly with respect to Nickajack, territorial citizens tended to believe that the Natives had gotten what was coming. Blount himself proclaimed that the fate of the Cherokees killed in Ore’s attack was “a score so far as it affects the hostile part that I am quite easy on.” But Blount was part of a small coterie in the Territory, many of whom were also territorial officials, who loudly and publicly denounced the unauthorized attacks even as they advocated war.<sup>56</sup>

These men’s principal objection to the attacks seemed to be that they violated the “laws of God, of nature, and of man.” Displaying an ostentatious commitment to the rule of law, these critics of the expeditions spent most of their time spinning out positivist arguments for the third category of human law. Reverence for the Constitution loomed especially large in these legal arguments. “[R]ead it by day, read it by night,” Judge Campbell charged a grand jury in the Hamilton District shortly after Ore’s expedition, “it is the supreme law of the land—it is the guardian of your liberties.” It was, Campbell

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<sup>55</sup> William Blount to James Robertson, September 9, 1794, in “The Correspondence of Gen. James Robertson” (October 1, 1898), 357; Abishai Thomas to John Gray Blount, October 26, 1794, *JGBP*, 2:447-48.

<sup>56</sup> Blount to Robertson, September 9, 1794.

reminded them, a “solemn compact” that they and their representatives had ratified, and could not be retracted individually other than by leaving the country. Invocations of the Constitution were especially pertinent in this context because, like the Washington Administration, these men regarded the Constitution as clear and unambiguous on the issue of authority over war. The Constitution “vests Congress, with a right of making peace and war,” Judge Anderson instructed a grand jury shortly after Ore’s expedition. “[W]e are bound as good citizens to act in conformity with their determination.”<sup>57</sup>

This invocation of lawful obedience fused legal and pragmatic considerations. As Blount and others understood, the Southwest Territory was precariously reliant on the federal government. The act of cession, one newspaper columnist observed, granted Congress, and Congress alone, “the right of governing this territory; also to protect. It made them the judges of when, how, and where respecting protection.” One line of argument framed this dependence in legal terms. The “grand machine, our laws,” was the only method through which society could defend itself, the pseudonymous “P.Q.” observed in the *Knoxville Gazette*, and, by violating the laws, the Territory’s citizens were throwing themselves back “into a state of nature,” in which they forfeited any claim to governmental protection. “The man who attempts to trample on your laws, is as great an enemy to you as Indians,” P.Q. warned, “because he is endeavouring to deprive you of the means of defence,” P.Q. urged territorial citizens to pursue “redress” through “constitutional channels” instead.

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<sup>57</sup> “To the Honorable Judge of the Territory of the United States of America South of the River Ohio,” *Knoxville Gazette*, November 1, 1794; “A Charge Delivered by Judge Anderson,” *Knoxville Gazette*, November 1, 1794; A Fellow Sufferer, June 15, 1793.

But there was also a practical edge to this argument, an issue of political strategy. Blount and others knew well how Knox and other high-level federal officials viewed the citizens of the Southwest Territory. When Blount had sought to persuade Washington and others on the necessity of a campaign into Indian country, he had discovered how “Beard and others foolish uninformed people have done the cause of the suffering frontier people so much injury in the Eyes of the people of the Atlantic States.” And when Blount expressed “pain” over Robertson’s orders to Ore, it was because of the repercussions to “the Reputation of the People I have the honor to be appointed to govern.” Picking up this strain, several newspaper writers argued that, had the people of the Southwest Territory been more obedient, they would have already obtained congressional support. Judge Anderson informed jurors that lawful conduct would secure the “affection of the general government, and induce them to extend . . . her kind protection.”<sup>58</sup>

Implicit in this argument was an acceptance of the legal categories urged by Knox and others. At root there was a fused issue of both the laws of war and constitutional law: when was the United States at war? Whether from principle or pragmatism, Southwest Territory’s officials adopted the view urged on them by Washington’s cabinet: the United States could not be at war with the Indians until Congress decided that it was.

Natives had a very different understanding of war and peace. For many Natives—particularly those outside the class of Native leaders—the conduct of the

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<sup>58</sup> William Blount to Judge Campbell, Judge McNairy, and Judge Anderson, August 28, 1793, in *TP: Vol. IV*, 301-03; “A Fellow Sufferer,” *Knoxville Gazette*, June 15, 1793; P.Q., *Knoxville Gazette*, July 13, 1793; Blount to Robertson, September 9, 1794; “A Charge Delivered by Judge Anderson,” *Knoxville Gazette*, November 1, 1794.

United States in failing to respond to their attacks was baffling, since it diverged with the legal frame they expected to govern frontier violence. In one story that reached Blount from the Cherokee territory, eight young Creeks had stopped at the house of federal Indian interpreter James Carey, where they “boasted” that “the Creeks did all they could to provoke the United States to war with them.” A lengthy catalog of their alleged deeds followed: “they killed and scalped men, women, and children; that they took them prisoners, and made them slaves like negroes; that they debauched their women, they took their property. But even though “they had done it for many years, yet they could not make them mad.” The Creeks’ swaggering braggadocio finished with a particularly pointed jibe: “Shall we take some man and *bouger* him, and send him back to tell his people, and try if that will not rouse them to war?”<sup>59</sup>

This highly gendered and likely embellished insult—Native instances of rape on the early American frontier were very rare—fit within long-standing Native patterns. Young Native men in particular were part of a boastful, masculine military culture accustomed to “lying and exaggeration” about war exploits. Attacks denigrating the manhood of enemies were particularly common: one visitor to Creek country observed that those lacking prowess in war were “stiled old women, which is the greatest term of reproach that can be used to them.” The Cherokees reportedly employed similarly insulting metaphorical language to convey their disdain for how readily the United States permitted them to kill its citizens. “[T]he Cherokees had eat a great quantity of the white's flesh which they were very fond of at first, but they had had so much of it, had got

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<sup>59</sup> “Minutes of Information given Governor Blount by James Carey, One of the Interpreter of the United States, in the Nation,” November 3, 1792, in *ASP:IA*, 327-29.



tired and thought it too salt.” James Robertson, who relayed this tale, added, perhaps unnecessarily: “this they spoke in way of derision.”<sup>60</sup>

Statements like those of the Cherokees and Creeks demonstrate how much the restraint of the United States surprised and upended Native expectations, and subjected the nation to mockery. Anglo-American failure to act equally befuddled the Chickasaw leader Piamingo, a staunch ally who had close ties with Blount and James Robertson. Piamingo—who was hardly disinterested, given his own desire to negate Creek and Cherokee power in the region—thought himself as a Cassandra whose warnings the United States had mysteriously disregarded. “[B]ecause you never went against them,” Piamingo wrote in early 1793, “the Creeks Boast that your people are not men.” A couple months later, he wrote again, expressing his mystification at the continued non-action of the U.S. “Did I not tell you how the Creeks and Cherokees would behave when they treated?” Piamingo wrote to James Robertson. “I said they would pay no regard to what they did; so you found it.” Yet, inexplicably, the federal government seemed to continue to negotiate: “I hardly know what you mean by treating with tribes that are always at war with you, and will be, until you whip them.” As a result, the Natives now held the United States in contempt. “If you knew how lightly and despisingly they speak of you and your friends, you could not bear it as you do[.] If we did not know you to be warriors, we should not know what to think of you.”<sup>61</sup>

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<sup>60</sup> Swan, “Report from Caleb Swan to Henry Knox,” May 2, 1791; “Extract of a Letter from General James Robertson, of Mero District, to General Smith, Dated Nashville,” July 20, 1793, in *ASP:IA*, 465. On perceived rarity of Native rapes on the frontier, see Joyce E Chaplin, *Subject Matter: Technology, the Body, and Science on the Anglo-American Frontier, 1500-1676* (Cambridge, Mass: Harvard University Press, 2001), 262; Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006), 221-30. One exception is the somewhat ambiguous rape accusation against a Creek presented in Ford, *Settler Sovereignty*, 108-16.

<sup>61</sup> Piamingo to General Robertson, June 17, 1793, in *ASP:IA*, 466; Piamingo to Agent, April 29, 1793, 5XX27, Draper Manuscripts, Reel 117, Wisconsin Historical Society, Madison, Wis.

Both the Native enemies and allies of the United States looked to find some explanation for the nation's unaccountable behavior. Unfortunately for the United States, one credible answer came the country's imperial rivals, Britain and Spain. In particular, the Cherokees, Creeks, and Chickasaws maintained strong diplomatic and commercial ties to Spanish Louisiana, frequently traveling to New Orleans and Pensacola to meet with Spanish representatives. The Cherokees reported that the Spanish, happy to undermine the influence of the United States, informed them "that United States had not money to carry on a war, and that we not fear to them injuries." In the eyes of the Cherokees, the fact that "the United States so patiently and tamely bore the injuries they [the Indians] had done them, without retaliation" served to "convince[] us of the truth of what the Spaniards have told us." Federal Indian interpreter James Carey, a man with close ties to the Cherokees, told William Blount had "often" heard them discuss the reasons for the passivity of the United States. "[T]hey suppose that the United States must be so situated with foreign Powers, that they dare not enter into a war with them, or they certainly would not be offering and begging peace, in return for murders, bloodshed, and robbery, daily committed on their citizens."<sup>62</sup>

The Spanish were not the only source for Native intelligence about the United States; they also turned to the U.S. citizens they found in Indian country, who offered a version of the Washington Administration's constitutional argument that only Congress could authorize a war. But, just as the intelligence that reached Blount was rarely an accurate account of the intricate politics of Indian country, the translation of federal

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<sup>62</sup> "Information by James Carey, One of the Interpreters of the United States in the Cherokee Nation, to Governor Blount,," March 20, 1793, in *ASP:LA*, 437.

constitutional law that reached the Creeks and Cherokees was very different from how Knox or Washington would have explained it. In particular, the information arrived via what Knox and Washington would have considered among the least reliable sources: an Indian trader from Charleston named Mr. Grunter. As John McKee recounted the tale to William Blount, Grunter “with apparent exultation informed the people present that the Indians were safe; that no State could declare war against the Indians; that, let them do what they would, your Excellency could not do them any injury in return; that the people of the territory were very anxious to have a war, and that they were the cause of the past disturbances.” Other traders were evidently bearing more extreme versions of the same account to the Creeks: a Mr. Hull had informed “the Indians [that] the Congress have thrown away the people of Cumberland, 'tis w[e]ll, to kill, plunder, and commit devastations there, for Congress will not be angry at them for it.”<sup>63</sup>

Both the Creeks and Cherokees found these suggestions persuasive enough to bring them up with federal representatives. In 1793, the Creeks asked to know “as quick as possible” whether “Governor Blount, and these Cumberland people . . . are under the Government of General Washington.” The following year, the Cherokee Hanging Maw observed to William Blount that “[f]or many years” the Creeks “had been Killing the People of this Country.” Maw enquired, “is it that this Country is not under the Protection of the U.S., or is it that the President is uninformed of the many murders & Thefts committed by the Creeks?” These suggestions horrified federal officials: Indian agent John McKee thought that the traders’ statements would “tend to impress on the

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<sup>63</sup> “Mr. McKee’s Report to Governor Blount,” March 28, 1793, in *ASP:IA*, 444-46; “The Information of Samuel Fulton, Native of Fayetteville, North Carolina.,” June 21, 1793, in *ASP:IA*, 463.

minds of the Indians a belief, (which I was of opinion they already began to conceive) that the only business of Congress was to bind the hands of her citizens, whilst the Indians butchered them.” And so those officials sought to emphasize to the Natives that, not only were the Cumberland residents “citizens of the United States,” but that the federal government was also highly solicitous of their welfare. The Cumberland people were “as much under the care of the President as the people of Philadelphia are, and he is equally desirous that your people should treat them well,” Blount told the Cherokee Bloody Fellow; the Governor told Hanging Maw that the United States had been given “full information of their [the Cumberland residents’] many sufferings.”<sup>64</sup>

From the perspective of the Cherokees or Creeks, who had watched Anglo-American polities constantly break apart or recombine in the previous decade, the idea that Cumberland was not part of the United States was hardly absurd. Arguably, it made a good deal of sense. It helped explain why the United States seemed so indifferent to the fate of its own citizens, when, as Piamingo explained, even the less powerful Chickasaws “could not bear to throw away, and let the blood of one man pass without retaliation.” But it also made understandable why the territorial citizens seemed to enjoy such freedom to violate what federal representatives had constantly held out as the binding laws of the United States. Natives, of course, could have readily understood the true reason—the complicated politics and imperfect authority that existed in a partly centralized polity—but federal officials admitted this reality only among themselves. On

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<sup>64</sup> “Talk from the Heads of the Upper and Lower Creeks, by Order of the Mad Dog . . . to Be Forwarded to His Excellency General Washington,” July 21, 1793, *ASP:IA*, 408; “Conference at Tellico Blockhouse,” December 28, 1794; “Mr. McKee’s Report to Governor Blount,” March 28, 1793.

the treaty ground and in their talks, they stuck to the unconvincing platitudes of federal control.<sup>65</sup>

These platitudes did not fool territorial citizens any more than they persuaded Natives. Those in the Southwest Territory knew very well how Natives were talking about them: the *Gazette* printed both Piamingo's judgments about the baffling tendency of the federal government to embrace its enemies as well as the reports that the Indian traders had proclaimed Cumberland outside federal protection, a move the newspaper interpreted as a cynical ploy to get cheap stolen horses. They also insisted they understood Natives far better than the distant politicians in Philadelphia, quoting with approval Breckenridge's gendered statement: "I consider men who are unacquainted with the savages like young women who have read romances, and have as improper an idea of the Indian character in the one case, as the female mind has of real life in the other." The point was that those who lived in the territories, unlike the distant politicians, understood the practices and expectations of the Natives. They knew the legal norms governing violence on the borderlands, and believed that passivity would produce neither respect nor peace.<sup>66</sup>

The challenge was to translate this argument, couched in the customary law of the borderlands, into a more legible legal form that would rebut the assertions of Knox, Blount, and others and legitimate their right to make expeditions against the Cherokees and Creeks. To do so, they sought to insert their legal practices into formal law, pressing

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<sup>65</sup> Piamingo to General Robertson, June 17, 1793.

<sup>66</sup> "Anecdote," *Knoxville Gazette*, June 19, 1794; "Knoxville, Saturday, June 15," *Knoxville Gazette*, June 15, 1793; "Knoxville, June 2," *Knoxville Gazette*, June 2, 1792. On the association between gender and novel reading in the early republic, see Cathy N. Davidson, *Revolution and the Word: The Rise of the Novel in America* (Oxford: Oxford University Press, 2004).

particularly hard on the rigid dichotomy between war and peace that the Washington Administration insisted on. This question was not decided in Philadelphia, they argued, but dictated by the reality in the Southwest Territory. The Territory's inhabitants were "in an actual state of war, and daily feel the effects, whatever may be said of peace elsewhere."<sup>67</sup>

At the heart of this argument was an insistence that Native actions spoke more loudly than any set of magic words, especially given the difficulty of determining who represented and spoke for the Indian nations. One way to establish Native hostility was to adduce proof that the Natives had been involved in attacks against whites, which leaders of expeditions into Indian country took great pains to do. James Ore, for instance, claimed to have discovered fresh scalps of Nashville inhabitants hanging from Cherokee doorposts in Nickajack, as well as horses stolen from territorial citizens. Another way was to cite evidence that the Native attacks were more than the actions of a few isolated "banditti." Here, the expeditions' defenders pointed to attacks by large and well-organized Cherokee and Creek armies, led by "the most distinguished of their warriors." These "act[s]," they insisted, could be viewed "in no other light than as positive a declaration of war as ever was or can be denounced by one nation against another."<sup>68</sup>

Once it was clear that the "actual, repeated, and continued hostilities" by the Cherokees and Creeks constituted a state of war, important legal consequences followed. Here, the authors looked particularly to the "law of nature and nations," which governed warfare among nations. For one, the United States would no longer be obligated by its

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<sup>67</sup> James Robertson to William Blount, March 12, 1793, in *ASP:IA*, 441-42.

<sup>68</sup> James Ore to Governor Blount, September 24, 1794, in *Letter from the Secretary of War*, 7-8; Smith to Pickering, October 1, 1795.

treaties with Creeks and Cherokees, under the well-established principle of international law, oft-cited in the Southwest Territory, that war dissolves all treaties. For another, it would no longer be necessary to distinguish among friendly and hostile factions of different tribes; the “whole nation,” Andrew Jackson wrote, could be “Scourged” for their attacks against the whites. And, perhaps most importantly, it would legitimate attacks carried out by the territorial militia. “The law of nations not only allows, but commands,” one author observed, “when we are attacked, either by a public or private enemy, to repel force by force.” James Robertson responded to William Blount’s pointed rebuff of his authorization of Ore’s expedition by insisting on its lawfulness. “[T]o be a good citizen, obedient to the Law is my greatest pride,” Robertson argued, but he could not have imagined that pursuing the Cherokees who had attacked the people of Nashville would be regarded as an “offensive measure unauthorized by the usage of Nations in such cases.”<sup>69</sup>

The existence of a state of war also had important consequences under statutory and constitutional law that undermined the suggestion that Congress alone held the power to determine on war. In making this claim, the expeditions’ legal defenders were promiscuous in the sources of law they relied on: in arguing that the Territory’s citizens had the right to “seek satisfaction” against Natives, one author, “A Fellow Citizen,” freely cited the right to assembly, the right to bear arms to defend the state, Blackstone’s discussion of the right of personal security, and the preamble of the Constitution. But

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<sup>69</sup> “Mr. Roulstone,” *Knoxville Gazette*, August 13, 1793; Andrew Jackson to John McKee, May 16, 1794, in *PAJ*, 1:48-49; James Robertson to William Blount, October 8, 1794, in *TP: Vol. IV*, 358-59. On discussion of the law of nations principle that war dissolves all treaties, see “Governor Blount’s Letter of Instructions of the 7th of October to David Campbell, Charles McClung, and John McKee, Commissioners, &c.,” October 7, 1792, in *ASP:IA*, 332. James Madison stated on this question on the floor of Congress that “by the laws, and universal sense of nations, when hostilities are once commenced between two different States, existing treaties are at an end.” 4 *Annals of Cong.* 696-97 (1794).

taken together, these authors constructed a pointed argument that flowed from the legal existence of a war. At the base was a right to self-defense, which the expeditions' defenders emphasized as "the first principle in natural or social law," the primary object of constituting government, and the "inherent right" of all peoples. "We . . . are afraid of war in all shape," the territorial legislature wrote Congress, "except that which the first law of nature, self-preservation, may enforce upon us, unauthorized by your declaration." But the argument from self-defense was not grounded solely in natural law. It translated into statutory terms in Congress's acceptance of North Carolina's cession of the Southwest Territory, which had explicitly promised to provide an adequate defense. "Have we experienced a fulfilment of that promise?" one writer asked rhetorically. The right of self-defense against a state of war also had constitutional implications. Proponents of expeditions closely examined Article I, Section 10 of the Constitution, which, as described by William Cocke, "expressly declares, that no state shall engage in war, unless actually invaded, or in such imminent danger as not to admit of delay." Unsurprisingly, those who argued for attack seized on this provision's qualifying language. Cocke interpreted this language to mean, "[W]hen an enemy invades any particular state, such state may engage in war, and Congress is bound to support her."<sup>70</sup>

The arguments advanced by Cocke and other defenders of the expeditions would probably not have swayed Knox or Washington, had they deigned to read them. Rather than abolishing the customary law that governed borderland violence, as Knox and others sought, these men used the diverse intellectual tools of early American law to recraft in a

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<sup>70</sup> A Fellow Citizen, "For the Knoxville Gazette," *Knoxville Gazette*, April 6, 1793; "To the Congress of the United States in Session at Philadelphia," *Knoxville Gazette*, March 27, 1794; "Mr. Roulstone," *Knoxville Gazette*, August 13, 1793; William Cocke, "For the Gazette," *Knoxville Gazette*, December 29, 1792.



compelling frame the legal principles seemingly acknowledged by both Natives and non-Natives. But in the process, the proponents of the campaigns into Indian country did not present their arguments as a claim for the primacy of local and customary law against federal supremacy. Rather, they did battle largely on the terrain defined by their opponents, fixating by way of critique on what seemed to them an unrealistic and unjustifiable formalism. In the process, they claimed to reverence and honor the Constitution just as much as Judge Campbell and Blount did.

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As territorial citizens well knew, the same issues that convulsed them were also the subject of “long and warm” debates in Congress, transcripts of which were reprinted in full in the *Knoxville Gazette*. There were two interrelated legislative proposals. The first would authorize the President to call up ten thousand militia for “offensive operations.” But when the Senate proposed substituting regular soldiers for the militia, fierce disagreements arose when the bill returned to the House. With ongoing heavy financial burdens and seeming injustice of the Northwest Indian War in mind, representatives from the east, particularly New England, were skeptical of the entire enterprise. “We have one Indian war already, which is enough at a time,” Fisher Ames of Massachusetts stated. Ames was similarly dubious about employing the “exasperated militia,” which, he asserted, would seize and shoot “the first man, with a red skin, whom

they met.” Only then would they discover “that you have been shooting an Indian of the wrong nation, while in the mean time, this whole nation rise and attacks you.”<sup>71</sup>

Joseph McDowell of North Carolina, by contrast, insisted that the “militia of the frontiers” consisted “the only proper forces to oppose the Indians with success.” Unlike the regulars, the militia “knew the country,” but more importantly, their “habits of life made them perfectly acquainted with the character of the enemy.” The most extreme comments came from Representative Carnes of Georgia, who veered off into a screed against the Administration’s Indian policy more generally. He alleged that there were “improper leanings in favor of the Indians” among the federal officials that made his “heart boil,” and asserted that he would “not give the life of one white man for those of fifty Indians.” As for protection, he threatened Congress that if they did not authorize a campaign, “the Georgians would take measures for themselves.” In the end, voting largely along these regional lines, the House rejected the Senate’s amendment, and the measure died. The *Knoxville Gazette* lamented that both houses wished to protect the Territory but “did not agree in the mode of doing it.”<sup>72</sup>

The other provision—long sought by Henry Knox, and specifically urged on Congress by President Washington—would make U.S. citizens found in arms within Indian country liable to court martial. Complaining that this “subject[ed] people to martial law,” the House of Representatives modified the bill to permit the military to arrest the offenders and bring them to trial pursuant to the Trade and Intercourse Act.

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<sup>71</sup> 4 Annals of Cong. 123-26, 774-79 (1794). A draft of the bill appears in “An Act For the More Effectual Protection of the SouthWestern Settlers” June 4, 1794, Reel 2: Territory Southwest of the Ohio River, Senate Territorial Papers (microfilm), M200, U.S. National Archives.

<sup>72</sup> “Congress of the United States, House of Representatives, Friday, June 6,” *Knoxville Gazette*, September 6, 1794; 4 Annals of Cong. 123-26, 774-79 (1794); “From a Philadelphia Paper,” *Knoxville Gazette*, May 8, 1794; “Knoxville, Monday, August 25,” *Knoxville Gazette*, August 25, 1794.

But the strongest disagreements focused on a proposed amendment that would exempt from these strictures citizens “in pursuit of Indians that had committed actual hostilities on the frontier.”<sup>73</sup>

This proposal, too, split Congress along the same regional lines as before. The New England representatives argued that the proposed change would blur the sharp line between sanctioned and unsanctioned violence urged by Knox. The amendment would “destroy” the statute’s purpose, which was to achieve “one of the great objects of frontier policy”—namely, to “restrain the right of private war, by placing the power of vengeance out of the reach of individuals, and in the hands of Government.” The amendment “actually arms all the passions of revenge with the rights of law”; it made the victim of an Indian attack “both judge and executioner in his own case”; it “legalize[d] all those acts of violence and revenge, that, for a century past, have deluged the frontier with blood.” The amendment, in short, was the exception that would swallow the rule. “It went to invert all the laws that had been made for the protection of the Indians,” James Hillhouse of Connecticut insisted. “[I]nstead of being a bill to protect them from the whites, the resolutions would produce a bill to protect the whites from them.”<sup>74</sup>

Representatives from the South and West, including James White, the Southwest Territory’s recently seated non-voting representative, reiterated the arguments advanced by the expeditions’ territorial defenders when they insisted that this approach was bad law and bad policy. The amendment’s backers insisted that “a settler was, by the law of nations, authorized to pursue the [Indians] across the line and to retaliate.” Restraining

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<sup>73</sup> George Washington to the United States Senate and House of Representatives, January 30, 1794, in *PGW:PS*, 15:157-58; 4 Annals of Cong. 1253-70 (1795).

<sup>74</sup> 4 Annals of Cong. 1253-70 (1795).

this right of retaliation, they insisted, would merely encourage “the savages to come over the line and murder with impunity.” But mostly, these representatives offered emotive appeals and outrage over what they interpreted as affronts to their constituents. If the law passed unamended, they threatened, “houses will soon be smoking and blood running.” Thomas Blount from North Carolina, brother of William, complained that instead of Congress protecting territorial citizens, “their characters are abused on this floor.” The most pointed attacks came from White, who proclaimed himself “much affected” and used his remarks to lash out against the congressmen who he believed had impugned the “frontier people.” Unsurprisingly, the *Knoxville Gazette* sided with White. In its only editorial comment on the debates, it observed that the arguments of the New Englanders “let the cat out of the bag” by confirming settlers’ suspicions that “many members of Congress prefer the protection of the savages to that of their suffering frontier fellow citizens.”<sup>75</sup>

This hard-fought debate was close; the committee of the whole initially endorsed the amendment, only for it to be rejected by the House. In the end, rather than create a separate bill governing the unauthorized expeditions, Congress simply amended the next version of the Trade and Intercourse Act to include a provision that granted the army the power to arrest offenders within Indian country. But there do not seem to have been any prosecutions under the Act’s new provisions, either.

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One congressman who stood largely aside from the debate was James Madison, who seemed to regard the entire matter as an exercise in futility. “[N]o law of any kind,”

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<sup>75</sup> *Ibid*; “Congress of the United States, House of Representatives, Wednesday, February 25,” *Knoxville Gazette*, April 10, 1795.

he remarked, “would be able to hinder people from crossing the line.” The frustrated Knox likely sympathized with this perspective, having seen his efforts to punish violators of the peace repeatedly come to naught. He, like Madison, had come to see local prejudices as too stubborn to be overcome by federal law.

But this narrative of legal impotence only captured part of the story. Equally problematic was the insistence by high federal officials that Congress alone had the authority to divide peace from war. This constraining legal straightjacket failed to fit the territories, where both Natives and non-Natives regarded war not as a clearly delineated status between nations but as part of a spectrum of violence between cultures. From the perspective of territorial citizens, the results were arbitrary: Congress seemingly acknowledged raids and counterraids as “war” in the Northwest Territory while refusing to do so in the Southwest. Moreover, as the residents of the Southwest Territory insisted, once their understanding of war was acknowledged, constitutional and statutory as well as natural law required the federal government’s intervention and support. For the people who crossed the line in defiance of government’s commands, federal law authorized, rather than hindered, their actions.

Congress, it turned out, was also slow. By the time it finally half-addressed the issue in 1795, the immediate crisis had passed. In October 1795, William Blount was writing that the Creeks and Cherokees had demonstrated “pacific conduct” for nearly six months. “Peace with the Indians exists now not only in name, or upon paper in form of treaty, but in fact,” Blount exulted, observing that this was the first cessation in hostilities in eighteen years. This sudden reversal had several causes: the defeat of the Ohio

nations, which demoralized the southeastern tribes; the Jay and Pinckney Treaties with Britain and Spain, which mitigated some of the intense factionalism produced by European influences; the shifts within Native nations toward a more centralized form of governance. But it also owed something to a change in federal policy, a move away from law toward finance.

## Chapter 6: The Expenses of Sovereignty

As part of his reports to George Washington on Indian affairs and the western territories, Henry Knox spent considerable attention on finance—a frequent topic for him, since, under the Articles of Confederation, he had long had to operate the War Department on a pittance. Knox particularly bemoaned that many of the troubles that confronted the United States in both Indian affairs and the territories seemed to stem from an unwillingness to spend money. “The United States having come into the possession of sovereignty, and an extensive territory,” he wrote, “[it] must unavoidably be subject to the expenses of such a condition.”<sup>1</sup>

As recent scholarship has demonstrated, the new federal government came into existence fixated on its finances. The Constitution and the new financial system granted the federal government financial resources that far exceeded what the states could muster. Over the following decade, as Knox had foreseen, a great deal of federal money flowed westward into the territories, as the “expenses” of sovereignty that Knox anticipated mounted. Yet national finance, long seen as the paradigmatic example of state capacity, played a paradoxical role in the territories. Rather than an unqualified source of strength, the national treasury served federal officials as a crutch to create policy when, as we have seen, law and authority proved inadequate. Often, federal officials barely seemed able to control or resist the claims made on federal funds.<sup>2</sup>

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<sup>1</sup> “Report from H. Knox, Secretary of War, to the President of the United States, Relative to the Northwestern Indians,” June 15, 1789, *ASP:IA*, 12-14.

<sup>2</sup> Much of the resurgence of focus on federal finance stems from the work of Max Edling, who has argued that the United States constituted a “fiscal-military state” along the lines of eighteenth-century European states. See Max M. Edling, *A Hercules in the Cradle: War, Money, and the American State, 1783-1867* (Chicago: University of Chicago Press, 2014); Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford; New York: Oxford University Press, 2003); Max M. Edling, “‘So Immense a Power in the Affairs of War’: Alexander Hamilton and the Restoration of

One role for money was to patch over federal failures. Unable to restrain or punish either Natives or Anglo-American settlers for crimes, the national government sought to forestall violence by compensating both groups for the harms the other had committed. The effect was that the federal government became financially responsible for the actions of people it could not control and, in the case of Natives, who were ostensibly not part of the American polity at all.

Federal officials also used federal funds to try shore up the tenuous and flexible loyalties of borderland inhabitants, both Native and non-Native. Throughout the 1790s, the federal government engaged in an extensive, and expensive, program to supply Native nations with so-called “Indian presents.” Intended to placate Native demands, not purchase Native lands, these gifts were justified through rhetorical invocations of Natives’ (often real) poverty. But in their more candid moments, federal officials acknowledged that they were trying to buy Native allegiance, in competition with British and French patrons. In this sense, the presents reflected federal limitations in the face of Native power.

Federal officials proved even more constrained in the face of constant demands by territorial citizens for “protection.” Federal money poured into the territories for defense. Some this came through spending on the army, but much of it involved paying territorial citizens directly for their service in the militia. In the process, federal money underwrote the territories’ economic development and enriched (some of) the inhabitants. Though territorial citizens, like Natives, often regarded this largesse as nothing more than

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Public Credit,” *The William and Mary Quarterly* 64, no. 2 (2007): 287–326. This chapter emphasizes Edling’s linkage between federal finance and the military, though it also emphasizes how expensive diplomacy and efforts to *avoid* conflict often were.



their due, federal officials, and some citizens themselves, understood this money as an effort to secure the questionable allegiances of ostensible U.S. citizens.

These expenditures reflected a national state that fit poorly into present-day scholarly dichotomies between “weak” and “strong.” On the one hand, there were only a handful of federal officials in the territories, and they rarely wrote or spoke as if they acted from positions of authority. On the contrary, tasked with governing vast spaces, these officials felt battered by a constant stream of events over which they had little control, confronted by Native and local leaders who seemed to have much more ability to dictate events. Federal officials could not even always control how federal funds were spent: over officials’ vociferous objections, the national treasury paid the perpetrators of violence that federal law deemed illegal and unwarranted. But on the other hand, national finance did a remarkable job of extending the influence and reach of this seemingly ineffectual government. The federal government in the territories was ubiquitous, not out of sight. In the form of medals and blankets, federal authority insinuated itself into Cherokee councils, even without the presence of a single federal officer. Muster rolls and payment vouchers—other forms of federal finance—implicated the lives of nearly all male territorial citizens. The prospect of federal payment caused Natives and non-Natives alike to take their complaints to territorial officials, and even to Philadelphia, for redress. In short, federal finance allowed a handful of constrained officials to orient the territories around federal policy.

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As recounted in the previous chapters, the failure of federal law left Natives and white settlers free to continue long-standing practices of retaliating against each other. Treaty law even seemed condone such actions by barring retaliation until “satisfaction shall have been demanded of the party of which the aggressor is,” as stipulated in the Treaty of Holston. Though these provisions were intended to forestall retaliation, the federal failure to fulfill the promises it made gave Native acts of revenge legal sanction.<sup>3</sup>

In an effort to forestall such violence, federal officials quickly hit on an ersatz substitute for justice through the criminal law: compensation. Unable to punish its own citizens for the crimes they committed against Natives, the federal government began to repay Native victims for both lives and property lost. As historians have traced, such payments corresponded with Natives’ own customary legal practice of “covering the grave”—that is, rectifying wrongs, including murder, through payment. “It has been understood, that, among the Indian nations, when one Indian kills another, the offence is not considered so much a public as a private evil, for which the family of the deceased is bound to obtain satisfaction . . . sometimes by blood, and at others, by pecuniary considerations.” Henry Knox wrote to the Creek leader Alexander McGillivray. Knox proposed, “[i]f this idea is just,” that McGillivray compensate the family of a Creek Indian murdered by whites, “to prevent the personal and national evils arising from indiscriminate retaliation.” Knox would make “immediate” repayment to McGillivray from the national treasury.<sup>4</sup>

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<sup>3</sup> Treaty of Holston, U.S.-Cherokees, July 2, 1791, 7 Stat. 39. Identical language appeared in the Treaty of New York, U.S.-Creeks, Aug. 7, 1790, 7 Stat. 35.

<sup>4</sup> Secretary of War to Alexander McGillivray, July 13, 1791, *ASP:IA*, 1:127-28. On federal practice of “covering the grave,” see Alan Taylor, *The Divided Ground: Indians, Settlers and the Northern Borderland of the American Revolution* (New York: Alfred A. Knopf, 2006), 28-30, 239-44; on practices of compensation in Native law, see Katherine A. Hermes, “The Law of Native Americans, to

For all that these payments corresponded with Native expectations, though, they rarely arose directly from Native demands. Rather, as in the case of Knox, they began with federal officials grasping for any available tool to assuage Native grievances. Most often, given the failure of the courts, the readiest method available was money, over which federal officials had much more discretion. Federal officials began to respond to every crime by doling out goods. In early 1791, for instance, unknown whites killed a number of Senecas and plundered their goods on the border between the Northwest Territory and Pennsylvania. Since “legal process will be both slow and uncertain,” Knox instructed St. Clair that the governor should write to the friends and relatives of the deceased to demonstrate the federal government’s “abhorrence” of the act: “you will convince them of your sincerity by making liberal compensation to the relations for the loss of property.” Knox later asked St. Clair to compile lists of stolen goods, to ensure “complete indemnification for every article lost.” A similar process unfolded near Knoxville in 1793, when unknown whites fired on a Cherokee and two Chickasaws, including a Chickasaw named John Morris, who later died from his wounds. Blount published a reward for the recovery of the murderers, but the men he suspected of the crime, he learned, all had alibis. In the interim, Blount arranged for Morris to be buried with full military honors “at the usual burial-ground of the white people,” and marched alongside the Chickasaw’s brother in the funeral cortege. After the funeral, Blount gave goods to Morris’s Chickasaw family, as well as to the Cherokees and Morris’s

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1815,” in Chris Tomlins et al., *The Cambridge History of Law in America* (Cambridge, UK: Cambridge University Press, 2008), 1:32; John Phillip Reid, *A Law of Blood; the Primitive Law of the Cherokee Nation* (New York: New York University Press, 1970), 93–112.

grandfather, who was white. “I considered it political nay essential that pretty liberal presents should be given,” Blount reported, “the more effectually to bury their sorrows.”<sup>5</sup>

Federal officials did not believe that compensation bought a permanent peace: Blount himself acknowledged that the relatives of the victims “are not to be permanently satisfied by Presents,” and would likely retaliate eventually. They recognized that these payments did not fully represent the justice they had promised. But as long as “justice” proved elusive, compensation would have to do. When a number of American settlers murdered a group of peaceful Cherokees, Henry Knox wrote to the Cherokee leader Hanging Maw and assured him that the President, “deeply afflicted,” would ensure that the Natives received the “same humanity and justice as his white children.” But, Henry Knox continued, “sometimes, the bad escape unpunished.” In that instance, Henry Knox enquired, “if the laws should not condemn the murderers of your friends, is there no other mode by which you could be satisfied?” He directed the Cherokees to William Blount, whom he had already directed to provide goods to “pacify the relations of the murdered Indians and thereby prevent future hostilities.”<sup>6</sup>

As a way of papering over law’s failure, compensation was not limited to murders, nor to payments to Natives. Rather, federal officials came to rely on payments whenever authority and coercion were inadequate to preempt the long-standing practices

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<sup>5</sup> Secretary of War to Arthur St. Clair, March 28, 1791, in *ASP:IA*, 1:174; Secretary of War to Arthur St. Clair, April 19, 1791, in *ASP:IA*, 1:174-75; William Blount to Secretary of War, May 24, 1793, in *TP: Vol. IV*, 261-62; William Blount to Secretary of War, May 28, 1793, in *TP: Vol. IV*, 262-64. For a newspaper account of Morris’s funeral, see “Knoxville, Saturday, June 1,” *Knoxville Gazette*, June 1, 1793.

<sup>6</sup> William Blount and Andrew Pickens to Secretary of War, August 6, 1793, *TP: Vol. IV*, 296; “Message from the Secretary of War to the Hanging Maw, Sent by Governor Blount,” August 27, 1793, *ASP:IA*, 1:431; Secretary of War to William Blount, August 26, 1793, *TP: Vol. IV*, 299-300.

that prompted frontier violence. Nowhere was this clearer than federal efforts to stanch the endemic practice of horse theft in the territories.<sup>7</sup>

After land, horses were among the most valuable property in the borderlands. Residents of the Southwest Territory were particularly horse-mad; prominent advertisements for studs appeared regularly in the territory's only newspaper. Unlike land, horses were mobile, which made them a tempting target for thieves. Nearly every traveler in the territories recounted losing a horse at some point in the journey.<sup>8</sup>

Both Natives and non-Natives were horse thieves. The territorial citizens stole horses from each other, and many stole from Natives as well: there were frequent reports of whites sneaking into Indian camps and coming away with three or four horses. But territorial citizens fixated on Natives as horse thieves. In the Southwest Territory, the inhabitants complained, that Natives had stolen 2,000 horses in the early 1790s, valued at a total of \$100,000. Natives would then resell the stolen horses to white traders happy to look the other way. Horses stolen in the Southwest Territory soon made their way to outposts in Georgia and North and South Carolina, where, after resale, they were spirited

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<sup>7</sup> Despite its frequency in the sources, historiographic discussion of horse theft between Natives and American settlers has been sporadic. A comprehensive consideration appears in Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780-1834* (Cambridge, Mass: Harvard University Press, 1962), 203-210; other brief discussions appear in Robbie Franklyn Ethridge, *Creek Country: The Creek Indians and Their World* (Chapel Hill: University of North Carolina Press, 2003), 177-188; William Gerald McLoughlin, *Cherokee Renaissance in the New Republic* (Princeton, N.J.: Princeton University Press, 1986), 44-47.

<sup>8</sup> For examples of such advertisements—where two horses, for instance, were named after the Chickasaw chief “Piamingo,” also known as “Mountain Leader”—see *Knoxville Gazette*, April 7, 1792. For accounts of having horses stolen, see “Journal Kept by George Hunter of a Tour from Philada. to Kentucky by the Illinois Country,” July 14-October 15, 1796, American Philosophical Society, Philadelphia, Penn; “Deposition,” January 30, 1796, typescript translation from French, Doc. 340a, Lasselle Family Papers, L127, Indiana State Library, Manuscripts & Rare Books Division, Indianapolis, Ind. On the trade in illegal horses, see Benjamin Hawkins to David Henley, June 5, 1798, Benjamin Hawkins Letters, Ayer MS 368, Newberry Library, Chicago, Ill.; William Blount to Secretary of War, November 10, 1794, in *TP: Vol. IV*, 364-70; Silas Dinsmore to David Henley, July 8, 1795, Folder 3, Silas Dinsmore Papers, Ayer MS 241, Newberry Library.

to Savannah or Charleston. Horses taken in the Illinois Country usually ended up in Kentucky.<sup>9</sup>

Horse theft and cross-cultural violence were closely intertwined. Many murders, including that of the Chickasaw John Morris, began as horse thefts. Natives who plundered horses from Tennessee settlers often found themselves pursued and so “kill[ed] in their own defence.” For their part, white victims of Native horse thefts could barely refrain “from taking what they call Satisfaction that is from killing Some of the Indians.” Both Indians and whites resorted to self-help to recover their losses, which, when coupled with mutual senses of collective responsibility, prompted further violence. One incident in the Northwest Territory in 1799 was especially telling. While traveling along a road, two Wyandots encountered a party of Americans, who grabbed the horse, saddle, and bridle of one of the Natives. The Americans justified such bald-faced theft by insisting that they were only seeking compensation from the Wyandots: “the Indians had stole horses enough,” they told them, “and that they would take that one in place.” After the theft, the Wynadots soon encountered two other American travelers on horseback. The Wyandots employed the same logic of collective guilt as the Americans: they insisted on taking one of the Americans’ horses, “thinking it also proper having lost one of their horses.” When the man refused to yield the horse, a fight ensued that ended in the death of the two white travelers.<sup>10</sup>

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<sup>9</sup> Numbers derive from “To the Congress of the United States in Session at Philadelphia,” *Knoxville Gazette*, March 27, 1794. Discussions of the networks for stolen horses appear in William Blount to Secretary of War, May 5, 1792, in *TP: Vol. IV*, 148-49; William St. Clair to Arthur St. Clair, October 25, 1796, Reel 4, ASCP. As one of Sargent’s correspondents observed, “the Indians (& believe White[s] too) Steal all the horses that can be come at.” Thomas Goudy to Winthrop Sargent, April 14, 1796, Reel 4, WSP. Instances of whites stealing horses from Indians are discussed below.

<sup>10</sup> William Blount to Secretary of War, November 8, 1792, in *TP: Vol. IV*, 208-16; William Blount to Secretary of War, May 5, 1792, in *TP: Vol. IV*, 148-49; Wyandot Chiefs to Simon Kenton and William Ward, August 25, 1799, Ayer MS 1019, Newberry Library, Chicago, Ill.

As such incidents underscored, horse theft presented a major threat to whatever tenuous peace prevailed in the territories. “Horse Stealing is the grand Source of Hostility between the white and red people in this district,” William Blount opined, the cause for “almost continual” complaints to him; if unchecked, he feared, it would end in open warfare. North of the Ohio, Arthur St. Clair similarly believed that Native horse theft was a prelude to full-fledged hostilities.<sup>11</sup>

Territorial officials tried different approaches to stanch the practice. Law was one route. The 1793 version of the Trade and Intercourse Act established a complicated licensing scheme for purchasing horses from Natives. In a couple rare instances, purchasers who knowingly bought stolen horses, or who stole horses from Indians, were prosecuted. In one exceptional case, a Vincennes resident brought suit against a Pottawattamie known as “Grand Blue” for holding a black mare the white settler claimed as his own; the two men reported “amicably settled the dispute.” Federal agents would sometimes intervene to recover horses that Natives asserted were theirs, as James Robertson did in Nashville in the early 1790s, thereby incurring the wrath, and a lawsuit, from the disgruntled white owner.<sup>12</sup>

The most frequent approach, however, was to send complainants or federal representatives into Indian country equipped with letters to Native leaders. Federal treaties with Native nations required that tribes restore stolen horses upon application for

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<sup>11</sup> Blount to Secretary of War, May 5, 1792; Gov. Arthur St. Clair to John Marshall, August 5, 1800, in *SCP*, 497.

<sup>12</sup> Act of March 1, 1793, § 6, ch. 19, 1 Stat. 329, 330; Writ of Replevin in *Henry Pea v. the Grand Blue*, an Indian, August 4, 1797, Box 2, File 128, Knox County Court File, Knox County Public Library, Vincennes, Ind.; *Common Pleas Court Minutes 1796-1799 Pt. I* (Indianapolis, IN: Indiana Historical Records Survey, 1941), 186; Sam'l Moore Adm. of *John More Deceased v. James Robertson*, (Sup. Ct. of L. & Eq., Mero Dist., 1797), in Mrs. Josie Smith, ed., *Minutes of the Superior Court of the Mero District, 1788-1803; Part I, 1788-1798* (Nashville, Tenn: Tennessee Historical Records Survey, Works Progress Administration, 1938), 234-35. For instances when U.S. citizens were indicted stealing Native horses, see John Rice Jones to Winthrop Sargent, October 17, 1797, Reel 4, WSP; William St. Clair to Arthur St. Clair, October 25, 1796, Reel 4, ASCP; *Government v. James Hawthorn & James Blackbourne* (Sup. Ct., Hamilton Dist. 1795), Knox County (Tenn.) Archives, Knoxville, Tenn.

recovery. Native leaders were often cooperative, especially as they rarely profited from the stolen horses personally. One Cherokee leader even promised to appoint men to go through the nation, and “procure by force or otherwise” all stolen horses. But William Blount was skeptical that the Cherokees would be successful: “I am very sure that the[y] [the chiefs] have not power nor influence sufficient to have [the horses] restored.” In one instance, after a territorial inhabitant reported horses stolen by the Cherokees, William Blount dispatched John Chisholm into the nation to recover them. Chisholm got the horses, but they were stolen as he headed out of Cherokee territory. Applying to the chiefs again, Chisholm recovered the horses a second time, only to have them stolen yet again, for a third and final time. “[T]herefore [I] think it is scarcely worth while to make application to the Indians for the recovery of our horses,” the victim of the original theft concluded. Another problem was that horses were easily and quickly traded among Indians. One horse owner in the Northwest Territory learned where his horses had gone third-hand: a local Delaware Indian told the owner that he had learned from a Shawnee that another Shawnee had taken the horse to the little Miami. The owner diligently traveled to the Shawnee village along the river and learned that that his horse *had* been there, but it was already gone; the owner abandoned his efforts.<sup>13</sup>

To avoid such complicated trips, some owners had success in hiring other Indians to recover the horses, which became a frequent source of Indian employment. This posed its own problems, however. “I had heard the savages frequently stole horses with a view to be hired to search for them,” one traveller in the Illinois Country reported. This

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<sup>13</sup> “Journal of the Grand Cherokee National Council,” June 26, 1792, *ASP:IA*, 1:271-74; William Blount to Secretary of War, May 28, 1793, *TP: Vol. IV*, 262-64; William Dever to John Sevier, December 20, 1796, Box 2, Folder 1, John Sevier Papers, 1796-1801, First Administration, Governor’s Papers, Tennessee State Library and Archive.



traveler had recovered his own horse after he offering a local Delaware a two-dollar reward.<sup>14</sup>

With both law and applications to tribes largely fruitless in recovering stolen horses, the federal government adopted a different tack: compensation. At first, this was an ad hoc solution. For those tasked with implementing federal policy, the benefits far outweighed the costs. Military commanders, threatened with the prospect of violence, informed their subordinates to have white victims “record their losses upon good testimony, and I am certain the Government will indemnify them sooner than have a drop of bloodshed.” When Chickasaws came to Indian agent James Robertson complaining that Kentuckians had stolen several horses, Governor Blount ordered Robertson to compensate the Chickasaws from the public treasury at a price of no more than fifty dollars per horse. “The dilemma at present is either for the United States to pay for these horses, or for the Indians to take pay (as they express it) by stealing as many other horses from some frontier people.” As Blount observed, “One way or the other they [the Indians] will have pay.”<sup>15</sup>

In 1796, Congress codified this approach when it renewed the Trade and Intercourse Act. Under the law, Natives who had goods stolen by whites would be compensated from the federal treasury. The law also provided that whites who had been

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<sup>14</sup> “Journal Kept by George Hunter.” Other instances of whites hiring Natives to recover lost horses can be found in Account of Lewis Chatellereault, 1797, Knox County (Ind.) Probate Records, Box 1, Knox County Public Library; John Duley v. Jonathan Purcell, November 4, 1798, Knox County (Ind.) Court File, Box 4, File 291, Knox County Public Library.

<sup>15</sup> Gen'l Wilkinson to Jonathan Cass, March 19, 1796, William Hayden English Family Papers, M98, Indiana Historical Society; William Blount to James Robertson, August 24, 1795, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 4, no. 1 (January 1, 1899), 67-68.

the victims of Indian theft would be repaid for their losses by the federal government, which would then deduct the amount from the tribe's annuity payments.<sup>16</sup>

Formally, compensation for Natives required the conviction of the U.S. citizens who had committed the crime. In practice, federal officials continued their earlier custom of paying the claims of Natives who demanded payment for stolen horses, even when they felt that those claims were dubious. William Blount strongly suspected that the Cherokee chief White Man-killer's horses simply wandered off during the Cherokee's 1792 visit to Knoxville, but the governor paid the Cherokee anyway. Several years later, Arthur St. Clair compensated a Delaware who demanded payment for a stolen horse, even absent any criminal proceeding; the Secretary of War subsequently endorsed this approach and promised to repay St. Clair. U.S. citizens even demanded repayment from the federal government when they helped pay for Natives to recover their horses.<sup>17</sup>

For the most part, though, compensation under the Trade and Intercourse Act went to U.S. citizens, not Indians. The number of Native claims presented to federal officers was dwarfed by the complaints of the territories' white inhabitants, who penned lengthy lists of stolen horses, expecting compensation under the statute. In 1799, inhabitants of the Northwest Territory gave Arthur St. Clair a list of horses that totaled \$1700—as much as many of the nations' yearly annuity. It is unclear how many of these claims ever received payment, especially in the 1790s. St. Clair and others forwarded

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<sup>16</sup>; Act of May 19, 1796, Ch. 30, 1 Stat. 469. The law limited compensation for whites to instances when the theft occurred *outside* Indian country, since U.S. citizens were legally barred from entering Indian country without official authorization.

<sup>17</sup> William Blount to Bloody Fellow, September 13, 1792, in "The Correspondence of Gen. James Robertson," *The American Historical Magazine* 2, no.1 (January 1, 1897): 74-76; James McHenry to Arthur St. Clair, August 15, 1799, Folder 2, James McHenry Letters, Ayers MS 931, Newberry Library; J. Winchester to David Henley, April 21, 1800, Box 2, Stanley F. Horn Collection, Special Collections, Jean and Alexander Heard Library, Vanderbilt University. Blount did refuse compensation, however, to one of White Man Killer's companions, who had purchased his horse from the Creeks, only to have a Knoxville resident recover the horse as stolen based on the judgment of a justice of the peace. "[B]y the law of the white people," Blount stated, "he is entitled to keep her without paying anything." Blount chided the Cherokees for buying horses from the Creeks, knowing that they stole from whites. Blount to Bloody Fellow, September 13, 1792.

claims to the President; the resulting bureaucratic delays—along with the dilatory behavior of many of the claimants themselves—meant that many claims were not adjudicated until well into the nineteenth century. Sometimes the payments were in fact deducted from the tribes’ annuities, though the evidence seems to suggest that the federal government more frequently just paid the claims from the treasury. Deducting from the annuities, one federal official concluded, would be “inexpedient.”<sup>18</sup>

One reason for delays in payment was that the creation of this system of ad-hoc administrative adjudication offered little guidance on how to evaluate claims, particularly with regard to supporting evidence. The statute provided only that claimants provide the “necessary proofs,” a term that flummoxed federal officials. Winthrop Sargent regarded compensation as the only barrier that stood between territorial inhabitants and “Lex Talonis”—the law of retaliation. He accordingly made the “most liberal Construction” of the statute, offering “lavish . . . promises and assurances” of compensation. Sargent hoped that the evidence required to support the claims would not be “legal”—evidence, in other words, that would hold up in a court of law. What Sargent saw as an advantage—the looseness of proof—Arthur St. Clair saw as a liability. Given the hazy information surrounding most purported thefts, the evidence for these claims could rarely be “satisfactory, or such as would entitle the claimants recover in a Court of Justice had the thefts been committed by fellow Citizens.” But such a generous standard would only encourage the territory’s inhabitants to abuse the system. “[N]ot a horse will be either lost or stolen, by whomsoever it may be done,”

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<sup>18</sup> Winthrop Sargent to Secretary of State, May 23, 1797, in *TP, Vol. III*, 468-71. On sending depositions to the President, and the delays it occasioned, see Timothy Pickering to Winthrop Sargent, May 18, 1798, Box 3, Folder 9, William H. English Collection, Special Collection Research Center, University of Chicago Library.

St. Clair bemoaned, “but the Indians . . . will be charged with it, and some person or other will be found to swear that they believe the Indians were guilty of it, and the United States will be called upon for all of them.” St. Clair accordingly advocated abolishing the provision altogether.<sup>19</sup>

The uncertainty around this question long outlasted St. Clair and Sargent’s terms in office, as the War Department struggled to create clearer standards. But even by end of the eighteenth century, it was clear that the system would be neither wholly generous nor restrictive; it would be capricious. As St. Clair predicted, claimants—many of whom who petitioned Congress directly—sought to push the federal promise of compensation as far as possible. Many, including Daniel Smith, the Southwest Territory’s secretary, and James Ore, leader of the 1794 unauthorized expedition against Nickajack, submitted claims for harms that occurred within Indian country, which the statute did not authorize, or that predated the statute and federal treaties, sometimes tracing back to the Revolution. In some cases, Congress drew a sharp line, fearful of opening the floodgates to endless claims; yet in other instances, it granted requests that seemed to have no legal basis.<sup>20</sup>

Alongside the vigorous and largely illegal trade in horses was a parallel trade in people, particularly enslaved African-Americans. “Negroes and Horses,” Anglo-

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<sup>19</sup> Sargent to Secretary of State, May 23, 1797; Arthur St. Clair to Samuel Dexter, Sec’y of War, November 29, 1800, Box 30, Folder 3, William Hayden English Papers, Indiana Historical Society.

<sup>20</sup> For the subsequent history of claims under the Trade and Intercourse Acts, much later codified into federal law, see the exploration in Larry C. Skogen, *Indian Depredation Claims, 1796-1920* (Norman : University of Oklahoma Press, 1996.). For a sampling of some of the claims presented to Congress, including the claim of Daniel Smith, see Walter Lowrie & Walter S. Franklin eds., *American State Papers: Claims* (Washington: Gales and Seaton, 1834), 193, 222, 309, 379, 445.

Americans repeatedly complained, were the “property” that Natives constantly stole from their settlements.<sup>21</sup>

There were many African slaves in the borderlands, where they often toiled alongside enslaved Natives. In both Tennessee and Kentucky, slavery was both legal and increasingly common: by 1797, William Blount was writing from Nashville that “Negroes are the most valuable Property in this Country.” Enslaved Africans obtained under French and British rule also lived in the Illinois Country, where their legal status was nebulous because of the unclear retroactive scope of the Northwest Ordinance’s prohibition on slavery.<sup>22</sup>

Just as proximity entangled whites and Natives together, Natives and Africans also forged relationships, though the sources only hint at these links. Like Native-white ties, these connections were often violent. In Vincennes in 1794, local Delawares allegedly helped a white man abduct a slave claiming his freedom into Kentucky. In 1797, a “free Negro” was arrested in Detroit for the murder of an Indian; he broke his shackles and escaped. And in an intriguing incident northwest of Nashville in 1799, an African-American slave that James Robertson had hired from Abraham Martin to work at Robertson’s iron works refused to accompany his master to the Mississippi Territory, instead “lay[ing] out Around and About the Iron Works.” John Jones, a white man who lived in the area, later reported that a group of Cherokee hunters who had been in

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<sup>21</sup> “Conference at Tellico Blockhouse,” December 28, 1794, The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 4, no. 1 (January 1, 1899), 82-94; Governor Blount to Doublehead and other Chiefs and Warriors, November 1, 1794, in *ASP:IA*, 534.

<sup>22</sup> William Blount to John Gray Blount, November 7, 1797, in *JGBP*, 3:174-86. On slavery in the Tennessee Country, see Cynthia Cumfer, *Separate Peoples, One Land: The Minds of Cherokees, Blacks, and Whites on the Tennessee Frontier* (Chapel Hill: University of North Carolina Press, 2007), 125–53; Carroll Van West, ed., *Trial and Triumph: Essays In Tennessee’s African American History* (Knoxville: University of Tennessee Press, 2002). On African slavery in the Illinois Country, see Matthew Salafia, *Slavery’s Borderland: Freedom and Bondage Along the Ohio River* (University of Pennsylvania Press, 2013); Patrick Bottiger, “Stabbed in the Back: Vincennes, Slavery, and the Indian ‘Threat’,” *Indiana Magazine of History* 107, no. 2 (2011): 89–122.

neighborhood for “some Considerable Time” came by Jones’s house one afternoon “all very much frightened.” The Cherokees, Jones stated, “intimated they had had a dispute with a negro fellow belonging to Genl. Robertsons Iron Works and that they had killed him.” The absence of any discussion or testimony about the nature of the “dispute” suggests the hidden nature of many of these relationships, which took place out of sight of most Anglo-Americans.<sup>23</sup>

But the predominant way that the surrounding Native nations came to understand enslaved Africans was as akin to horses: as valuable and mobile property that could easily be taken. Because Indian country was a foreign jurisdiction so close to territorial settlements, some slaves fled there to escape bondage. But Natives also seized dozens of slaves against their will—in ambushes on boats traveling down the Ohio or Tennessee, for instance, or in raids on Anglo-American settlements; the Cherokees reported taking twenty-seven slaves in a single summer. In Native attacks, one army officer observed, “the Negroes are the only ones who have a Chance of their lifes (I suppose because they sell well).” The Native nations of the Southeast and the Ohio and Illinois Countries had long traditions of taking captives and incorporating them into their societies, which sometimes happened with Africans. But slaves’ value as property distinguished them from other captives. Joseph Brown, a white child captured by the Cherokees in 1788, reported that the Cherokees were on the point of executing him when they realized that his captor would then insist on taking revenge on a “Negro woman” they had also

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<sup>23</sup> “Information of Joseph Baird” June 13, 1794, Box 2, Folder 7, William H. English Collection, Special Collection Research Center, University of Chicago Library; Peter Audrain to Winthrop Sargent, November 15, 1797, Reel 4, WSP; James Robertson, “Deposition,” [after 1799], Box 2, Stanley F. Horn Collection, Special Collections, Jean and Alexander Heard Library, Vanderbilt University; John Jones, “Deposition,” June 2, 1800, Box 2, Stanley F. Horn Collection, Special Collections, Jean and Alexander Heard Library, Vanderbilt University.

captured. In Brown's telling, the prospect of losing the "service of the negro" was too painful; the Cherokees' "avarice," he reported, spared him.<sup>24</sup>

In one ironic moment, Tennessean John Sevier even reprimanded the Cherokees for being too quick to disregard slaves' humanity. "You know it is wrong to swop people for horses," Sevier stated, "for negroes is not horses tho they are black." Sevier's highly hypocritical remarks—he lived, after all, in a society in which horses, slaves, and land all served as routine and interchangeable mediums of exchange—also ignored the source of Native knowledge of Africans' values as commodities: their white neighbors. Arthur St. Clair reported that the Natives discovered that white Indian traders offered "a ready sale for every Thing plundered from the Inhabitants of the United States, but particularly Horses and Negroes." William Blount supplemented his negotiations with Chickasaw leaders by selling them slaves on the side.<sup>25</sup>

Moreover, in taking slaves that legally did not belong to them, Natives were also just aping their white neighbors. If territorial court proceedings are any indication, territorial citizens frequently filched each others' slaves. William Blount himself, along with his Indian agent John Chisholm, brought a criminal suit alleging that a man named George Mitchell had unlawfully taken "a certain Woman Slave named Amey the property

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<sup>24</sup> John Francis Hamtramck to Maj. Wyllys, May 27, 1789, Vol. 10, JHP; J. G. M. Ramsey, *The Annals of Tennessee to the End of the Eighteenth Century: Comprising Its Settlement, as the Watauga Association, from 1769 to 1777; a Part of North Carolina, from 1777 to 1784; the State of Franklin, from 1784-1788; a Part of North Carolina, from 1788-1790; the Territory of the U. States, South of the Ohio, from 1790 to 1796; the State of Tennessee, from 1796 to 1800.* (Charleston: J. Russell, 1853) 509-16. On Native captivity practices in the Southeast, see Christina Snyder, *Slavery in Indian Country: The Changing Face of Captivity in Early America* (Cambridge, Mass: Harvard University Press, 2010).

<sup>25</sup> "Arthur St. Clair's Commentary on the Trade and Intercourse Act," 1794, Reel 7, ASCP; William Blount to James Robertson, August 24, 1795, in "The Correspondence of Gen. James Robertson" (January 1, 1899), 66.

of William Blount.” In one instance, white thieves reportedly abducted two slaves belonging to a Cherokee woman and carried them into Kentucky.<sup>26</sup>

As with the traffic in horses, the trade in slaves thrust on federal officials the obligation to try to recover Anglo-American property from Indian country. White victims badgered federal representatives like Rufus Putnam, William Blount, and Indian agent James Seagrove to retrieve their enslaved property, even providing detailed descriptions of the stolen or runaway Africans. The treaties that the United States drafted specifically included provisions explicitly promising that “the practice of Stealing Negroes and Horses” from Anglo-Americans “shall forever hereafter cease” and requiring the restoration of stolen property. But Native leaders found it as difficult to return stolen slaves as stolen horses. When William Blount met with the Cherokees in 1794 and “repeatedly mentioned about the delivery of Negroes,” Bloody Fellow was able to recall the location and owner of nearly every slave taken from the Southwest Territory. Some, he knew, had been sold to the Creeks or to the Spanish. Many, though, remained within the Cherokee Nation, but Bloody Fellow lamented that he was powerless to recover them: “We are but a poor People and have no goods to purchase the Negroes from the Persons who have Possession of them, if we attempt to take them by force perhaps they might put them to death or injure them.”<sup>27</sup>

Once again, federal finance provided the solution. Bloody Fellow noted that they would be likely be able to deliver the slaves “when we receive our annual allowance from

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<sup>26</sup> The State v. John Chisholm (Superior Court, Hamilton District 1794), Docket 657/580, Knox County (Tenn.) Archives; George Mitchell v. William Blount (Superior Court, Hamilton District 1795); The Territory v. Page Billow, Minutes of the Superior Court of Law & Equity of the Mero District (1792), 82-83.

<sup>27</sup> “Treaty of Peace and Friendship between the President of the United States and the Kings, Chiefs, and Warriors of the Wabash and Illinois Tribes (copy)” September 27, 1792, Box 2, Folder 5, RPP; Major Robert Flournoy to James Seagrove, October 5, 1793, *ASP:IA*, 416-17; “Conference at Tellico Blockhouse,” December 28, 1794.



the U.S. then we can with those goods pay the Possessor for them & deliver them to you.” Even before the enactment of the Trade and Intercourse Act, William Blount had sought to obtain federal compensation for slaves that Natives had taken, advising that one disgruntled resident should draw up a petition “respecting their Negroes” in “good hand writing” and with the facts plainly stated, so that Blount could forward the claim to the President. After the Act, many of the petitions seeking reimbursement pleaded for compensation for stolen slaves as well as horses.<sup>28</sup>

In one case, the federal government became entangled in a dispute over slave property that did not even involve the citizens of the United States. By some unknown method, the Cherokees obtained “a negro man, a negro woman and child” that belonged to the Chickasaw leader George Colbert. Colbert came to Knoxville with a retinue of twenty Chickasaws to ask William Blount’s assistance in recovering the slaves. Blount pledged his help but was apparently unsuccessful, as a year later John Sevier sent a letter to the Cherokees. Sevier, indicating that he was “requested to write to you” by the Chickasaws, lectured the Cherokees that they could not expect to be “brothers and good neighbours” with the Chickasaws “if you keep their people from them.” A year later, with still no relief, Colbert evidently applied to Benjamin Hawkins, the new federal Indian agent. Colbert sought relief from the only ready source of property the Cherokee Nation had—the federal government’s “annual present made the nation.” Hawkins

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<sup>28</sup> “Conference at Tellico Blockhouse,” December 28, 1794; William Blount to James Robertson, 1795, *The Correspondence of Gen. James Robertson*, (January 1, 1899), 93-94.

agreed to this arrangement as long as the Cherokees consented; after that, the issue vanished from the record.<sup>29</sup>

Even absent clear resolution, the dispute over Colbert's slaves reveals how much federal finance and authority had insinuated themselves into Indian country. Colbert expected federal officials to resolve his dispute with the Cherokees, and Blount, Sevier, and Hawkins all agreed to intervene. Moreover, federal annuities and other funds had become Indian Country's readiest and most fungible source of compensation, even in disagreements among Natives.

In short, throughout the 1790s, federal officials paid out compensation to both Natives and non-Natives, for crimes committed by the other. Though this had the ironic effect of conforming to Native customary practice, the underlying motivation for those who crafted the policy was the precise opposite: to replace what officials regarded as the customary legal order of retaliation with a new legal order of peace and security. Federal officials had tried, and failed, to accomplish this goal through law; they turned instead to money. They were trying to buy their way to peace.

The strange and perverse consequence of this seeming federal weakness was to reorient both Natives and non-Natives toward the national government. Instead of raiding Knoxville, Nashville, or Vincennes, Native leaders arrived in these towns as supplicants seeking payment. Instead of traveling into Indian country—either to “take satisfaction” or to pursue their horses—white claimants now traveled to Philadelphia, or

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<sup>29</sup> William Blount to James Robertson, November 30, 1795, “The Correspondence of Gen. James Robertson,” (January 1, 1899), 80-81; John Sevier to The Little Turkey, August 25, 1796, in “Executive Journal of Gov. John Sevier,” 119; Benjamin Hawkins to Chiefs, Head Men, and Warriors of the Chickasaw Nation, May 21, 1797, in *Letters, Journals, and Writings of Benjamin Hawkins*, ed. C. L. Grant (Savannah, Ga.: Beehive Press, 1980), 1:112-13.

forwarded their petitions there, to obtain relief. Through compensation, the federal government became financially responsible for the acts of people it could not control. The result was that relations between Natives and non-Natives in the territories were now triangulated through a distant national government.<sup>30</sup>

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Compensation for the harms committed by U.S. citizens was only a small portion of the federal funds that flowed into Indian country. A much larger proportion were so-called “Indian presents” that the federal government gave to Native nations throughout the territories. Some of these presents were symbolic: silver medals especially designed to be doled out to Native leaders and elaborate military uniforms bedecked with frills. But most were practical: food, alcohol, gunpowder, guns, bullets, clothing, blankets, cloth, tobacco, mirrors, pots, and other household items. Native demands for these goods, and the federal willingness to satisfy them, reflected a complicated mixture of strength and weakness on both sides.

Federal officials arriving in the territories quickly discovered that, whenever they encountered Natives, they also confronted outstretched hands. Indians demanded goods as concrete proof of federal professions of goodwill. When Antoine Gamelin traveled up the Wabash River into the lands of the Miami confederacy on a diplomatic mission, the Native leaders asked for a “draught of milk” (alcohol), “some good broth,” and powder and ball. “[A] bearer of speeches should never be with empty hands,” the Miamis informed Gamelin. An Anishinaabe emissary who met with federal representatives in the early 1790s spent most of his speech bemoaning how his nation was “very poor,”

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<sup>30</sup> Arthur St. Clair to Henry Dearborn, Sec’y of War, October 2, 1802, Reel 5, ASCP.

appealing for guns, clothes, liquor, and provisions “to cover me and my peoples.” Such demands seemed to mark all interactions between Natives and the federal government. “It is a fact that whomsoever has to see the Indians is obliged to give them [goods],” one federal officer complained. “[I]t is unavoidable.”<sup>31</sup>

Because of these interactions, “beggar” became the standard epithet federal officials applied to any Native they encountered. “They are the greatest beggars and the most indolent creatures we ever saw,” the commissioners to the Treaty of Hopewell reported of the Choctaws they met in 1786. Governor Arthur St. Clair described Baptiste DuCoigne, the leader of the Kaskaskias around Vincennes, as “the greatest beggar I have met with among nations who are all beggars.” His second-in-command, Winthrop Sargent, recounted how “very glad” he was whenever Indians left. When Indians came on what they called “friendly Visits,” Sargent complained, “they generally eke out [these visits] while you have any thing to give them, & this may be applied to their whole Colour, who are beggarly past Description.” A federal military officer stationed at Fort Finney along the Ohio reported that Natives visited “almost every day to eat and drink with us, by way of brightning the chain of friendship curse them.”<sup>32</sup>

As historians have demonstrated, federal officials’ contempt for Natives and their demands fundamentally misunderstood Native culture. For both the varied Native peoples of the Ohio Country and the Cherokees, Creeks, Choctaws, and Chickasaws of the Southeast, gift-giving served a critical diplomatic role in cementing relationships in

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<sup>31</sup> “Report of Antoine Gamelin” May 17, 1790, in *SCP*, 155-60; “Speech of Chief of the Chippewas,” 1791, Reel 47, Henry Knox Papers; John Francis Hamtramck to Winthrop Sargent, August 9, 1792, Reel 3, WSP.

<sup>32</sup> Hopewell Commissioners to John Hancock, Jan. 4, 1786, No. 138, Reel 47, Henry Knox Papers; Gov. Arthur St. Clair to Secretary of War, May 1, 1790, in *SCP*, 136-40. “Winthrop Sargent Diary” September 1, 1789, WSP, Massachusetts Historical Society; Erskurius Beatty to John Armstrong, June 14, 1786, Box 1, Folder 18, Armstrong Papers, M6, Indiana Historical Society.

cultures oriented around exchange. Natives showed up to diplomatic meetings with federal officials with gifts of their own, frequently maple sugar and wampum. But federal officials had little use for sugar or “beads,” as they dubbed wampum. By contrast, Natives needed, often quite urgently, the presents the federal government bestowed. Centuries of trade had profoundly reoriented Native societies around European trade goods. The blankets, pots, and especially guns and gunpowder that Natives demanded were essentials that Native nations could not readily produce for themselves. The result was a situation of deep economic inequality. When U.S. army general James Wilkinson sought to intimidate the warring nations of the Northwest Indian Confederacy, he reminded them that the “warriors of the United States” could raise their own meat and bread “& they make arms & ammunition for their own use.” Implicit in Wilkinson’s bluster was the implication that Natives lacked the same know-how. As the Cherokee leader Little Turkey said of arms and ammunition, “we could not make it ourselves.”<sup>33</sup>

Natives understood very well how federal officials viewed them, and attempted to counter their claims. “We did not come here with an expectation of getting presents from you,” an Ottawa delegation informed federal army officials in 1786. “I am no beggar,” the Chickasaw leader Piamingo similarly insisted as he asked that the President provide powder and bullets for his people; he would pay for them with furs, skins, or horses. But exchange was often not enough, in part because Natives were shut out of aspects of the

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<sup>33</sup> James Wilkinson, “Talk to the Warring Nations” April 3, 1792, James Wilkinson Letters, Ayer MS 982, Newberry Library. For a brief overview on the large literature on gifts and trade goods in Native culture, focusing particularly on the Native Southeast, see Joseph M Hall, *Zamumo’s Gifts: Indian-European Exchange in the Colonial Southeast* (Philadelphia: University of Pennsylvania Press, 2009); Kathryn E. Holland Braund, *Deerskins & Duffels: The Creek Indian Trade with Anglo-America, 1685-1815* (Lincoln: University of Nebraska Press, 1993); Daniel K. Richter, *Trade, Land, Power: The Struggle for Eastern North America* (University of Pennsylvania Press, 2013), 53-68.

Anglo-American market economy—“We Red People have no money,” Piamingo lamented—but also because Native claims of poverty were not mere rhetoric. By the 1790s, much Indian country was a war-ravaged land. For thirty years, Anglo-Americans had destroyed Native villages, leveled cornfields, and pillaged Native goods. Bloodshed and destruction continued after the end of the Revolution: a quasi-war raged south of the Ohio, while the federal government’s expeditions against the Northwest Indian Confederacy dislocated entire populations, turning whole nations into refugees. Anglo-Americans understood this relationship between warfare and Native poverty, and they sought to use it as a form of power against Native peoples. “[W]hen your Houses [and] Cornfields are destroyed you have no provisions made to replace them, but are thrown into the greatest distress and Missary,” U.S. army commander Henry Burbeck told the Anishinaabe assembled at Fort Mackinac in the Northwest Territory in 1799: “[I]n short it’s the W[hite] people that you have to depend on and to apply too [sic] for all your wants.”<sup>34</sup>

These accounts of Native poverty and suffering were often structured by gender and age. “The white People cloath their women and children,” a leader of the Wabash Confederacy told a federal representative at a treaty session in Vincennes in 1792. “[O]urs are running naked. Take pity on them & send something every spring to make them glad.” Elsewhere, the Wabash and Illinois told Anglo-Americans that they “commend our women & children to your care.” Federal officials attempted to satisfy these demands by routinely including goods intended for Indian “queens” and “squaws”

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<sup>34</sup> Henry Burbeck, “Speeches to Indians,” Oct. 1799, Ayer 121, Newberry Library. A discussion of the devastation wrought in Native communities, see Colin G. Calloway, *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities* (Cambridge [England]: Cambridge University Press, 1995), 108-57. Colin Calloway aptly calls the end of the Revolution “the peace that brought no peace.” *Ibid.*, 272-91.

at diplomatic gatherings, and promising to supply Natives with goods for “your women and children.” Many military officers found themselves feeding “old men, Women, and Children, who seem to have no relations to afford them support.” Since both Native and American cultures associated masculinity with autonomy and independence, couching Native reliance on federal goods in such explicitly gendered terms served similar, yet antithetical, goals. For (male) Native leaders, pleading for goods on behalf of women and children diminished their own sense of dependence on the Americans. For federal officials, by contrast, associating Natives with women and children heightened the association between Natives and the era’s well-worn gendered tropes of dependency.<sup>35</sup>

Metaphors based on familial relationships also governed the meaning of federal “presents.” By providing for Indian nations, the United States was stepping into a well-established role as the metaphorical “father” of Native peoples. “All white People who have hitherto spoken to Us, have always called Us Children,” a Wabash leader informed Rufus Putnam during treaty negotiations. “I shall therefore call You Father.” In one dramatic moment at the negotiations of the Treaty of Greenville, the assembled Ohio country nations ceased calling the federal representatives brothers and instead “acknowledged” the United States “to be our father.” Federal representatives embraced this language, and role, when speaking to Natives. When William Blount doled out gifts

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<sup>35</sup> “A Journal of the Proceedings at a Council Held with the Indians of the Wabash and Illinois at Post Vincents, by Brigadier General Putnam,” October 1792, in *MRP*, 335; Speeches of the Wabash and Illinois Indians, February 1-4, 1793, in *PGW:PS*, 12:82-89; John Francis Hamtramck to Gen. James Wilkinson, January 24, 1796, NWTC. On gendered understandings of dependency during this period, see Christine Stansell, *City of Women: Sex and Class in New York, 1789-1860*, 1st ed (New York: Knopf, 1986), 3–38; Daniel Scott Smith, “Female Householding in Late Eighteenth-Century America and the Problem of Poverty,” *Journal of Social History* 28, no. 1 (1994): 83–107. Explorations of gender in Native societies appear in Theda Perdue, *Cherokee Women: Gender and Culture Change, 1700-1835* (Lincoln: University of Nebraska Press, 1998); Nancy Shoemaker, “An Alliance between Men: Gender Metaphors in Eighteenth-Century American Indian Diplomacy East of the Mississippi,” *Ethnohistory* 46, no. 2 (1999): 239–63; Juliana Barr, *Peace Came in the Form of a Woman: Indians and Spaniards in the Texas Borderlands* (Chapel Hill: University of North Carolina Press, 2007); Ann M Little, *Abraham in Arms: War and Gender in Colonial New England*, *Early American Studies* (Philadelphia: University of Pennsylvania Press, 2007); Gregory Evans Dowd, “The Spinning Wheel Revolution,” in *The Revolution of 1800: Democracy, Race, and the New Republic*, ed. James P. P. Horn, Jan Lewis, and Peter S. Onuf (Charlottesville: University of Virginia Press, 2002), 267–83.

to the Cherokees, for instance, he spoke of “the good things which our father, the President, ha[s] done for you, and what be yet intended to do.”<sup>36</sup>

As with gender dynamics, scholars have traced how this language of kinship and paternalism was susceptible to differing interpretations by Natives, who saw fathers as benevolent figures who protected and doted on their children, and federal officials, who viewed fathers as authority figures. But by the late eighteenth century, Natives understood pretty well the meanings that the Anglo-Americans assigned to these familial metaphors. In one striking moment at the Treaty of Holston, the assembled Cherokees observed that calling the United States eldest brother and father was “only a Title of Friendship we being the oldest people on this ground.” The Cherokees then proceeded to invert the metaphor. “Look [on] me as a mother more than any thing else,” Hanging Maw told William Blount and the assembled federal representatives, employing the maternalism more comfortable for the matriarchal Cherokees. “[M]y land raised & produced you.” Other Cherokees stressed how much “it hurts our hearts” to hear the Anglo-Americans demand land: “[Y]ou have grown up on our land now taking it away from us it is just like an ungrateful child robbing his father.” Other Native groups stubbornly insisted on calling the United States “brothers,” or rejected familial relationships altogether in favor of the less hierarchical “friend.”<sup>37</sup>

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<sup>36</sup> “A Journal of the Proceedings at a Council Held with the Indians of the Wabash and Illinois at Post Vincents, by Brigadier General Putnam,” October 1792; “Journal of the Grand Cherokee National Council,” June 26, 1792, in *ASP:IA*, 1:271-74; “Minutes of a Treaty with the Tribes of Indians . . . Begun at Greenville,” June 16, 1795, *ASP:IA*, 1:564.

<sup>37</sup> “Treaty of Holston--June & July, 1791. Between Gov. Wm. Blount & the Cherokees,” June 26-July 3, 1791, 15U1-59, Draper Manuscripts, Reel 58, Wisconsin Historical Society, Madison, Wis.; “Speech of the Indians,” July 19, 1792, in *MRP*, 297. On paternalistic metaphors, see Cynthia Cumfer, *Separate Peoples, One Land: The Minds of Cherokees, Blacks, and Whites on the Tennessee Frontier* (Chapel Hill: University of North Carolina Press, 2007), 78-97. Bethel Saler, *The Settlers' Empire: Colonialism and State Formation in America's Old Northwest* (Philadelphia: University of Pennsylvania Press, 2014), 71-72; Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991), 84-90; Purdue, “An Alliance Between Men.” Father Prucha argues that paternalism was the transhistorical core of federal



In short, though they contained elements of truth, narratives of Native weakness and reliance on American goods could often reflected expediency, for both sides. For Americans, these narratives bolstered aspirations of national power, while Natives played up their poverty to extract trade goods. But, as the Cherokees' reversal of federal paternalism suggests, the rhetoric of a benevolent federal government dispensing its largesse to an impoverished people was often just that: empty words that glossed over how federal officials and Native peoples actually behaved when they met on the frontier.

In particular, federal self-representation as liberal and generous obscured an important reality: the early federal government had little desire to be a conduit for food, weapons, and goods to Indians. Burdened by an enormous war debt, the new nation sought to spend as little public money as possible on Indian affairs. Behind the scenes, Henry Knox and other federal officials were urging "the most rigid oeconomy" on Indian agents and others at every juncture, particularly with respect to Indian "presents."<sup>38</sup>

Yet despite these admonitions, presents flowed out anyway, accompanied by a stream of excuses from federal officers to justify their seeming disregard of official instructions. In this correspondence among themselves and their superiors, government officials painted a very different picture than the one they offered for Native consumption. In their own accounts, these officials described *themselves* as the constrained supplicants, confronting Natives confident of their own strength. Officers

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Indian policy. Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1984).

<sup>38</sup> Henry Knox to Joseph Martin, June 23, 1788, 2XX20, Draper Manuscripts, Reel 116, Wisconsin Historical Society. For other instances where "oeconomy" was urged, see William Blount to James Robertson, April 15, 1794, in *TP: Vol. IV*, 340-41; William Blount to John McKee, N.D., Folder 8, John McKee Papers, Manuscript Division, Library of Congress.

spoke of “the impossibility of resisting the applications of Indians for rations, and presents.” Such language suggests that federal compliance with Native demands for material support reflected, not federal authority and Native weakness, but the reverse: a recognition that Native power in the borderlands obliged the federal government to send goods westward.<sup>39</sup>

Native power and federal acquiescence had several sources. From a financial standpoint alone, the federal government desperately wanted to maintain friendly relations with Native peoples. Henry Knox frequently wrote of how the United States could ill-afford a war with the Natives. Events proved Knox’s predictions right. When, despite what Knox regarded as the nation’s best efforts, the United States engaged in the four-year Northwest Indian War, the conflict drained federal coffers, consuming over five million dollars—over eighty percent of federal revenues during this period. Knox’s back-of-the-envelope calculations made clear that, whatever the price of purchasing Native loyalty was, it would be far less than the expense of a “system of coercion and oppression.”<sup>40</sup>

Providing goods promised to be a much cheaper way to ensure peace: “[O]ne grate mean of securing the allegiance of the natives,” Rufus Putnam wrote, “I take to be the furnishing them with such necessaries as they want.” Thomas Jefferson similarly concluded, “The most economical as well as the most humane conduct towards them [the Indians] is to bribe them into peace, and to retain them in peace by eternal bribes.” The

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<sup>39</sup>“Draft of Proposal for a Person to Examine Public Property,” May 23, 1800, Box 5, James McHenry Papers, Clements Library.

<sup>40</sup> Henry Knox to George Washington, June 15, 1789, in *GWP:PS*, 2:490. On the war’s cost, see Stephen Aron, “Lessons in Conquest: Towards a Greater Western History,” *Pacific Historical Review* 63, no. 2 (1994): 125, 139; Taylor, *The Divided Ground*, 238. Knox feared that a “protracted Indian war” would bring “destruction to the republic,” especially given the “depressed state of the finances.” Secretary at War to Gov. Arthur St. Clair, December 8, 1788, in *TP*, *Vol. II*, 165-66; “Report of the Secretary at War to Congress,” July 10, 1787, in *ibid.*, 31-35.

cost of a single expedition, Jefferson argued, would supply Natives with “presents on the most liberal scale” for a century.<sup>41</sup>

Moreover, in providing Natives with goods, the federal government was not crafting policy on a blank slate, but conforming to decades of diplomatic tradition in the formerly British and French regions that now comprised the Northwest and Southwest Territories. These precedents conditioned expectations for how a Euro-American power seeking Native support should behave.<sup>42</sup>

Vincennes, long a hub for French and then British diplomacy with the Native nations of the Illinois country, provides an excellent illustration of how earlier practice constrained federal officials. Granting presents to “friendly” Indians was the “Practice of all European People,” Winthrop Sargent wrote to Major John Hamtramck, the commanding officer of Fort Knox, the town’s army outpost. Sargent lamented his lack of funds to support such gifts, but Hamtramck was undeterred. Sargent’s letter crossed one from Hamtramck to him that contained virtually identical language. Hamtramck noted that, financial limitations notwithstanding, he had been forced to make assurances of presents to the Natives who came in. “It was necessary in order to secure their [the Indians] friendship to promise them some trifling recompense,” he reported. “[I]t is an old Custom and they all expect it, which obliged me to promise it to them and if they get nothing I shall appear in a very ridiculous point of view.” Several years later, Hamtramck justified supplying Natives alcohol to a different superior by insisting that

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<sup>41</sup> Rufus Putnam to George Washington, June 16, 1783, in *MRP*, 216; Thomas Jefferson to Charles Carroll, April 15, 1791, in *PTJ:MS*, 20:214.

<sup>42</sup> On earlier French and British gift-giving practices in the region, see White, *The Middle Ground*, 112-19, 403-04.

during diplomatic meetings the Indians “expect a keg from their father, they have been accustomed to it, by both French and British Governments.”<sup>43</sup>

Hamtramck felt particularly obliged to satisfy Native expectations because, as he and every other federal official in the territories was well aware, the British and Spanish, with whom the United States fiercely competed for Native loyalties, continued to dole out goods from Detroit and New Orleans. “[I]f our Government does not make [the Natives] presents,” Hamtramck wrote Henry Knox, “they will go to the British, who will be glad to see them and who will, supply them amply.” The Wabash chiefs told Hamtramck that the British presented them with “Goods . . . in large heaps like stacks of Hay”; Arthur St. Clair similarly pressed for more federal goods by noting that the British had given Natives six thousand pounds in cash and an equal amount in goods. In the Southwest Territory, Leonard Shaw, federal agent to the Cherokees, attempted to obtain the loyalty of an influential Cherokee chief, White Owl’s Son, by presenting him a laced scarlet coat, a ruffled shirt, a handkerchief, and some feathers. But rather than expressing gratitude, White Owl’s Son merely told Shaw “what valuable presents had been given to him . . . by the British in Detroit,” including four coats and two shirts, boats, arm bands, gorgets, and as much gunpowder and lead as he wanted. Other reports indicated that the Spanish in New Orleans had entire warehouses full of items intended for the Cherokees, Chickasaws, and Choctaws. British and Spanish officials heightened the sense of competition by telling the Indians that the “Americans were poor,” since the United

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<sup>43</sup> Winthrop Sargent to John Francis Hamtramck, July 16, 1790, *TP: Vol. III*, 320-21; John Francis Hamtramck to Winthrop Sargent, July 21, 1790, Reel 3, WSP; John Francis Hamtramck to Gen. James Wilkinson, January 24, 1796, NWTC.

States was distributing goods to the Natives that the Americans had purchased from Europe.<sup>44</sup>

The result was an escalating and expensive arms—or rather presents—race, as federal officials sought to outgift the British and Spanish. Governor Blount doled out goods liberally to try to wean the Chickasaws and Choctaws from foreign influence—“ten beaves [cattle] a day and what Rum they wanted and tobacco to smook after they get home and every other they could say,” the Natives bragged. Their agent told Blount the strategy was working: “[T]hey have boasted they never met with so good treatment from the British as from your Excellency.” The Chickasaw leader Ugalayacabe complained that the “delusory presents of the Americans [] unhappily blinds too many of my color.” Bloody Fellow similarly praised American liberality, asking his fellow Cherokees when they had ever gone to the British and “brought home the like of this?”<sup>45</sup>

Federal officials justified the mounting costs by repeatedly insisting that it would “impolitic”—in the eighteenth-century sense of poor policy—to “break thro’ the Custom” and disappoint Native expectations. Implicitly, this acknowledged that tenuous federal authority in the territories, which Sargent euphemistically referred to as “our present Situation,” required such liberality. Others admitted this relationship more explicitly: the magistrates of Vincennes strongly approved of Hamtramck’s “constant Practice” of

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<sup>44</sup> John Francis Hamtramck to Secretary of War, March 31, 1792, *TP: Vol. II*, 380-83; Arthur St. Clair to Henry Knox, January 27, 1788, *TP: Vol. II*, 89-91; “Minutes of Information given Governor Blount by James Carey, One of the Interpreters of the United States, in the Nation,” November 3, 1792, in *ASP:IA*, 1:327-29; “The Following Information Delivered on Oath, by James Leonard, a Citizen of the United States, to James Seagrove, Agent of Indian Affairs, Southern Department Rock Landing, on the Oconee, in Georgia,” July 24, 1792, in *ASP:IA*, 307-08. There was, in fact, a trade in goods specifically intended for distribution to Indians, most of which were imported from Europe. Two observers noted that the “Goods suitable for the Indians are of a particular kind,” and usually arrived in ships during the spring. Samuel Holden Parsons and James Davenport to Samuel Huntington, April 6, 1789, Ayer MS 687, Newberry Library.

<sup>45</sup> James Robertson to William Blount, October 12, 1792, in *TP: Vol. IV*, 197-98; “Talk of the Chickasaw Chiefs at the Bluffs, Represented by Wolf’s Friend Ugalayacabe, to Commandt. Balshase,” 1797, in Box 2, James McHenry Papers, Clements Library, University of Michigan. For the context of this particular speech, see Charles A. Weeks, “Of Rattlesnakes, Wolves, and Tigers: A Harangue at the Chickasaw Bluffs, 1796,” *The William and Mary Quarterly* 67, no. 3 (2010): 487–518.

feeding and clothing local Natives who came to the settlement precisely “on Account of the weak Situation of the Country.”<sup>46</sup>

Of course, federal officials sought to conceal these facts from Natives, offering their presents as a testimony to the strength and wealth of the United States. Yet many Anglo-Americans feared that the Natives were not fooled. The Indians, they knew, were just as capable as assessing the situation as Anglo-Americans, and could recognize that the federal government’s “large presents and annuities” demonstrated weakness rather than strength. “[I]nstead of viewing such conduct on the part of the United States, as an evidence of friendship towards them [the Indians],” the legislature of the Southwest Territory reported to Congress, “they have considered it as an evidence of fear, or as a tribute paid to their superior prowess in war.”<sup>47</sup>

Though these legislators had their own agenda in urging the abandonment of diplomacy, they were right: judged by their behavior, many Native leaders understood all too well the bargaining power they held. Federal officials frequently complained that Native leaders, rather than behaving like supplicants, expected federal goods as a “Matter of Right.” This was particularly true for those leaders who had long been courted by federal officials. The influential Cherokee leader John Watts and his entourage, for instance, reportedly burned the government-supplied beds they slept on during a diplomatic visit after officials refused to permit them to take the beds with them. Similarly, during a 1795 Chickasaw visit to Philadelphia, Secretary of War Timothy Pickering worked hard to secure the loyalties of their leader Major Colbert and his

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<sup>46</sup> Sargent to Hamtramck, July 16, 1790; Magistrates of Knox County to Arthur St. Clair, July 29, 1791, Reel 3, ASCP.

<sup>47</sup> “Memorial to Congress,” September 18, 1794, in *TP: Vol. IV*, 354-55. For an instance when federal officials emphasized national wealth in distributing goods, see Henry Knox, “Message from the Sec’y of War to Frenclhemastubre the Great Leading King of All the Choctaw Nation of Indians” June 27, 1787, JHP, vol. 6.

entourage. Pickering not only promised Colbert and his companions clothing for them and their entire families, but even gave Colbert four hundred dollars to purchase “an elegant Stallion.” But Colbert “seemed to consider this sum hardly sufficient”; the Chickasaw leader, Pickering complained, “was singularly difficult to please.”<sup>48</sup>

Such demands were not limited solely to Native leaders, however. Time spent among the Creeks and Cherokees led Benjamin Hawkins, southeastern superintendent of Indian affairs, to denounce all Indians as a “proud lying spoiled untoward race.” Years of presents from Britain and Spain, he lamented, had accustomed them to receive goods “sufficient to clothe all the Idlers in the Nation.” Now the Natives he encountered “demand any thing they want, from a whiteman, and feel themselves insulted, when refused, they think they confer a favour on the donor if they accept of clothes from him when naked or provisions when hungry.”<sup>49</sup>

Alongside complaints about Natives’ lack of humility, federal officials attacked their seeming lack of gratitude. The one thing that the federal government’s extravagance was supposed to purchase—Native allegiance—proved fickle. “The very Indians, who no longer ago that the last autumn were prevented from suffering the extremes of hunger by the bounties of the United States,” Daniel Smith reported to Henry Knox, “have recently been either stealing horses, or murdering defenceless women and children.” Reports from a council held within the Cherokee nation in 1792 indicated that many of the chiefs who had been fed and clothed by William Blount had quickly turned face and advocated for war. Bloody Fellow did point to the expensive goods he received

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<sup>48</sup> Sargent to Hamtramck, July 16, 1790; Andrew Jackson to John Sevier, February 24, 1797, in *Andrew Jackson Papers*, 1:126-27; Timothy Pickering to David Henley, August 26, 1795, Folder 16, Timothy Pickering Letters, Ayers 926, Newberry Library.

<sup>49</sup> Benjamin Hawkins to David Henley, June 5, 1798, Benjamin Hawkins Letters, Newberry Library.

from Blount—the silver medal, and coat with silver epaulettes, and scarlet coat with silver lace—in advocating for peace. But in the end, he, too, felt constrained to support the war. By contrast, one of the foremost leaders of the push for war, John Watts, had also always received “the attention [of] Governor Blount and the White People . . . whenever he came among them.” Reportedly, even Watts’s own brother, Unacata, mocked his changeable loyalties. “[T]he Whites had given him (Watts) a great many fine Clothes and he grown saucy,” Unacata stated, even as he refused to join Watts in his call to take up arms.<sup>50</sup>

It is important to interpret federal complaints of Natives’ sense of entitlement critically. Federal officials’ anger about Native behavior reflected their own racialized biases. Accounts of proud and spoiled Natives represented the converse of the tropes of Native poverty and dependency that surrounded federal largesse; by refusing to mouth the words of supplication and distress that federal officials expected from such “beggars,” Native leaders seemed to be violating the diplomatic script around Indian “presents.” In condemning Natives for insufficient gratitude for governmental liberality, federal officials’ disdainful reaction mirrored wider denunciations of the era about the unworthy poor.<sup>51</sup>

But, just as Native poverty was more than a mere rhetorical artifact, so too the entitled behavior of Native leaders likely reflected more than simply the projections of federal officials. It represented, rather, a hard-headed recognition by Natives of the

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<sup>50</sup> Acting Governor Smith to Secretary of War, June 22, 1793, in *TP: Vol. IV*, 276-77; William Blount, “Report to Henry Knox Regarding Preparations for War by Cherokee Indians: Knoxville, Southwest Territory” October 7, 1792, Beinecke Library, Yale University, New Haven, Conn.; “Information by Richard Finnelson,” November 1, 1792, in *ASP:IA*, 1:288-91.

<sup>51</sup> On criticism during this period of the poor as idlers, see Gary B. Nash, “Poverty and Poor Relief in Pre-Revolutionary Philadelphia,” *The William and Mary Quarterly* 33, no. 1 (1976): 3.



power that they held in the particular historical moment, when the federal government was arguably far more dependent on Natives than vice versa. Natives, it turned out, were just as adept at using what leverage they could under constrained circumstances as were the federal officials they encountered.

In looking to the new federal government to pursue the “sweets of Emolument, which now offer,” as one observer described it, Natives were hardly alone. As the venal machinations of legislators, land speculators, and financiers suggest, early Americans’ deep anxieties over corruption and abuse were often well-warranted, and the national treasury undergird many great fortunes. If Natives were distinctive in this general “Scramble . . . for the Loaves & Fishes,” as one officer-seeker described this grab for federal patronage, it was perhaps only in the size and scope of their success in using their bargaining power to secure federal largesse.<sup>52</sup>

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Whether the federal government was spending a lot or a little on Natives is a matter of perspective. Viewed in hindsight, the federal government got off cheap. As existing literature emphasizes, the federal government bought Native land for much less than it was worth on the open market. Between 1790, when it entered the Treaty of New York with the Creeks, and 1800, the federal government spent \$122,000 on treaty-stipulated annuities for Native nations. During the same period, the federal government obtained a minimum of nearly 12 million acres of land through federal Indian treaties, a price that works out to around one cent per acre. Since, over this period, the federal

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<sup>52</sup> Judge Turner to Winthrop Sargent, November 6, 1787, Reel 2, WSP; Richard Platt to Winthrop Sargent, November 15, 1789, Reel 3, WSP.

government sought to resell the land for prices ranging from 30 cents to two dollars per acre, it was substantially undercompensating Natives for their lands. Even Henry Knox acknowledged that the federal government was “taking away [Indian] lands” for “pitiful considerations.”<sup>53</sup>

But if Knox acknowledged that the federal government was obtaining Native land cheaply, he nonetheless did not feel that the federal government was spending too little on Indians. On the contrary, he was the most vocal of a bevy of federal officials bemoaning what they regarded as the inordinate expenses of the Indian Department. These protestations reflected the standard carping of public officials about spending funds, especially during the cash-strapped early republic. But, particularly from the standpoint of the 1790s, the assertion that Indian affairs cost the federal government a great deal of money rang true.

For one, despite rosy-eyed expectations about sales of western lands, there was tremendous uncertainty over the future of how the public domain would be distributed, as earlier chapters recount. In the 1790s, income from the land purchased from Natives was

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<sup>53</sup> “Report of the Secretary of War to the President,” December 10, 1790, in *TP, Vol. II*, 313-14. Calculating the number of acres purchased by the United States is difficult. The figure of nearly 12 million comes from Susan B. Carter et al., “Table Ag542-543: Lands Purchased by the United States from American Indian Tribes: 1795-1838,” in *Historical Statistics of the United States Millennial Edition Online* (New York: Cambridge University Press, 2006), which relies on a 1839 report. But this calculation is almost certainly too low, since it seems to only include land obtained at the Treaty of Greenville. Another estimate puts the amount at over eighteen million, based on map measurements, but this estimate, too, seems to include only the Treaty of Greenville, ignoring the other land cession treaties the federal government entered during the decade. Stanley Lebergott, “The Demand for Land: The United States, 1820-1860,” *The Journal of Economic History* 45, no. 2 (1985): 181, 211, app’x B. On work that suggests that Natives were substantially undercompensated for their lands, see Eric Kades, “Dark Side of Efficiency: Johnson v. McIntosh and the Expropriation of American Indian Lands,” *University of Pennsylvania Law Review* 148 (2000): 1065; Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Belknap Press of Harvard University Press, 2005), 74–82. For another discussion on the expenses of the Indian department during this period, see Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (Cambridge: Cambridge University Press, 2010), 49-50.

largely hypothetical, and many feared it would it never materialize. In fact, federal land sales over the decade did not even equal federal expenditures on treaty annuities.<sup>54</sup>

More broadly, fixating on federal annuities has the ironic effect of construing the treaties as nothing more than a land sale, in which all the terms appeared within the four corners of the document. Federal officials may have aspired to transform treaties into such simple exchanges, but in practice, neither Natives nor federal representatives viewed treaties this way. Though they concluded with formal written documents, treaty sessions were also grand diplomatic affairs where Natives reaffirmed their relationship with the United States. They resembled nothing so much as an elaborate weeks- or months-long conventions in the woods, usually held in the borderlands distant from Anglo-American settlements, attended by scores of federal officials, soldiers, interpreters, and clerks, as well as hundreds or even thousands of Natives.<sup>55</sup>

For federal officials, all these aspects of treaty sessions required one thing: money. It was the treaty sessions, not the annuities, that led one federal superintendent to bemoan “the great expence attending Indian Treatyes.” Federal officials had to feed, clothe, and house all the Natives who showed up, as well as supply them with gifts, at federal expense, in addition to providing provisions and salaries for the scores of staff treaties required. Natives also had an annoying habit of failing to stick to federal timelines: Blount complained that the Chickasaws and Choctaws showed up “many days” early to 1792 treaty session, “which made expenses much higher.” Federal

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<sup>54</sup> The federal government received \$101,000 in land revenue between 1789 and 1800, though revenue quickly increased afterward. Susan B. Carter et al., “Table Ea588-593: Federal Government Revenue, by Source: 1789-1939,” in *Historical Statistics of the United States Millennial Edition Online* (New York: Cambridge University Press, 2006).

<sup>55</sup> On treaties as a grand affairs—and U.S. efforts to convert them into a simple land transaction—see Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* (New York: Oxford University Press, 2013), 13-118; Dorothy V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982).

representatives futilely tried to keep down costs by limiting the attendees to only “headmen,” but “common Indians,” as they called them, came anyway, often in enormous numbers, expecting to be housed and fed.<sup>56</sup>

Despite officials’ best efforts, then, treaty sessions were elaborate affairs that ate up, quite literally, public resources. At the small treaty that Rufus Putnam held at Vincennes in 1792, which only seven hundred Natives attended, Putnam estimated that 40,000 rations would be required as a “moderate calculation.” For a proposed meeting with the Cherokees, federal officials purchased 8,000 pounds of flour, one ton of lead, and 900 gallons of whiskey. In addition to food, federal officials carried all manner of goods. To his treaty session, Putnam carried coats, hats, suits, kettles, blankets, shirts, hatchets, knives, and ribbons. Most of these items had to be transported from Philadelphia—prices in the territories were, federal officials complained, usurious—which required salaries for wagoners, boatmen, and storekeepers.<sup>57</sup>

The result of all these expenses was that a single treaty session ended up costing many multiples of the annuities enshrined in the written treaties as the formal consideration for ceded lands. A conference with the Chickasaw and Choctaw Indians—a peace conference, where no lands were to be purchased—ran an estimated \$6,754.50. The goods alone for a proposed treaty with the Cherokees cost \$4,743.25. In 1789, Arthur St. Clair estimated that a treaty along the Mississippi would cost an estimated \$10,250 in goods, transportation, and salaries, and another \$5,000 for 30,000 rations. St.

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<sup>56</sup> Richard Wynne to John Steele, February 19, 1789, Box 1, Folder #4, John Steele Papers, Southern Historical Collection; John Steele to Cairy [Carey], Linguist, June 8, 1789, Box 1, Folder #4, John Steele Papers, Southern Historical Collection. For more discussion of complaints about expenses, see Calloway, *Pen and Ink Witchcraft*, 20-48.

<sup>57</sup> “Schedule of Goods Delivered by Joseph Baird at the Indian Treaty,” September 1792, Folder 4, RPP; “Invoice of Items Purchased by Tench Francis for Proposed Conference with the Cherokee Indians,” August 1793, Folder 1, Silas Disnmore Papers, Ayer MS 241, Newberry Library.

Clair would know: the Treaty of Fort Harmar that he had just concluded had cost over \$18,000. One congressman's extreme estimate put the cost of the Treaty of New York with the Creeks at \$61,000 in presents, and a subsequent meeting at \$150,000. Little wonder that the inhabitants of Cumberland feared that the expense of holding an Indian treaty from their own funds would "reduce them to the Greatest Poverty and Distress."<sup>58</sup>

Treaties were merely the most concentrated instances when federal moneys went to house, cloth, and feed Natives. Precisely because treaty sessions represented a relationship rather than a single transaction, the underlying logic—that the federal government had to continually supply Native peoples to secure their allegiances—meant that much of the federal government's Indian Department expenditure was entirely unconnected with land sales but intended merely to maintain Native goodwill. This was particularly true for the Chickasaws and Choctaws in the Southwest Territory. Since neither nation had sold land to the federal government, neither received an annuity, but their strategic location in the southeast borderlands, and the constant fear of Spanish influence, quickly directed federal largesse their way. In 1793, William Blount, who hoped to use the Chickasaws to counter what he saw as the threat from the Creeks, proposed that a staggering \$97,500 in goods be supplied to the Chickasaws and Choctaws annually—including 16,000 blankets, 70,000 yards of cloth, and 15,000 pounds of ammunition. The actual amount they received was less dramatic, but still significant: the federal government provided them with \$16,000 worth of goods, including gunsmithing and blacksmithing tools, as well as paying the salary of a blacksmith from Knoxville for

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<sup>58</sup>David Allison, "Estimate of the Supposed Expense of the Chickasaw and Choctaw Indian Conference to Be Held at Nashville 1st. June Next." 1792, Folder 4: 1792, WBP:LC; Arthur St. Clair to Congress, May 16, 1789, Reel 2, ASCP; "*Annals of the Congress of the United States* 4 (June 6, 1794): 774–79; "Cumberland District Ct. Records," R6, 1783-87, Reel 224, Tennessee State Library and Archives. R6.

their use. Another \$3,000 worth in goods followed based on the President's promise a few years later. Federal officials also supplied the Chickasaws with 1500 bushels of corn after a poor harvest.<sup>59</sup>

Natives, though, did not simply wait for the federal government to provide goods. Instead, throughout the 1790s, they constantly showed up at federal forts in both the Northwest and Southwest Territories, expecting to be fed. Commanding officers, in vain, tried to refer Natives to the governor, which only "excite[d] their indignation." The Natives insisted that "in all their intercourse with white people, [they had] been accustomed to do business with military Chiefs." Hesitant to allow Natives to return their nations empty-handed—where the officers feared they would report, "We have nothing to expect from the United States"—the officers issued the rations the Indians demanded: 3,154 pounds of flour, 2,196 pounds of beef, 220 gills (5 ounces) of salt, and 294 gills of whiskey at Fort Defiance in 1798; 2556 pounds of beef in a single month in 1796 to support ninety Indians "who have altogether been victualled by the Garrison" at Fort Wayne; 688 rations of liquor in a single month in 1801 at Fort Washington. The costs mounted. In Vincennes, Captain Prior spent \$1600 in a single year on the Indian Department; other officers referenced the "incredible expence to government" of feeding Natives. Complaining that the "provisions to Indians distributed at military posts far exceed in value the amount of their annual Stipends [and] encourage the Indians in idleness," the Secretary of War attempted to have the practice "absolutely terminated" except in instances of "indispensable charity." But the "incidental expenses" of the

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<sup>59</sup> William Blount and Andrew Pickens to Secretary of War, August 1, 1793, in *TP: Vol. IV*, 291-93; Timothy Pickering to David Henley, May 11, 1795, Folder 6, Timothy Pickering Letters, Ayers 926, Newberry Library; "Supply for the Chickasaws," April 27, 1793, in "The Correspondence of Gen. James Robertson," *The American Historical Magazine* 2, no. 4 (October 1, 1897): 363.

Indian Department—including the “rations issued to Indians”—only continued to rise, going from thousands to tens of thousands of dollars every year.<sup>60</sup>

Federal officials did not have to travel to remote borderlands outposts to encounter importuning Natives, however. Throughout the 1790s, groups of Cherokees, Choctaws, and Chickasaws, bedecked in federally provided attire, could be found strolling the streets of Philadelphia. Their presence was the result of what were termed “Indian visits,” where groups of Native leaders journeyed thousands of miles to meet directly with the President and Secretary of War in the capital. Throughout the decade, Cherokee leaders John Watts and Bloody Fellow and the Chickasaw leaders Piamingo and Colbert traveled to Philadelphia nearly yearly. One congressman joked that Henry Knox would soon learn Cherokee “by keeping continually whole tribes of indians at this place.”<sup>61</sup>

Both high-level federal officials and Native leaders saw advantages in such visits. Successive Secretaries of War encouraged trips to Philadelphia as an opportunity to impress Native leaders with the size and power of the United States as well as to provide evidence of nation’s goodwill toward Natives; the officials believed that Natives who saw “the population of the country, and the improvements of all sorts” would quickly realize the “futility” of war against the United States. For their part, Natives embraced the visits

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<sup>60</sup> Henry Knox to Arthur St. Clair, February 25, 1793, Reel 4, ASC Papers; James Wilkinson to Winthrop Sargent, November 17, 1797, Reel 4, WSP; “Abstract of Provisions Issued at Ft. Defiance” April 1798, Box 8, Solomon Sibley Papers, Burton Historical Collection, Detroit, Mich.; “Abstract of Provisions Issued at Ft. Washington to the Indians” October 31, 1801; “The Secretary of War to Governor St. Clair,” April 25, 1800, in *TP: Vol. III*, 82-83; William Blount to James Robertson, October 11, 1793, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 2, no. 4 (October 1, 1897): 373.

<sup>61</sup> John Steele to William Blount, April 1, 1792, Folder 4: 1792, WBP:LC. For other instances of Native visits to Philadelphia, see Secretary of War to William Blount, January 31, 1792, in *TP: Vol. IV*, 115-17; “General Robertson’s Acct,” March 28, 1792, Box 1, Folder 3, James Robertson Papers, Special Collections, Vanderbilt University Library; James Wilkinson to Harry Innes, May 10, 1792, Box 1, Folder 6, Harry Innes Papers, Manuscript Division, Library of Congress; “General Putnam’s Speech to the Indians, Inviting a Deputation to Philadelphia,” October 5, 1792, in *ASP:IA*, 1:320; William Blount to Daniel Smith, March 12, 1793, Box 1, Folder 1, Daniel Smith Papers, Tennessee State Library and Archives; William Blount to John Gray Blount, May 26, 1794, in *JGBP*, 2:396-97; Willie Blount to John Gray Blount, September 22, 1795, in *JGBP*, 2:594-95; David Henley to John Chisholm, October 29, 1796, Box 1, Folder 29, David Henley Papers, Tennessee State Library and Archives.

as an opportunity to conduct diplomacy unmediated by Indian agents, who were predictably wary of these trips. “Indian visits to this place [Philadelphia] ought to be prevented,” one close associate of William Blount complained. “[A]fter the agreement made in Treaty the Indians had only to say we are dissatisfied with the Superintendent we will go to Congress, this they do and get what they want.” This observation helps explain why so many Natives eagerly made the long and occasionally dangerous journey and why they often organized their trips unbidden by federal officials in the territories, who gave them their support only reluctantly and often only after receiving direct orders.<sup>62</sup>

Indian visits were expensive. Natives who traveled on these trips were housed, fed, transported, and clothed at federal expense, and escorted by translators and agents paid from the federal treasury. Upon arrival in Philadelphia, Native leaders were “abundantly supplied with goods,” with the obvious intent that their allegiance would be secured and they would be able to report back to their nations on the nation’s generosity. William Blount, who accompanied the Chickasaws on a 1793 visit to Philadelphia, hoped that the chief Piamingo would “give ocular demonstration of the liberality of the United States” on his return. Such “liberality” meant that the costs of these Indian visits often equaled those of treaty sessions: Blount estimated a single Cherokee visit in 1792 ran about ten thousand dollars.<sup>63</sup>

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<sup>62</sup> David Allison to Benjamin Hawkins, April 21, 1792, Folder 4: 1792, WBP:LC. For federal officials who saw advantage in Indian visits, see Henry Knox, “Instructions to Captain Alexander Trueman, of the First United States’ Regiment,” April 3, 1792, *ASP:LA*, 230; Rufus Putnam to Henry Knox, July 5, 1792, in *MRP*, 273. For an instance when Natives spontaneously organized a trip to Philadelphia, see William Blount to Hugh Williamson, April 14, 1792, in *John Gray Blount Papers*, 2:194-96. Blount reported that three Chickasaws appeared en route to Philadelphia with a letter from Washington from Piamingo; Blount reported that he would endeavor to “turn them back,” but doubted whether he would succeed.

<sup>63</sup> William Blount to John McKee, N.D., Folder 8, John McKee Papers, Manuscript Division, Library of Congress; Secretary of War to William Blount, February 8, 1793, in *TP: Vol. IV*, 237-38; Blount to Robertson, October 11, 1793; William Blount to Secretary Smith, April 27, 1792, in *TP: Vol. IV*, 143-45.



In sum, satisfying Native demands through elaborate treaty sessions, provisions, “presents,” and Indian visits was a costly undertaking. Tallying up the precise figures is difficult given the poor state of early federal recordkeeping, but one calculation—pieced together from various records in 1820 and likely an underestimate—stated that the federal government spent \$722,393 in the Indian Department throughout the 1790s, nearly 2% of the federal government’s non-debt expenditures during the period. The expenditures continued to rise, precipitously, in the following decades.<sup>64</sup>

Though these numbers vindicated those who saw placating Native wants as cheaper than warfare, they nonetheless dramatically exceeded the \$15,000-20,000 annually that most of these prognosticators believed even the most generous presents would cost. By the early 1800s, Indian Department expenditures routinely exceeded \$100,000 a year. These were especially large sums of money in the territories, where hard currency was scarce; Ohio, for instance, brought in a little less than \$40,000 in taxes in 1798-99, while Tennessee supplied just over \$13,000 in the same period. The Indian Department expenditures look quite large, too, when set against the \$972,000 the federal government spent on compensation and pensions for Revolutionary War veterans during the same period.<sup>65</sup>

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<sup>64</sup> “Expenditures for the Indian Department Since the Declaration of Independence,” December 7, 1820, in *American State Papers: Indian Affairs, Volume 2*, eds. Walter Lowrie and Walter S. Franklin (Washington: Gales and Seaton, 1834), 209-12. This calculation includes expenditures on treaties (tbl 2), expenditures on the Indian Department under military appropriations (tbl 3), and expenditures on Indian trading posts (tbl 4). Federal government non-debt expenditures derived from Susan B. Carter et al., “Table Ea636-643: Federal Government Expenditure, by Major Function: 1789-1970,” in *Historical Statistics of the United States Millennial Edition Online* (New York: Cambridge University Press, 2006). The evidence that this amount undercounts actual expenditures comes from several sources. Some historical sources indicate that many expenditures on Indian affairs did not receive the “Indian Department” label. Arthur St. Clair to Congress, May 16, 1789, Reel 2, ASCP. Other federal records provide numbers that contradict those presented in the report. For in instance, while the 1820 report records only 28,8288.37 in expenditures that year, another source indicates \$41,000. “Estimates for the Year 1789,” July 9, 1789, in *American State Papers: Finance*, eds. Walter Lowrie and Matthew St. Clair Clarke (Washington: Gales and Seaton, 1832), 1:11-13. Some of this disparity is likely due to the destruction of records in a War Office fire in 1800. For an additional discussion of Indian Department finance, see Rockwell, *Indian Affairs*, 49-50.

<sup>65</sup> Jefferson to Carroll, April 15, 1791. For estimates in these amounts, see Henry Knox to George Washington, June 15, 1789, in *PGW:PS*, 2:490 (\$15,000); Rufus Putnam to Fisher Ames, January 9, 1790, Mss. Misc. Boxes P, American Antiquarian Society

These expenditures certainly seemed enormous to those outside of the federal government. In the *Knoxville Gazette*, William Cocke complained of “half the wealth of the union presented to the enemy”; an ordinary citizen from Georgia, writing to President Washington, bemoaned the “enormous sums of money” expended “yearly” on Indian “presents.” Some drew explicit comparisons to federal spending on veterans. If Congress “has any bounty to spare,” Tennessee’s first governor John Sevier argued, it should grant its “charity” to “the lame, the halt, and the blind soldier” who sacrificed for their nation, rather than “giving thousands to those who dispise it.”<sup>66</sup>

The response in the Northwest Territory was even more extreme. Some of the inhabitants of Vincennes argued that, instead of “receiv[ing] any Indians into the Village, [] we ought to kill them.” Perhaps the clearest evidence of the frenzied response of many frontier settlers to federal support for Natives comes from the 1794 riot in Cincinnati, discussed in the previous chapter. As the inhabitants whipped themselves into a genocidal fury against a group of Choctaws aiding the U.S. army, they “Observed that those Indians were a Considerable Expence to the US--that it would be Serviceable totaly to destroy them (and that Instantly) than that they should receive any further Support.”<sup>67</sup>

Underlying this rage was a deep-seated sense that the federal government was coddling Natives at the same moment that the nation’s own citizens were left to suffer the

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(\$20,000). Tax revenue from Ohio and Tennessee comes from “No. 145: Internal Revenues,” February 5, 1800, *American State Papers: Finance*, 1:616-21. Expenditures on veterans from Susan B. Carter et al., “Table Ea636-643: Federal Government Expenditure, by Major Function: 1789-1970,” in *Historical Statistics of the United States Millennial Edition Online* (New York: Cambridge University Press, 2006).

<sup>66</sup> William Cocke, “For the Gazette,” *Knoxville Gazette*, December 29, 1792; James Mulryne, November 22, 1792, in *PGW:PS*, 11:420-23; John Sevier to Andrew Jackson, January 29, 1797, in *PAJ*, 1:120-21.

<sup>67</sup> Magistrates of Knox County to Arthur St. Clair, July 29, 1791, Reel 3, ASCP; “Testimony of James Leonard,” September 19, 1794, Reel 7, ASCP.

fury of Native attacks unaided. “While [the Cherokee chief] Double Head . . . and his sanguinary Brothers are received and caressed at Philadelphia,” the inhabitants of the Southwest Territory reportedly complained, “we are daily Suffering at the Hands of their Associates in Iniquity.” Biased in favor of Natives, the federal government seemed to be forgetting its obligation to its own citizens. The “present measures of the Federal Government,” one observer reported, led many people to believe “they are neglected, and the interest of the indians only consulted.” Returning to the paternalist metaphors that frequently framed Indian affairs, one inhabitant of the Southwest Territory complained that Congress “are more favourable to their savage, adopted, and illegitimate, than to us their legitimate children.”<sup>68</sup>

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Territorial citizens’ narrative of federal neglect was misleading. Their attacks on Natives as the undeserving beneficiaries of federal largesse ignored the extent to which much of this westward flow of funds ended up in their, rather than Native, hands. Towns like Vincennes, Detroit, Knoxville, and Nashville were full of inhabitants dependent on the Indian Department for their livelihood. Some, like Indian interpreters and agents, were directly on the federal payroll. But federal spending enriched a larger circle than simply federal employees. Territorial merchants provided the rations, horses, and wagons the department needed, often at high markups; wagoners and boatmen

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<sup>68</sup> William Blount to John Gray Blount, July 29, 1794, in *John Gray Blount Papers*, 2:420-21; John Sevier to William Cocke, July 6, 1797, in “Executive Journal of Gov. John Sevier,” 139; “Mr. Roulstone,” *Knoxville Gazette*, August 13, 1793.

transported goods up the rivers from Philadelphia into Indian country; craftsmen built the boats, trading posts, and warehouses the Department called for.<sup>69</sup>

Beyond these legitimate opportunities, minimal oversight meant that it was easy enough to divert some of the stream of federal monies flowing through the territories away from their intended recipients. In Vincennes, the local commander, Captain Prior, reportedly dubbed himself “agent for Indian affairs on the Wabash,” and operated the department as a “system of job-making” for the “sole benefit” of him and his confederates--at “very Enormous” expense. In Nashville, local Indian agent James Robertson allegedly organized a cartel of local merchants, to whom he directed business supplying Indians in return for kickbacks—discounts on items for personal use, a wink and a nod when Robertson took items for himself and billed them to the Indian Department. In order to make the prices billed the government seem reasonable, an informant asserted, Robertson and the merchants then delivered the Indians only half the goods contracted for. Such venality allegedly included the territorial governors themselves: rumors circulated that William Blount employed moneys sent for treaties to buy slaves, which he later traded for the required provisions at a tidy profit, pocketing the difference. Little wonder that Secretary of War Timothy Pickering bemoaned the “great abuses existing in the conduct of affairs in the Southwestern Territory.”<sup>70</sup>

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<sup>69</sup> For examples of local financial connections to the Indian Department, see “Articles of Agreement Between John Chisholm and David Moore,” September 21, 1795, William Blount Papers, McClung Historical Collection, Knoxville Public Library, Knoxville, Tenn.; William Blount to David Henley, July 23, 1795, William Blount Papers, McClung Historical Collection; Hamtramck to Sargent, August 9, 1792.

<sup>70</sup> Winthrop Sargent to Secretary of War, July 6, 1792, *TP: Vol. II*, 404-05; Judge Turner to Gov. Arthur St. Clair, June 14, 1794, in *SCP325*; Oliver Wolcott to David Henley, May 30, 1795, Box 16, Folder 9, Oliver Wolcott Papers, Connecticut Historical Society; “Deposition of Samson Williams,” July 7, 1795, Documents, Box 1, Folder 3, David Henley Papers, Tennessee State Library and Archives; Timothy Pickering to David Henley, July 22, 1795, Folder 12, Timothy Pickering Letters, Ayers 926, Newberry Library.

But there was also a deeper and more significant irony to territorial protests over Natives' dependence on the federal government. In a formal constitutional sense, it was the territories, not Native nations, that were "dependent." At the time, the term conveyed a political meaning that indicated a lack of autonomy, the opposite of independence. It was this meaning that Arthur St. Clair invoked when he described territories as the "dependent colon[ies]" of the United States, in contrast to sovereign participants in the nation. But St. Clair did not use dependence purely as a technical term; he also argued that this position mandated citizens' subordination to the dictates of the national government. When the territorial inhabitants grew too demanding, St. Clair insisted that they be "put in Mind that they are not yet a part of the Union, but dependent upon it."<sup>71</sup>

This category of dependence led some to view the territories through the same lens of paternalism that federal officials had tried to thrust on Native peoples. This metaphor cast the territories as the growing children of a benevolent and caring nation-father. Unsurprisingly, St. Clair particularly embraced this rhetoric: he described the territories as "in a State of Infancy," and related his feelings on viewing the development of the Northwest Territory to "those of a father" who had watched his son grow up and was about to venture out into a dangerous world. But some of the territorial inhabitants adopted this rhetoric, too, expressing "gratitude to the Federal Government for the

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<sup>71</sup> Gov. Arthur St. Clair to Oliver Wolcott, December 5, 1795, in *SCP*, 378-83; Gov. Arthur St. Clair to Secretary of Treasury, August 9, 1793, in *TP: Vol. II*, 458-59. I explore the issue of territories' constitutional status more fully in Gregory Ablavsky, "Bickerings and Discontents: Administrative Constitutionalism in the Northwest Territory," in Gillian Metzger and Jeremy Kessler, eds., *Administering the Constitution: The History and Theory of Administrative Constitutionalism* (forthcoming 2017).

paternal care which they have exercised over the colony” and describing the territory as a “Child . . . nursed with such tenderness by the United States.”<sup>72</sup>

But if the citizens of the territories were children, they were willful and disobedient children who seemed to have little love for their parents, or so federal officials felt. In fact, many territorial inhabitants would have rejected the infantilizing metaphor; their view of their relationship with the United States was less sentimental and more transactional. Like Natives, their loyalties and allegiances seemed fickle and changeable. “They are too far removed from the seat of government to be much impressed with the power of the United States,” St. Clair reported to a congressman in Philadelphia of the residents of the Northwest Territory. “Fixed political principles they have none, and though at present they seem attached to the General Government, it is in fact but a passing sentiment, easily changed or even removed.” Earlier, St. Clair told President Washington that the “Ligature that binds together” the territories and the United States “is a weak one.”<sup>73</sup>

Also like Natives, frontier settlers used their strategic position in the borderlands to their advantage, flirting with Spanish and British patronage to possibly secure some sort of autonomous status. Throughout the 1780s and 1790s, much of the western United States was aflame with secessionist sentiments: Rufus Putnam described this vision of a “separate, independent Government” as a “maggot . . . in the heads of some people.” Though the most active advocates for secession were in Kentucky, the idea infected the

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<sup>72</sup> Governor St. Clair’s Address at Marietta” July 15, 1788, in *SCP*, 54-55; Arthur St. Clair, “Remarks of Governor St. Clair Before the Constitutional Convention” November 3, 1802; “Petition to Congress of the Inhabitants of the Territory Northwest of the Ohio” December 24, 1801, Reel 5, St. Clair Papers; “Reply of Council to the Governor,” September 28, 1799, in *SCP*, 457-58.

<sup>73</sup> Arthur St. Clair to James Ross, December 1799, in *SCP*, 480-84; Gov. Arthur St. Clair to President, August 1789, in *TP: Vol. II*, 204-12.

territories, too. In the Northwest Territory, federal officials were highly uncertain of the loyalties of the French in the Illinois Country and in Detroit, who had only recently become U.S. citizens. In the Mero district around Nashville—itsself named in honor of the Spanish governor of New Orleans—inhabitants could not quite decide whether they wanted to join Spanish Louisiana or invade and take it over; plans for both seemed to emerge every few years. Federal officials believed that the Spanish and British encouraged these secessionist sentiments, hoping to check American power. “Spain on the one hand is certainly at Work for that purpose,” St. Clair reported, “and on the other hand I have reason to believe that Great Britain is not Idle.” Throughout the period, territorial officials occasionally received panicked letters from Philadelphia over alleged Spanish, British, and French agents working their way through the territories, reportedly sowing secessionist allegiances in their wake. In fact, many of the locals who engaged in the most elaborate intrigues were also the ones that the federal government had to rely on to implement its policies—James Wilkinson, later federal commander of the U.S. army in the Northwest Territories; Harry Innes, later a federal judge, in Kentucky; James Robertson, later a federal Indian agent.<sup>74</sup>

The alarmism over secessionism, especially in Philadelphia, ignores the extent to which many in the territories were posturing, at least in part. Like Native nations, they were engaged in a playoff system of their own, using the prospect of disloyalty to secure

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<sup>74</sup> Putnam to Ames, January 9, 1790; Arthur St. Clair to Isaac Dunn, December 9, 1788, Beinecke Library, Yale University. For discussions of alleged foreign agents in the territories, see Henry Knox to Josiah Harmar, November 14, 1787, Vol. 6, JAH; James McHenry to Arthur St. Clair, May 24, 1796, Box 1, James McHenry Papers, Clements Library, University of Michigan; James Wilkinson to Winthrop Sargent, May 28, 1797, Reel 4, WSP. For recent considerations of these widespread flirtations with secession, see David E. Narrett, “Geopolitics and Intrigue: James Wilkinson, the Spanish Borderlands, and Mexican Independence,” *The William and Mary Quarterly* 69, no. 1 (2012): 101–46; Gene Allen Smith and Sylvia L. Hilton, eds., *Nexus of Empire: Negotiating Loyalty and Identity in the Revolutionary Borderlands, 1760s-1820s* (Gainesville: University Press of Florida, 2011); Francois Furstenberg, “The Significance of the Trans-Appalachian Frontier in Atlantic History,” *The American Historical Review* 113, no. 3 (2008): 663-66. An older but valuable overview appears in Arthur Preston Whitaker, *The Spanish-American Frontier: 1783-1795; the Westward Movement and the Spanish Retreat in the Mississippi Valley* (Boston: Houghton Mifflin Company, 1927).

ever-greater concessions from the government. The threat of secession was in line with inhabitants' preferred interpretation of their relationship to the federal government, which was contractual, not familial; they viewed their loyalty to the national government as contingent on the federal government fulfilling its obligations to its citizens, just as the Declaration of Independence suggested.

Above all, they expected one thing from the federal government: "protection," a keyword that, as Patrick Griffin has demonstrated, reverberated throughout the borderlands during this period. "[P]rotection," in the words of Virginia governor Patrick Henry, "is the best & grand object of social compact." Henry interpreted the federal government's failure to adequately defend Kentucky against Native attacks in this frame. "[I]f it is found that no reliance can be placed in Congress for protection, are not all the Western people driven into a separation from us?" Western settlers took such thinking to heart, insisting that the federal government had failed to fulfill its duties. "America ought not to exist as a nation," one Kentuckian observed, "unless she chastises . . . her hostile enemies." One writer in the *Knoxville Gazette* put it baldly. "Allegiance and protection are reciprocal in their nature," the pseudonymous "Fellow Citizen" wrote, "and the one *may* of right be refused when the other is withdrawn."<sup>75</sup>

As this statement suggests, the attack on the federal government for inadequate protection was a particular hobbyhorse of the inhabitants of the Southwest Territory, who, as we have seen, believed they were the "most easy prey & the most out of

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<sup>75</sup> Patrick Henry to Virginia Delegates, May 16, 1786, in *The Papers of James Monroe*, eds. Daniel Preston and Marlena C. DeLong, eds. (Westport, Conn: Greenwood Press, 2003), 2:252-54; Patrick Henry to Virginia Delegates, July 5, 1786, in *Papers of James Monroe*, 2:315-18; George Thompson to James Madison, June 1, 1790, George Thompson Papers, Clements Library, University of Michigan; Rufus Putnam to Henry Knox, January 6, 1791, in *MRP*, 247; A Fellow Citizen, "For the Knoxville Gazette," *Knoxville Gazette*, April 6, 1793. Griffin's argument on the centrality of protection—which, Griffin argues, was the "organizing principle for [the] West"—appears in Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York: Hill and Wang, 2007).



protection” of any part of the United States. They especially resented that their pleas were neglected, they believed, because of their political powerlessness and remote location. “We are part of the united government, and from them we have a right to expect protection,” a grand jury in the Hamilton District pronounced in 1793. Pointing out the defense afforded the victims of the Algerine pirates, the Territory’s legislature reminded Congress “that the citizens who live in poverty on the extreme frontier are as much entitled to [be] procted [sic] in their lives, their families, and their little property, as those who roll in luxury, ease, and affluence, in the great and opulent Atlantic cities.” An author in the *Knoxville Gazette* expressed this sense of neglected grievance, writing of recent attacks: “Had THESE DEPREDATIONS been committed in PHILADELPHIA the reader can fill in the blank.” An anonymous reader actually did so, writing in: “there would have been provisions made to punish those savages.”<sup>76</sup>

The extravagant rhetoric of the territorial citizens should not obscure the genuineness of their sufferings. Cherokees and Creeks killed over two hundred territorial citizens in a population of several thousand; representatives in the territorial assembly asserted that nearly all of them had lost a “dear wife or child, or aged parent, or near relation” to Native attacks. (Of course, they made no acknowledgment that the Cherokees and Creeks shared this experience of loss because of whites’ attacks.) But the territorial citizens’ claim on protection was also an attempt to wring federal resources

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<sup>76</sup> James White to James Monroe, August 9, 1792, in *Papers of James Monroe*, 555-57; “Address of the Grand Inquest of the District of Hamilton,” *Knoxville Gazette*, November 23, 1793; “To the Congress of the United States in Session at Philadelphia,” *Knoxville Gazette*, March 27, 1794; “Knoxville, Saturday, January 12,” *Knoxville Gazette* (microfilm), January 12, 1793, Tennessee State Library and Archives.

from a reluctant government. “Does not Congress consider the lives of their people of more value than money?” wrote one western settler pleading for military action.<sup>77</sup>

Many in the federal government well understood this linkage between federal military expenditures and territorial loyalties. Expending money on the military, Henry Knox reported, was the means most likely “to attach the people of the frontiers to the government of the United States.” Massachusetts congressman Fisher Ames echoed Knox’s link between federal money and territorial loyalties. “Congress has little occasion to make itself known to [the frontier settlers] except by acts of protection,” he told Rufus Putnam. “The most successful way to banish the ruinous idea of the future independency of the western country is, doing good to the settlers, to gain their hearts.”<sup>78</sup>

In the Northwest Territory, such rhetoric by ordinary citizens and federal officials alike was successful, helping drag the reluctant national government into the lengthy and costly war against the Northwest Indian Confederacy. “To obtain protection against lawless violence, was a main object for which the present government was instituted,” Henry Knox wrote in his public declaration of the war’s causes. Echoing the constant refrain from the territories, he continued: “A frontier citizen possesses as strong claims to protection as any other citizen.” Privately, he wrote to Arthur St. Clair to use the federally supported expeditions into Indian country as an opportunity to “impress the frontier Citizens, of the entire good dispositions of the General government towards

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<sup>77</sup> “To the Congress of the United States”; Thompson to Madison, June 1, 1790. William Blount put the number killed or taken prisoner by Creeks and Cherokees at “upwards of two hundred,” while the residents of the Mero District alone presented President Washington with a list of 117 killed and wounded in the region since the Treaty of Holston. William Blount to James Seagrove, January 9, 1794, in *TP: Vol. IV*, 320-23; Citizens of the Mero District to George Washington, August 13, 1793, in *PGW:PS*, 13:440-42. In 1791, there were a little over 7,000 residents around Nashville, and 35,000 in the Territory as a whole. Walter T. Durham, *Before Tennessee: The Southwest Territory, 1790-1796: A Narrative History of the Territory of the United States South of the River Ohio* (Rocky Mount Historical Association, 1990), 53.

<sup>78</sup> Henry Knox, “A View of the Present State of the Military Force of the United States” March 19, 1791, NWTC; Fisher Ames to Rufus Putnam, February 22, 1791, in *MRP*, 250.

them.” He gave St. Clair what amounted to talking points to quiet the frontier complaints: “The United States embrace with equal care all parts of the Union, and in the present case are taking expensive arrangements for the protection of the frontiers.”<sup>79</sup>

These “expensive” arrangements proved highly important to the Northwest Territory’s economic development—not only in encouraging settlement by removing perceptions of Native threats, but because the U.S. army soon became one of the most important drivers of the territorial economy. The money that cascaded westward as a result of the war against the Northwest Indian Confederacy proved a particular boon for Cincinnati, where the army was stationed. “Inhabitants have doubled here within nine months past,” John Cleves Symmes reported from the city in 1790, “owing to two reasons principally—the residence of the army here, and great demand for labour on buildings is such to give employment to every class.” An inhabitant of Marietta later recalled how all “the Yong & interprising men follow[ed] the Arme[y] to catch the Government’s money & Make to themselves Fourtains [fortunes].” Embittered, he complained, “The Indian War Built up Cincinaty & the adjacent Countrey at the expence of the Ohio Companey’s Settlement.”<sup>80</sup>

The army proved financially essential to other places in the Northwest Territory as well. When the United States took possession of Detroit in 1796, many of the firms that had long made a living from the fur trade began providing the military with the enormous quantities of alcohol, beef, and especially flour needed to support the soldiers.

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<sup>79</sup> “The CAUSES of the Existing HOSTILITIES between the UNITED STATES, and Certain Tribes of INDIANS North-West of the OHIO . . . January 26, 1792, in *TP*, Vol. II, 359-66; Henry Knox to Arthur St. Clair, March 19, 1791, NWTC.

<sup>80</sup> John Cleves Symmes to Jonathan Dayton, November 4, 1790, in *CJCS*, 132-38; Journal of Ichabod Nye (typescript), pp. 39-40, Folder 2, Box 3, Marietta, Ohio Collection, Ohio Historical Society. For additional discussions of the role of federal military spending in encouraging the development of the Northwest Territory, William H. Bergmann, *The American National State and the Early West* (Cambridge ; New York: Cambridge University Press, 2012), 53-93.

The town was so dependent on military money that its judges protested when the army attempted to limit soldiers' leave, as it would deprive the "the Citizens [of] the benefit of the free circulation of Cash." There was a similar effect wherever soldiers were stationed: citizens in the Illinois country began building flour mills to supply the army when soldiers were posted downriver. Federal officer John Hamtramck estimated his soldiers in Vincennes had consumed one-third of all the flour produced in the village. William Blount observed that the lands to the north were "more full of Money arising from . . . the army North of Ohio than any other Part of America."<sup>81</sup>

The Southwest Territory ostensibly fared differently, as Blount's jealousy indicates. As we have seen, despite Blount's zealous advocacy and citizens' impassioned pleas, Congress refused to authorize punitive expeditions there akin to the campaign north of the Ohio. Andrew Cayton has argued that this failure helped sour territorial inhabitants against the federal government, creating long-standing regional divergences in attitudes toward national authority.<sup>82</sup>

The claim that the federal government neglected the Southwest Territory, though, gives too much credit to the bitter complaints of the most vocal territorial citizens. In

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<sup>81</sup> William St. Clair to Arthur St. Clair, September 13, 1798, Reel 4, ASCP; James McHenry to Arthur St. Clair, August 15, 1799, Folder 2, James McHenry Letters, Ayers MS 931, Newberry Library; John Francis Hamtramck to Josiah Harmar, January 19, 1789, in *Outpost on the Wabash*, 145-47; William H. Masterson, *William Blount*, Southern Biography Series (Baton Rouge: Louisiana State University Press, 1954), 254.

<sup>82</sup> Andrew R. L. Cayton, "'Separate Interests' and the Nation-State: The Washington Administration and the Origins of Regionalism in the Trans-Appalachian West," *The Journal of American History* 79, no. 1 (June 1, 1992): 39-67; Andrew R. L. Cayton, "'When Shall We Cease to Have Judases?' The Blount Conspiracy and the Limits of the 'Extended Republic,'" in *Launching the "Extended Republic": The Federalist Era*, ed. Ronald Hoffman and Peter J. Albert, Charlottesville: Published for the United States Capitol Historical Society by the University Press of Virginia, 1996), 157-89. Cayton presents the Southwest Territory as a largely stateless realm where white settlers "initiated and completed the conquest of the southern flank of the American republic largely on their own . . . because they had no other choice . . . [T]hey filled a vacuum left by the government of the United States." Cayton's argument has quickly become conventional wisdom among historians: e.g., Gordon S Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (Oxford: Oxford University Press, 2009), 133; Kristofer Ray, "Land Speculation, Popular Democracy, and Political Transformation on the Tennessee Frontier, 1780-1800," *Tennessee Historical Quarterly* 61, no. 3 (October 1, 2002): 171-81. One line of argument is that the federal government was unwilling to invest in the Southwest Territory because of the lack of federal lands there, though I have found little evidence to support this assertion; I suggest the reasons why I believe the federal government opted not to pursue war in the Southwest Territory in Chapter 5.

fact, the authority and legitimacy of the federal government was the subject of fierce contention within the Territory. Even as many argued that the national government had failed to fulfill its most fundamental obligation of protection, others sharply disagreed. “If ever a people lived under a desirable Government,” Territorial Judge Campbell observed in a grand jury charge, “it may truly be said to be the people of the [Southwest] Territory . . . We experience all the Advantages of Government without feeling any of its burdens.” Another argued that the Territory had flourished under federal rule, which had “establish[ed] things greatly beneficial to the people collectively.”<sup>83</sup>

This view was credible because, notwithstanding the protests, the federal government heavily subsidized the territories. Though local taxes and fees underwrote some infrastructure and parts of the judicial system, the heaviest expenses were paid from the federal treasury. The largest expense of all, protecting the territories, was borne entirely by the federal government, which paid the substantial costs of the territorial militia.

The militia was a deeply local institution that required all male citizens to serve to protect the community. Military men like St. Clair and especially Henry Knox had little respect or confidence in the militia, whom they viewed as disobedient, ill-trained, and unreliable. But territorial citizens insisted that local militia, being accustomed to Native methods of warfare, were far more effective against Native attacks. And so, in both the

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<sup>83</sup>David Campbell to Secretary of State, February 25, 1792, in *TP: Vol. IV*, 121-28; L.M., “For the Gazette,” *Knoxville Gazette*, February 27, 1794. Campbell was likely alluding to the fact that many federal taxes did not encompass the territories.

Northwest and Southwest Territories, Congress used its constitutional power to authorize the President to call out the militia to supplement the minuscule national military.<sup>84</sup>

As an institution, this federalized militia was an odd amalgam of local and national authority. Though the militia ostensibly fell under the formal control of federally appointed military commanders like Arthur St. Clair, in practice the militia had little respect for the regular army. The army did not select militia officers; localities did. Even in the territories, where the federal governors appointed militia leaders, they felt constrained to pick local notables based on their stature in the community. Whenever the militia and regular army fought alongside each other, as they did during the Northwest Indian War, there were incessant disagreements over rank and command.<sup>85</sup>

Federal officials held the formal authority to decide when and how to call out the militia. Yet distance required placing much of this authority in influential locals or in the so-called county lieutenants, the militia's local commanders. Federal officials' discretion was also heavily constrained by demands from local inhabitants: they were "teazed to death by rumours of persons killed, strong assertions & persuasions of the necessity of establishing posts at this that and the other place." Westerners had strong views, based on experience, about what "adequate" protection required—not just large numbers of general militia, but also specialized scouts, rangers, and mounted militia. Federal

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<sup>84</sup> Act of September 29, 1789, Ch. 25, 1 Stat. 95; Act of April 30, 1790, Ch. 10, 1 Stat. 119; Act of May 2, 1792, Ch. 28, 1 Stat. 268. On the early federal military, see Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York: Free Press, 1975); Francis Paul Prucha, *The Sword of the Republic, the United States Army on the Frontier, 1783-1846*, Wars of the United States (New York: Macmillan, 1968). On early militias and debates over their role in federalism, see Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford: Oxford University Press, 2006), 41-71; Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill: University of North Carolina Press, 1982). Given how contentious the issue of federal control over the militia was during ratification, the speed with which Virginia, Pennsylvania, and other states turned to the federal government to support their militia during the frontier crisis is striking. See Don Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," *The William and Mary Quarterly* 55, no. 1 (1998): 39-58.

<sup>85</sup> For instances of disputes between the militia and the regular army during the war, see Ebenezer Denny, "Copy of Lieut. Denny's Report to the Secretary at War," January 1, 1791, Reel 3, ASCP; "Report of a Special Committee of the House of Representatives on the Failure of the Expedition Against the Indians," March 27, 1792, in *SCP*, 286-99.

officials fulminated that localities were always calling up more militia than needed, and to little effect. The counties, Arthur St. Clair observed, did “not ma[k]e a very discreet use of the powers they were invested with, as to numbers.”<sup>86</sup>

In practice, then, federal officers exercised little control over either the personnel or the service of the “federal” militia. What the federal government did provide was financing. While in federal service, the militia received the same pay as regular soldiers in the federal army, from the same source—the national treasury. They also received pay for subsistence and supplies, which made the mounted rangers and scouts, with their horses, especially expensive. Henry Knox fruitlessly appealed to the militia commanders to observe the “highest oeconomy.” Instead, he lamented, the militia made “unlimited expences” and were “exceedingly inattentive to public Stores of every kind.” The pay afforded to the scouts and rangers the frontier settlers so favored was especially outrageous. “Were it carried to a considerable extent,” Knox complained, “no Government on earth could support it.”<sup>87</sup>

The numbers supported Knox’s complaints. As Native attacks escalated in the early 1790s, the federal government expended tens of thousands of dollars monthly on militia defense. In early 1791, Henry Knox predicted that militia protection for all of Virginia and Kentucky would cost \$50,000 for the year. By 1792, the Southwest Territory had an estimated 1500 militia under arms—at a time when the Territory’s population was only 35,000—at a cost for an estimated \$20,000 for three months

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<sup>86</sup> William Irvine to James White, July 22, 1787, Vol. 6, #35, JHP; Gov. Arthur St. Clair to Hon. John Brown, July 18, 1791, in *SCP*, 225-26. On empowering influential locals to call out the militia, see Henry Knox to Josiah Harmar, April 13, 1790, #76, Vol. 12, JHP.

<sup>87</sup> Henry Knox to Josiah Harmar, April 25, 1788, Vol. 7, #67, JHP; Henry Knox to Josiah Harmar, December 22, 1788, Vol. 9, #53, JHP; Henry Knox, “Circular to the County Lieutantants,” July 29, 1790, Folder 4, Harry Innes Papers, Manuscript Division, Library of Congress; Henry Knox to Harry Innes, April 13, 1790, Folder 4, Harry Innes Papers, Manuscript Division, Library of Congress.

protection. By 1793, the Territory spent \$37,517.69 on militia for protection against Cherokees and Creeks during October and November alone; Henry Knox feared that costs would top \$100,000 by February. Expenses in the isolated Mero District, around Nashville, were especially heavy: Blount calculated that they were four times greater than those elsewhere in the Territory.<sup>88</sup>

To pay these claims, literal chests filled with tens of thousands of dollars made their way to the office of David Henley, the army's paymaster in Knoxville. Henley later recounted being completely overwhelmed, as he had to process hundreds of thousands of dollars in claims and payments almost single-handedly (his ineffectual assistant, an untrained army officer, later vanished, leaving his accounts \$50,000 in arrears).<sup>89</sup>

Though many territorial inhabitants regarded these measures as inadequate, others recognized that the Southwest Territory received a double benefit from these federal expenditures, as the writer L.M. observed in the *Knoxville Gazette*. For one, "the citizens have been protected . . . the force of the Territory has been called out." For another, "for these services they are and will be paid, in money, a medium of trade, general and efficacious." L.M. noted that under North Carolina's rule, the only currency in circulation was near-worthless state paper, which was nonetheless in short supply. Now, thanks to the federal government, "a medium of commerce, viz. gold and silver, has been introduced," leading, in L.M.'s view, to the "rise and growth of every little town."<sup>90</sup>

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<sup>88</sup> "Report from H. Knox, Secretary of War, to the President of the United States, Relative to the Northwestern Indians," January 5, 1791, *ASP:IA*, 2:108-09; Hugh Williamson to John Gray Blount, December 12, 1792, in *JGBP*, 2:221-22; "David Henley In Account with David Allison," October 21-November 6, 1793, Folder 3, WBP:LC; William Blount to James Robertson, April 15, 1794, in *TP*, Vol. VI, 340-31.

<sup>89</sup> David Henley to Gabriel Duvoll, March 3, 1808, Box 1, Folder 41, David Henley Papers, Tennessee State Library and Archives.

<sup>90</sup> L.M., "For the Gazette," *Knoxville Gazette*, February 27, 1794.



Inhabitants soon came to see militia claims as nearly as central to the local economy as land rights—like title, “the [militia] Certificates became as it were a circulating Medium thro’ out the Territory.” Militia claims also presented the same hazards as land ownership in the Territory. Just as North Carolina had attempted to halt fraud through bookkeeping, the War Department outlined an elaborate payment procedure involving extensive paperwork, stipulating that militia commanders provide triplicate receipts, to regulate the massive flow of funds. But this failed to stop abuse. In one instance, a muster master allegedly skimmed four dollars from the pay of every officer. In another, commander reportedly mustered more men than really served; he then distributed the pay for these phantom soldiers among the actual militia.<sup>91</sup>

More common than outright fraud, however, was a complicated system of speculation in militia claims. Because of the delay in federal payment, and because of the shortage of specie in the Southwest Territory, soldiers entitled to militia payments routinely assigned them at a discount to other parties, who then passed them along as currency; storekeepers frequently accepted militia vouchers as payment. Many of these assignments were done informally, often lacking the name of the attorney, witness, or even party involved in the transfer, but nonetheless securing the required endorsement of a justice of the peace. Territorial citizens were, in essence, trading and gambling on federal credit, a practice that Secretary of War Timothy Pickering complained was “unauthorized” and pernicious. His fear was that those who had actually served would be “injured” while “persons who have speculated on their claims” would receive “unjust

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<sup>91</sup> Timothy Pickering to David Henley, May 29, 1795, Folder 9, Timothy Pickering Letters, Ayers 926, Newberry Library; James McHenry to David Henley, May 18, 1797, Box 2, James McHenry Papers, Clements Library; William Clairborn to David Henley, January 31, 1796, Box 1, Folder 21, David Henley Papers, Tennessee State Library and Archives.

emolument.” Once again, Pickering fretted, local practices wrested ostensibly federal authority out of the hands of federal officials, even as territorial citizens would blame the federal government for its inattentiveness to their needs.<sup>92</sup>

But if territorial citizens proved remarkably effective at repurposing federal funds to their own ends, the federal government also received an ostensible benefit from the seemingly ceaseless flow of federal funds to pay the militia. If nothing else, federal finance was a source of federal power that gave federal officials authority over a militia otherwise largely outside meaningful federal control. Federal officials could, and did, refuse to pay expenses that they regarded as unauthorized.

A particularly fierce controversy raged around the Beard and Ore expeditions of 1793 and 1794. As discussed in the previous chapter, these expeditions flagrantly violated federal law, but efforts to hold the perpetrators legally accountable failed. Territorial citizens brazenly argued that not only were the expeditions legally justifiable, but that Congress was obligated on “equitable” grounds to repay their expenses from the public treasury. For Ore’s expedition, James Robertson even signed off on the muster rolls required for federal reimbursement. William Blount was shocked at the audacity. There was not “the most distant hope that the Perpetrators of such lawless unauthorized acts could expect the least Pecuniary Reward for their trouble, for services I cannot call them.” Blount told Robertson. “I know not the price I would take to report such an order to the War office.”<sup>93</sup>

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<sup>92</sup> Timothy Pickering and Oliver Wolcott to John McNairy, May 30, 1795, Folder 23, Timothy Pickering Letters, Ayers 926, Newberry Library. On the use of militia vouchers for payment to merchants, see Durham, *Before Tennessee*, 227.

<sup>93</sup> A Fellow Citizen, “For the Knoxville Gazette,” *Knoxville Gazette*, April 6, 1793; William Blount to James Robertson, September 9, 1794, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 3, no. 4 (October 1, 1898): 357.

In the short term, Blount's predictions were right: successive Secretaries of War, in authorizing the Territory's militia payments, refused to pay the costs of the offensive military operations, even going so far as to instruct the paymaster to parse out which militia companies had remained within territorial boundaries. Blount noted that this refusal was a "great Disappointment" to many speculators, who were "deeply interested . . . holding many of the claims." One territorial resident complained that his "whole time" was taken up trying to obtain reimbursement. Another stated that, as a consequence of this refusal, the inhabitants' "Confidence in the General Government [was] lost." When a grand jury in Hamilton District presented its grievances against the government in 1795, two of its four complaints stemmed from frustration that the national executive refused to pay these expenses under the "*pretence*" that they were offensive operations.<sup>94</sup>

The jury offered an implicit theory for this apparent failure: states that had representatives, they noted, had received both payment and protection from the federal government. This explanation for the Territory's seeming mistreatment by Congress held widespread currency. Increasingly, citizens concluded that the Territory's political problems stemmed from its constitutional status: as one writer observed in the *Knoxville Gazette*, "All dependent governments are deficient as to form." Were the Territory represented in Congress, another *Gazette* writer opined, the relation of their sufferings would wring tears from the walls themselves, if not from the unfeeling congressmen. William Blount himself hinted that Ore's expedition would have been warranted in "states who have Senators and Representatives in the Public Councils." But there was

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<sup>94</sup> William Blount to John Gray Blount, October 26, 1794, in *JGBP*, Vol. 2, 448-50; Robert Hays to William Blount, April 1, 1794, Folder 6: 1794, WBP:LC.; William Clairborn to David Henley, January 31, 1796, Box 1, Folder 21, David Henley Papers, Tennessee State Library and Archives; "Hamilton District, Superior Court of Law, April Term, 1795," *Knoxville Gazette*, April 24, 1795.

also a remedy: the Territory held the power to cast off their territorial status and assume statehood. Anxiety over Indian affairs led multiple voices to argue that the Territory should seek admission as a “member state of the federal union” as “speedily as possible.”<sup>95</sup>

In some ways, these calls proved prescient. After Tennessee’s admission to statehood, disgruntled militia members submitted petitions to Congress requesting payment, first for Beard’s 1793 expedition and later for Ore’s 1794 attack. Congress referred the petitions to Secretary of War James McHenry, who urged that Congress not pay the costs of either expedition, which had flouted federal law. He provided especially lengthy documentation on the illegality of Ore’s attack. But Tennessee’s newly elected congressman, Andrew Jackson, who himself had served as a private in Ore’s brutal expedition, agitated strongly for payment of the 1793 expedition by employing the overwrought anti-Indian rhetoric of the era—“the knife and the tomahawk,” he recounted for Congress, “were held over the heads of women and children.” When the petition was referred back to committee, Jackson secured a position as chairman, producing a report that once again stressed Indian perfidy, suggested that the President’s militia authorization had legitimated the attacks, argued that the Territory enjoyed a separate right under the Constitution to repel attacks, and insisted that the militiamen were simply following orders. Without much discussion, Congress authorized payment as part of the yearly military appropriation, an action that a correspondent told Jackson “has heightened the esteem of the people, for the General Government, and secured to yourself a

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<sup>95</sup> “Hamilton District, Superior Court of Law, April Term, 1795,” X, “For the Knoxville Gazette,” *Knoxville Gazette*, April 20, 1793.; “Mr. Roulstone,” *Knoxville Gazette*, August 13, 1793; Blount to Robertson, September 9, 1794, “Knoxville, Monday, August 25,” *Knoxville Gazette*, August 25, 1794; William Blount to James Robertson, November 22, 1794, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 3, no. 4 (October 1, 1898): 374-75.

permanent interest.” Jackson’s successor in office, William Clairborne, soon accomplished the same feat with Ore’s even more dubious expedition. Like Jackson, Clairborne focused on the individual militiamen; how were they to know that their commander lacked legitimate authority? Congress agreed to the payment without opposition. Perhaps the earlier heated debates on unauthorized expeditions had exhausted them, or they were apathetic about a retroactive issue. But Jackson and Clairborne cared deeply, and their passion prevailed.<sup>96</sup>

There was, of course, an irony about the newly “independent” state proving its autonomy by lapping at the federal trough. But it in many respects, it was entirely consistent with the territories’ creation and development. Territorial citizens may have viewed themselves as dependent in name only, but in many respects they were wards of the national government in practice as well as in theory. Federal officials recognized this reliance: “[T]he expence of protecting such distant settlements greatly exceeds the value of them,” Henry Knox wrote. Nonetheless, the funds kept flowing despite this assessment, demonstrating how frontier citizens proved even more effective than Natives at using some of the same sources of leverage—their dubious allegiances in a competitive and unsettled borderland—to wring cash from the federal government. In the process, federal expenditures buoyed and expanded an often marginal economy. “All the Stirrings of Industry” had been “set in Motion by the circulation of [federal] Money,” Arthur St. Clair reported from the Northwest Territory, in urging that yet more funds be expended

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<sup>96</sup> *Letter from the Secretary at War, Inclosing His Report on the Petition of Hugh Lawson White . . .* (Philadelphia: William Ross, 1797); *Letter from the Secretary of War, Inclosing His Report on the Petition of Stephen Cantrill, . . .* (Philadelphia: Joseph Gale, 1798); *Annals of Congress*, 4 Cong., 2nd Sess., 1737-38; “Speech before the U.S. House of Representatives,” in *Jackson Papers*, December 29, 1796, 1:106-07; William C. C. Claiborne to Andrew Jackson, July 20, 1797, in *Jackson Papers*, 1:146-48; Act of Mar. 3, 1797, 1 Stat. 508; Act of May 8, 1798, Ch. 41, 1 Stat. 556; *Annals of Congress*, 5th Cong., 2nd Sess., 1521-22. On anti-Indian rhetoric and its political uses in this era, see Peter Rhoads Silver, *Our Savage Neighbors: How Indian War Transformed Early America* (New York: W.W. Norton, 2008).

there. Such money “like a gentle stream fertilize[d] and beautif[ied] the whole Country through which it flowed.”<sup>97</sup>

Some territorial citizens recognized that they benefitted from these expenses, but they viewed such payments as nothing more than their due—merely the fulfillment by the federal government of its obligation, under the “social compact,” to protect all parts of the federal union. It did little to alter the tendency of territorial residents, especially in the Southwest Territory, to view themselves as abandoned by distant politicians untroubled by their destruction, and to view their survival as largely thanks to their own self-reliance rather than government aid. Thus it was that those in the territories could describe themselves, without any apparent awareness of irony, as of that “class of men, that earn their scanty living by hard labour, and who do not seek in the sweets of the general Government, to their aid.”<sup>98</sup>

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In 1807, Joseph Buell wrote to an unknown correspondent on “business of trifling consequence.” Buell, from Marietta in the new state of Ohio, wanted to know what he should do with a small cannon given the town by the federal government during the Indian war, “in our former stage of government.” Now, he reported, the gun’s “principal use” was the “discharging of it on the 4th of July, Reechoing the toasts drank in contempt to the Genl Government.”<sup>99</sup>

The “small field piece” Buell described was part of the stream of federal largesse that had flowed into the territories throughout the 1790s. The national treasury had paid

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<sup>97</sup> “Report of the Secretary of War to the President,” December 10, 1790, *TP, Vol. II*, 313-14; Arthur St. Clair to Unknown, January 24, 1790.

<sup>98</sup> Griffin Greene to Winthrop Sargent, November 25, 1792, Reel 3, WSP.

<sup>99</sup> Joseph Buell to [unknown], July 2, 1807, Box 4, Marietta, Ohio Collection, Ohio Historical Society.

the extravagant costs of the national military campaign against the Northwest Indian Confederacy, but it had also paid for corn for the Chickasaws, ruffled shirts for Cherokee leaders, goods to compensate relatives of murdered Haudonesaunees as well as white owners of horses stolen in the Southwest Territory, and the costs of the territorial militia. For all their insistence on economy, federal officials were quick to turn to federal funds to try to placate the repeated and competing demands placed on them by both Native and non-Native inhabitants of the territories.

Such largesse reflected an amalgam of federal constraint and power. Federal officials turned to money when law failed: compensation made up for the federal government's inability to control and punish Natives and white settlers. They also used money to try to secure the fickle allegiances of both groups. But even these generous expenditures proved a blunt, and often ineffective, method of making policy. Much-courted Native leaders like John Watts commanded attacks on the Southwest Territory, while the territorial militia secured federal funds for expeditions in flat contravention of federal orders and at odds with federal goals. In part, this seeming failure stemmed from democracy: federal officials could not always rely on Congress to support them, especially after statehood gave former territories much more voice in national councils. But it also reflected the broader challenge of governing the borderlands, where there were multiple centers of power, and authority, allegiance, and identity all proved fluid.

Yet in the long run, federal largesse proved a potent tool in securing at least some of the fickle allegiances of territorial inhabitants, both Native and non-Native, to the national government. Many early Americans had a hard-headed understanding of the

role of self-interest in governance. “[M]ankind are every where governed by their Interest however variously modified,” the venal James Wilkinson argued. “To select, seize, & turn to advantage the predominant passion is the depth of political science.” Others extended this interest-based theory of politics to Indian affairs. “The great object in managing Indians, or indeed any other men, however enlightened, is to obtain their confidence,” Henry Knox instructed William Blount (who presumably well understood the role of self-interest in creating attachments). “This cannot be done but by convincing them of an attention to their interests.” Many Tennesseans and Natives, of course, remained deeply skeptical of the federal government. But secessionist sentiments in the West waned, and federal patronage produced powerful pro-American factions within many Native nations; future Native struggles against the United States quickly became civil wars.<sup>100</sup>

For both Natives and territorial citizens, the concept of dependence played a central role. As scholars have noted, concepts of dependency were first applied to people of color, including Natives, before being transferred to certain recipients of state aid more generally. Anglo-Americans increasingly employed dependence as a term of art to describe both the purported reality and the legal status of Native nations within the United States. Over time, Native “dependence” became a free-floating justification for federal authority over all Indians.<sup>101</sup>

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<sup>100</sup> Gen. James Wilkinson to Diego Gardoqui, January 1, 1789, James Wilkinson Letters, Beinecke Library, Yale University, New Haven, Conn.; Secretary of War to William Blount, April 22, 1792, in *TP: Vol. IV*, 137-42. On the role of federal patronage in producing divisions within Native societies, especially in the Southeast, see Claudio Saunt, *A New Order of Things: Property, Power, and the Transformation of the Creek Indians, 1733-1816* (Cambridge, U.K: Cambridge University Press, 1999); Gregory Evans Dowd, *A Spirited Resistance: The North American Indian Struggle for Unity, 1745-1815* (Baltimore, Md: Johns Hopkins University Press, 1992), 117-90.

<sup>101</sup>For the history and development of the concept of dependence in American history, see Nancy Fraser and Linda Gordon, “A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State,” *Signs* 19, no. 2 (1994): 309–36. On Native economic



The history traced here suggests that the linkage of dependency between Natives and the people who would later be termed “welfare recipients” was more direct than historians have recognized: the federal “bounty” bestowed on Natives made them among the first creators and beneficiaries of what would later become scholars have dubbed “the national welfare state.” Though most work on the welfare state’s early antecedents has focused on pensions and payments to veterans, Natives presented a different case, as their claim of national resources stemmed not from service or merit, but, at least ostensibly, from poverty and humanitarian impulses. The federal government’s authority over Indian affairs also meant that supplying Natives was a national project, unlike the deeply local schemes of poor relief that operated within Anglo-American society. Already, by the late eighteenth century, neighboring Anglo-Americans had come to view Natives as the wards of a paternalist federal government.<sup>102</sup>

The deep irony was that it was precisely because the Shawnees, Delawares, Cherokees, Chickasaws, and Choctaws were “*independent* tribes of Indians,” in Henry Knox’s words, that they were able to extract such concessions. Even if Natives’ white neighbors attempted to thrust the two together, Indian affairs and “welfare” were

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dependence, see Richard White, *The Roots of Dependency: Subsistence, Environment, and Social Change Among the Choctaws, Pawnees, and Navajos* (Lincoln: University of Nebraska Press, 1983); Stephen Aron, *How the West Was Lost: The Transformation of Kentucky from Daniel Boone to Henry Clay* (Baltimore: Johns Hopkins University Press, 1996), 198. Chief Justice Marshall famously termed Native peoples as “domestic dependent nations,” *Cherokee Nation v. Georgia*, 30 U.S. (5 Peter) 1 (1831). Later, the Supreme Court would employ Marshall’s language to justify expansive federal power over Indians, describing their “weakness,” “helplessness,” and “dependen[ce] on the United States . . . for their daily food.” *United States v. Kagama*, 118 U.S. 375 (1886). For further exploration of the legal significance of the concept of dependence for Natives, see Gregory Evans Dowd, *War Under Heaven: Pontiac, the Indian Nations & the British Empire* (Baltimore: Johns Hopkins University Press, 2002), 174-211; Gregory Ablavsky, “Beyond the Indian Commerce Clause,” *Yale Law Journal* 124, no. 4 (2015): 1012–90.

<sup>102</sup> On the early history of “welfare” in the United States, see Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1995); Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America*, (New York: BasicBooks, 1996); Laura Jensen, *Patriots, Settlers, and the Origins of American Social Policy* / (Cambridge, UK: Cambridge University Press, 2003); Gautham Rao, “Administering Entitlement: Governance, Public Health Care, and the Early American State,” *Law & Social Inquiry* 37, no. 3 (2012); Kristin Collins, “Petitions Without Number”: Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements,” *Law and History Review* 31 (2013): 1–60. On the link between Natives and welfare in a much later period, see Karen M. Tani, “States’ Rights, Welfare Rights, and the ‘Indian Problem’: Negotiating Citizenship and Sovereignty, 1935-1954,” *Law and History Review* 33 (2015): 1–41.

different, and neither Native peoples nor federal officials, at least in their more candid moments, regarded Native nations as dependents. Strategically positioned in the borderland between the United States, Spanish Louisiana, and British Canada, these nations were outside the control of any Euro-American power, which made them all compete to secure Native allegiances. Both Natives and federal representatives, then, interpreted federal gifts through the lens of allegiance and diplomacy, as the price of Native friendship. But this history of empowered Natives and conciliatory, even obsequious, federal officials was forgotten, leaving behind a narrative in which the continued flow of hundreds of thousands of federal dollars into Indian country was a symbol of Native weakness rather than strength.<sup>103</sup>

Another irony was that the territorial inhabitants, for all their disdain for Natives' reliance on federal goods, were also "dependent" on the United States. This was true not just in the term's formal political meaning but also in an economic sense, as federal money was a primary driver of the territorial economy. But, just as recipients of national funds would later be distinguished based on the contrast between "needs" and "rights," territorial inhabitants did not see themselves as equivalent to Natives; they regarded themselves as entitled to the largesse they received. They saw the federal government's enormous expenditures on defense and particularly the militia as merely their due, part of their "right" to receive protection from the national government.<sup>104</sup>

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<sup>103</sup> Henry Knox to George Washington, July 7, 1789, in *PGW:PS*, 3:134-40.

<sup>104</sup> The contrast between "needs" and "rights," and its consequences for the American state and its social policies, is a central theme of the work of Linda Gordon. See Linda Gordon, ed., *Women, the State, and Welfare* (Madison, Wis: University of Wisconsin Press, 1990); Linda Gordon, *Pitied but Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (Cambridge, Mass.: Harvard University Press, 1995).

In the long run, this rhetoric of entitlement proved remarkably effective. Native “dependents” of the federal government ultimately received its benevolence through their forcible eviction from their homelands. This process destroyed the wealth Native nations had assembled—farms, plantations, livestock, and slaves, much accumulated as a result of conscious federal efforts to use gifts to encourage the adoption of American modes of agriculture—and forced Natives to places where they truly did rely on meager federal rations for survival. Meanwhile, the citizens of the former territories, now risen to the “independent” status of statehood, prided themselves on their autonomy and self-reliance, firing off federal cannons to condemn the national government.<sup>105</sup>

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<sup>105</sup> On Native wealth and its destruction, see Alexandra Harmon, *Rich Indians: Native People and the Problem of Wealth in American History* (The University of North Carolina Press, 2013), 55-132. As other historians have pointed out, this concept of self-sufficiency in face of dependence on the federal government created a pattern that governed much of western expansion: as Richard White observes, “More than any other region, the West has been historically a dependency of the federal government,” but westerners envisioned themselves as a “people who carved out their own destiny.” Richard White, *It’s Your Misfortune and None of My Own* : *A History of the American West* (Norman : University of Oklahoma Press, 1991), 57–59.

## **PART III: STATEHOOD**

## Chapter 7: Statehood, Precedent, and Federal Power

In 1796, the Southwest Territory became the first U.S. territory to seek admission as a state. The Northwest Ordinance provided some guidance on admission: it stipulated that the territories would be admitted once they had 60,000 free (non-Native) inhabitants, though they could be admitted earlier at Congress's discretion. But the Ordinance left many other questions unresolved. As a result, Congress debated the Territory's statehood at length, focused less on the new state of "Tennessee" than on the future. "Other States would be rising up in the Western wilderness, and claiming their right to admission," Representative Smith of South Carolina observed at the outset of the debate, "and therefore the precedent now to be established, was of very considerable importance."<sup>1</sup>

In admitting Tennessee and, six years later, the eastern portion of the Northwest Territory, "Ohio," Congress began to clarify these undetermined issues. Some questions concerned process: could Tennessee claim admission as of right, or did it require a special act of Congress? But other issues centered on the long-term division of authority between the United States and the newly admitted states. People in the territories-cum-states, as well as in Congress, had to work through the tangle of property, jurisdiction, and sovereignty that lay latent, and unresolved, in much territorial practice. In particular, with the end of direct federal sovereignty, early Americans had to determine how much of the deep federal involvement in governance throughout the territories would be similarly unspooled.

Unsurprisingly, these controversies came to turn on land and Indian affairs. In part, this was because federal power over both the public domain and Indian affairs rested

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<sup>1</sup> 5 Annals of Cong. 1303-04 (1796).

on constitutional sources other than federal authority over the territories. But even more meaningfully, as we have seen, administering land and Indian affairs was the bulk of what federal territorial governments did. The result was a robust federal administrative structure of Indian agents and land offices independent of the territorial executive, judicial, and legislative branches that passed from federal to state control. At the time, precisely because these issues mattered so much for daily governance, newly admitted states, especially Tennessee, were anxious to claim authority in these areas. Defying the federal government, they sought to assert jurisdiction over both the public domain and Native diplomacy.

The confrontations that followed were framed in era's high rhetoric of federalism—as a clash over the meaning of sovereignty, territorial jurisdiction, and the Northwest Ordinance's promise that the new states would be admitted “on an equal footing with the original States in all respects whatsoever.” But underlying these broad struggles over constitutional meanings lay more immediate controversies in which interests loomed just as large as ideology. In these conflicts, the states and the federal government served as the proxies for rival claimants. This was particularly true in Tennessee, where issues of the public domain and Indian affairs swirled together in a struggle over Cherokee land rights. As quasi-legal settlers turned to state jurisdiction while the Cherokees sought federal vindication, the dispute demonstrated the stakes at issue in determining which sovereign would arbitrate property and jurisdictional

conflicts. In this sense, the constitutional struggles over federalism on state admission represented a fight over adjudicatory authority.<sup>2</sup>

In Tennessee, the federal government ultimately gained what seemed a Pyrrhic victory: it maintained its authority in principle even as it ceded Tennessee the power the state sought, leaving the Cherokees to bear the costs of this capitulation. But, because of precedential stakes, even this limited success had important consequences. In particular, when Ohio subsequently sought admission, the federal government asserted its authority by forcing the state to disclaim its rights to the public domain. Because of the unique political circumstances of Ohio's statehood, the state acquiesced. The result was that the practice became entrenched part of constitutional practice. In this sense, the federal government's brief moment of sovereignty in the territories resulted in a durable expansion of federal power.

This process also offers a corrective to the predominant scholarly narrative, which interprets the structure of dual sovereignty created by early American federalism as an embrace of localism and diversity. Yet, as we have seen, these values flourished in the territories even when sovereignty, jurisdiction, and ownership were formally all united under the federal government. This was because foreign jurisdictions, secessionist movements, and wild-eyed plans for self-sovereignty all contended with the United States for authority. Statehood collapsed these contentions into the overarching divide between federal and state sovereignty, thereby channeling preexisting conflicts such as the struggles between the Cherokees and their neighbors into a structural contest between state and federal authority. The vision of state territorial sovereignty that Tennessee and

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<sup>2</sup> Northwest Ordinance, Ch. 8, 1 Stat. 50, 53 (1789)

other states came to champion offered more homogeneity, not less; it sought to transform the borderlands into the “ordinary jurisdiction” of state control.<sup>3</sup>

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That federal land ownership of public lands became a question at all was surprising given the text of the Northwest Ordinance, which provided that the “legislatures of . . . [the] new States shall never interfere with the primary disposal of the soil by the United States in Congress assembled.” But Ordinance’s continued status after statehood was an open question. Although most regarded the Ordinance as a constitutional document, its status as a compact meant that, upon statehood, the former territorial residents were arguably entering a new and different agreement with the federal government.<sup>4</sup>

The first test of this provision came in the Southwest Territory, where frustration with federal rule made the desire for statehood nearly unanimous. “People here almost without Exception are for a State,” territorial governor William Blount wrote. In late 1795, Blount commissioned a census that reported that the Territory had 77, 262 free inhabitants, well over the 60,000 inhabitants required for statehood under the Ordinance. Blount, concluding that this now made the Territory “a State of Right,” accordingly issued a proclamation calling for a constitutional convention.<sup>5</sup>

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<sup>3</sup> For work on federalism in this period, most of which focuses on high politics and constitutional history, see Alison L LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass: Harvard University Press, 2010); Gordon S. Wood, “Federalism from the Bottom Up,” *The University of Chicago Law Review*, 2011, 705–32, Saul Cornell and Gerald Leonard, “The Consolidation of the Early Federal System, 1791-1812,” 518-54.

<sup>4</sup> *Journals of the Continental Congress*, 32:334-43. On the uncertain status of the Northwest Ordinance after statehood, see Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington: Indiana University Press, 1987).

<sup>5</sup> William Blount to James Robertson, February 2, 1795, in “The Correspondence of Gen. James Robertson,” *The American Historical Magazine* 4, no. 2 (April 1, 1899): 171-72; “Enumeration of Inhabitants of the Southwest Territory,” November 28, 1795, Reel 2: Territory Southwest of the River Ohio, Senate Territorial Papers (microfilm), M200, U.S. National Archives; William Blount to John Gray Blount, March 28, 1795, in *JGBP*, 2:520-23; “Proclamation by Governor Blount,” November 28, 1795, in *TP: Vol. IV*, 407-08. Although Tennessee was the first state created from the U.S. territories, the process of its statehood has received little scholarly



The convention met in January 1796, in the office of War Department paymaster David Henley, the War Department's paymaster, one of the few public buildings in Knoxville. Over next two and a half weeks, the convention drafted a proposed constitution similar to other state constitutions of the time. What made the draft constitution exceptional was the attention it devoted to land. One article of the declaration of rights specifically guaranteed the right of preemption to the settlers south of the French Broad River. The initial draft of the proposed constitution also outlined the boundaries of the new state and enshrined the state's "Sovereignty and right of Soil" within the borders. But a somewhat confusing qualifier was subsequently added that the state claimed the right of soil only "so far" as consistent with the U.S. Constitution, the North Carolina Bill of Rights and Constitution, the Northwest Ordinance, and North Carolina's act of cession; this provision also stipulated that nothing in the State Constitution would affect individual claims guaranteed under the Cession Act. It was this ambiguous version that secured approval from the Territory's inhabitants.<sup>6</sup>

As adopted, then, Tennessee's Constitution merely acknowledged the confusing muddle of federal, state, and individual claims that had characterized the Tennessee country from the beginning. Noticeably absent were Native land rights, even though federal treaties guaranteed Cherokee and Chickasaw ownership of most of the land within state's new boundaries. One commentator, writing to President Washington, found "the Instrument called a Constitution" defective, reflecting its hasty drafting. At the very

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attention. For exceptions, see Jo Tice Bloom, "Establishing Precedents: Dr. James White and the Southwest Territory," *Tennessee Historical Quarterly* 54, no. 4 (December 1, 1995): 324–35; Samuel C. Williams, "The Admission of Tennessee into the Union," *Tennessee Historical Quarterly* 4, no. 4 (December 1, 1945): 291–319.

<sup>6</sup> *Journal of the Proceedings of a Convention, Began and Held at Knoxville, January 11, 1796* (Knoxville: Printed by George Roulstone, 1796), 9–10; Tenn. Const. of 1796 (superseded 1835), Art 11, §§ 31, 32. For more background on the convention, see Edward Terry Sanford, *The Constitutional Convention of Tennessee of 1796* (Nashville, Tennessee: Marshall & Bruce, 1896).

least, he urged, an article should be added “recognizing the right of the United States to dispose of the lands occupied by the Indians, and also the vacant lands within the limits prescribed by the Treaty of Holstein [Holston].”<sup>7</sup>

When Congress received a copy of Tennessee’s Constitution, its response was mostly astonishment at the seeming effrontery of the would-be state: Tennessee had conducted the census and drafted its constitution on the strength of its own authority alone, without any congressional authorization. An intense debate followed over the quasi-metaphysical question of when, exactly, Tennessee had become a state, and whether Congress had a role in deciding statehood. Representative Albert Gallatin, from western Pennsylvania and a supporter of the nascent Republican Party, argued that the Southwest Territory “became *ipso facto* a State the moment they amounted to 60,000 free inhabitants,” and that Congress was obliged to recognize this fact under the terms of the Northwest Ordinance. Others insisted that residents could not “at their own mere will and pleasure” simply declare themselves a separate state, which required congressional approval. Some saw politics at work in this opposition: William Blount, for instance, suspected that the delay was due largely to fears that Tennessee would join other southern states in opposing John Adams’s presidential campaign. But letters from territorial citizens indicated that they, too, held divergent views on this question.<sup>8</sup>

Another line of debate focused on the seeming deficiencies of Tennessee’s Constitution. Several congressmen wished that the conditions and restrictions of the

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<sup>7</sup> Arthur Campbell to President [Washington], February 18, 1796, in *TP: Vol. IV*, 420.

<sup>8</sup> 5 Annals of Cong. 1300-30 (1796); William Blount to John Sevier, June 2, 1796, William Blount Papers, McClung Historical Collection, Knoxville, Tenn; James Winchester to John Sevier, July 19, 1796, Box 2, Folder 1, James Winchester Papers, Tennessee State Library and Archives; John McNairy to John Sevier, July 24, 1796, Box 2, Folder 1, John Sevier Papers, 1796-1801, First Administration, Governor’s Papers, Tennessee State Library and Archive.

Northwest Ordinance had been explicitly written into the document. In particular, the issues of lands, both Native and federal, loomed large, just as they had for the Tennesseans. James Hillhouse of Connecticut, long the House's leading defender of Native title, expressed concern over the breadth of the state's territorial claims and advocated redrawing the state's borders to exclude Indian lands, a proposal echoed by other northern congressmen. Proponents of Tennessee's statehood responded by insisting all the laws of Congress would still apply, obviating the need for further guarantees of title. The ordinance would remain "paramount" to the state's constitution, the Trade and Intercourse Act barring settlement on Indian lands would provide security for Native title, and North Carolina's still-valid cession ensured that all unappropriated lands would belong to the United States. In the end, statehood ultimately prevailed, though Congress, seeking to affirm its authority over the process of admission, lamely enacted a statute retroactively authorizing Tennessee's actions.<sup>9</sup>

Yet what seemed like settled law when viewed from Congress turned out to be much more open in the minds of Tennesseans, producing what one congressman had accurately predicted might be "disagreeable discussions." In particular, weeks into its first sitting and only two months after official statehood, the Tennessee Assembly raised the question of ownership of the public lands in a remonstrance to Congress. Though the Assembly limited its claim to an insistence that Congress honor its obligations under the North Carolina cession by satisfying North Carolinian land grants, the remonstrance's language swept more broadly, insisting on the state's "equal footing" and emphasizing the guarantee of each state's "right of soil and sovereignty" implied by the Treaty of Paris

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<sup>9</sup> 5 Annals of Cong. 1300-30 (1796); Act of June 1, 1796, ch. 47, 1 Stat. 491.

and congressional actions during the American Revolution. In forwarding the petition to Andrew Jackson—Tennessee’s new congressional representative—John Sevier, the newly elected governor, made the implied link between property and sovereignty explicit. In his view, “the state of Tennessee is reinvested with all the right of domain [i.e., ownership]” that North Carolina had held prior to cession. Otherwise, the promise in the federal statute admitting Tennessee “on an equal footing with the original States, in all respects whatever” would be violated, since Tennessee would “not equally stand possessed of those free and independant rights the original States enjoy.”<sup>10</sup>

Jackson strongly agreed with Sevier’s position. Tennessee’s sovereignty, he stressed, was enshrined in both the federal constitution and in the act of admission, and ownership was an integral aspect of sovereignty. “[T]he right to the Soil,” he told Sevier, “is so firmly invested in the sovereignty of the State, both by Constitutional principles and by the law of nations added to that . . . that nothing but the act of the Strong hand of power itself, can divest us of that right.” The United States, he emphasized, had “no solid Legal ground” for its claim to land within the state; he seconded Sevier’s reliance on the equal footing doctrine, since otherwise “the right of Domain is not a right which must be preposterous and perversion of the English Language.” A year later, Jackson reported rumors that Alexander Hamilton concurred with their position: the former Secretary of the Treasury supposedly opined that “the vacant soil belongs indubitably to the sovereignty of the State.”<sup>11</sup>

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<sup>10</sup> “Address and Remonstrance of the General Assembly of the State of Tennessee,” [August 9, 1796], in *ASP:IA*, 1:625-26. The date is taken from J. G. M. Ramsey, *The Annals of Tennessee to the End of the Eighteenth Century* (Charleston, S.C: J. Russell, 1853), 675–76. Sevier quotation from John Sevier to Andrew Jackson, December 12, 1796, in *PAJ*, 1:102.

<sup>11</sup> Andrew Jackson to John Sevier, January 18, 1797, in *PAJ*, 1:116-18; Andrew Jackson to John Overton, January 22, 1798, in *PAJ*, 1:168-71. Jackson was perhaps referring to Hamilton’s written opinion in the Yazoo controversy, which argued that the Contract

In crafting their arguments from sovereignty, Jackson and Sevier passed over in silence the question of the Northwest Ordinance and its guarantee of federal title. But their claims represented less a repudiation of the Ordinance than an emphasis on its contradictions. The equal footing doctrine and the codification of federal land ownership were only reconcilable based on a highly formalist divide between state jurisdiction on the one hand and property on the other hand. But as Jackson and Sevier convincingly argued, this dichotomy was untenable in either early American law or, even more meaningfully, practice. As Jackson and Sevier knew from first-hand experience, governing the public domain and its distribution was perhaps the most significant form of sovereignty in the Tennessee country.

Related to their anxieties over land were Sevier and Jackson's concerns about federal overreach in Indian affairs. "In you alone is Constitutionally invested the authority and power of protecting the State," Jackson informed Sevier after the governor told him of state plans to try to prosecute Natives for crimes against the white citizens. Authority over such matters, Jackson emphasized, "are powers, that Consistant, With the Sovereignty retaind. by the States, properly belong to Each Individual State, which never ought on any account to be Surrender to the General Government." This led Jackson to an extended attack on the President for "Grasping after power" he did not constitutionally enjoy and threatening to "overwhelm[]" the "Sovereignty of the Individual States." Jackson singled out for attack the federal officer David Henley, who remained in

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Clause prohibited Georgia's repeal of its land sales to the Yazoo Companies. Robert Goodloe Harper, *The Case of the Georgia Sales on the Mississippi Considered . . .* (Philadelphia: Printed by Richard Folwell, 1799), 88-89. However, Hamilton specifically disclaimed any determination as to whether Georgia had legitimate title to the land that it had sold. *Ibid.*

Tennessee as army paymaster and was now invested with authority to “superintend[] the Indian affairs.” This position, Jackson complained, was unsanctioned by “any law that I can find.”<sup>12</sup>

Consistent with this theory, Sevier conducted his own diplomacy with the Cherokees and Creeks. As authorized under federal law, he issued passports permitting U.S. citizens to travel into Indian country. But he went further, routinely corresponding with Native leaders and dispatching his own representatives into Indian country, and seemingly arrogating to Tennessee the right to determine whether the state would honor federal Indian treaties. To justify this seeming usurpation of federal law and prerogative, he contrasted his own “extensive acquaintance with several Indian tribes upwards of thirty years” with the callow and ignorant young men the federal government employed as its agents. Moreover, he told Secretary of War McHenry that, “notwithstanding the [federal] Agents resident among them,” much of the Cherokee nation lay “within our territorial limits,” which required that the state government be “constantly engaged, and much time taken up, in the transaction of indian business.”<sup>13</sup>

The boldest challenge to federal authority over Indian affairs, however, came from William Blount. The former territorial governor had a new position as one of Tennessee’s new U.S. senators. But this recognition did not seem to satisfy Blount, who

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<sup>12</sup> Andrew Jackson to John Sevier, February 24, 1797, in *PAJ*, 1:126-27;

<sup>13</sup> John Sevier to Secretary of the Department of War, July 20, 1796, in “Executive Journal of Gov. John Sevier,” 111-14. For Indian country passports issued by Sevier, see Folder 4, Box 5, John Sevier Papers, 1796-1801, First Administration, Governor’s Papers, Tennessee State Library and Archive. Examples of Sevier’s negotiations with Natives are myriad; a sample include “A Talk from Dog Warrior & Mad Blew and All the Principle Chiefs of the Creek Nation” October 1796, Box 2, Folder 1, John Sevier Papers, 1796-1801; John Sevier, “Talk to the Indians at Tellico,” September 1798, in *Sevier Family History, with Collected Letters of Gen. John Sevier, First Governor of Tennessee, and 28 Collateral Family Lineages*, Cora Bales Sevier and Nancy Sawyer Sevier Madden, eds., (Washington, 1961), 144-45; John Sevier to John Watts and other Chiefs of the Cherokee Nation, March 5, 1797, in “Executive Journal of Gov. John Sevier,” 136-37; John Sevier to James Ore, May 12, 1798, in “Executive Journal of Gov. John Sevier,” 151-53. Cynthia Cumfer convincingly describes Sevier’s actions as part of a broader Tennessean approach of what she terms “limited federalism”—that is, arrogating seemingly federal power over Indian affairs to the state. Cynthia Cumfer, “Local Origins of National Indian Policy: Cherokee and Tennessean Ideas about Sovereignty and Nationhood, 1790-1811,” *Journal of the Early Republic* 23, no. 1 (April 1, 2003): 21–46

felt neglected and betrayed by his former superiors, especially in the War Department: in the waning days of the territorial government, he and Secretary of War Timothy Pickering had had an acrimonious correspondence in which Pickering suggested that Blount's handling of Indian affairs was suspicious and self-serving. This mortified Blount. "[H]e had taken great pains to settle that state, and to render it important," one conversant reported of a discussion with Blount soon after Tennessee's statehood. Yet "he been treated very ill by the President . . . [and] the executive officers of the United States. The conversation indeed became so affecting to him, that he wept."<sup>14</sup>

The lachrymose Blount soon became involved with a dubious scheme put forward by his close associate, John Chisholm, who had served as Blount's errand man into Indian country. Chisholm, apparently an arrant boaster—a "windy blasty fellow," as Blount himself once described him—concocted a plan to attack and capture Spanish Pensacola. Blount fixed on the proposal and expanded it into an ambitious project to seize all of Spanish Louisiana and transfer it to the British. Blount's motivation seemed to be to preserve his stature and reputation in the wake of statehood. "[P]eople about here thought it was all over with Governor Blount," one of Blount's co-conspirators reported back in Tennessee, "but he would rise yet." Blount himself indicated that he had "high expectations of emolument and command" upon a successful outcome.<sup>15</sup>

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<sup>14</sup> "Deposition of Doctor Nicholas Romayne," July 15-20, 1797, in *Report of the Committee of the House of Representatives of the United States, Appointed to Prepare and Report Articles of Impeachment against William Blount, a Senator of the United States . . .* (Philadelphia: Printed by John Fenno, 1797), lviii-lxxii. For Blount's disagreements with Pickering, see Secretary of War to William Blount, March 23, 1795, *TP, Vol. IV*, 386-93; Timothy Pickering to David Campbell, August 28, 1795, Folder 2, Timothy Pickering Letters, Ayers 926, Newberry Library; Timothy Pickering to David Henley, July 22, 1795, Folder 12, Timothy Pickering Letters, Ayers 926, Newberry Library. Blount's biographer suggests that it was Blount's dislike for Pickering that prompted his rupture with the Federalists. William H. Masterson, *William Blount* (Baton Rouge: Louisiana State University Press, 1954), 271-75.

<sup>15</sup> "Deposition of James Carey" September 29, 1797, in *Report of the Committee of the House of Representatives*, cxiv-cxxi; "Examination of James Carey" July 8, 1797, in *Report of the Committee of the House of Representatives*, cvi-cxii; "Deposition of Doctor Nicholas Romayne," July 15-20, 1797. The principal interpretation of the actions that produced Blount's conspiracy appears in Andrew R. L. Cayton, "'When Shall We Cease to Have Judases?' The Blount Conspiracy and the Limits of the 'Extended

Blount believed success hinged on his influence among the Natives; his nebulous plans seemed to envision leading an Indian army into Spanish territory. He thus obsessed about his reputation among the Indian nations, which he feared was diminishing now that he no longer held official status; he needed, he insisted, to “hold[] his importance among them.” To that end, Blount wrote to the federal Indian interpreter James Carey, with whom he had worked closely, to secure him and the Indians to the conspiracy. “If I attempt this plan,” Blount told Carey, “I shall expect to have you and all my Indian country and Indian friends with me.”<sup>16</sup>

As he conveyed to Carey, Blount believed he was in competition to preserve his influence against the men who had replaced him in administering southeastern Indian affairs. Receiving flattering accounts that the Cherokees, “much dissatisfied” with the new regime, “were calling out for their old friend Gov. Blount,” Blount worked hard to undermine Indian Department officials at every turn. When, for instance, the Cherokee John Watts complained that the Secretary of War had refused provide alcohol, Blount mocked the Secretary and promised the Cherokee leader two kegs of whiskey in Knoxville instead. Blount had an especial dislike for his replacement as superintendent of Indian affairs, his one-time friend and political ally Benjamin Hawkins, who had previously served as a senator from North Carolina. Blount instructed Carey to damage Hawkins’s authority among the Creeks and Cherokees. “[A]ny power or consequence he

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Republic,” in *Launching the “Extended Republic”: The Federalist Era*, eds. Ronald Hoffman and Peter J. Albert, (Charlottesville: University Press of Virginia, 1996), 157-89. Consistent with his broader interpretation of the contrast between the Northwest and Southwest Territories, Cayton argues that Blount’s Conspiracy stemmed from an effort to fill the “vacuum” that purported federal inaction had produced in the Southwest. I discuss this interpretation, and possible corrections to it, in Chapter 6. Older discussions and materials appear in Frederick J. Turner, “Documents on the Blount Conspiracy, 1795-1797,” *The American Historical Review* 10, no. 3 (April 1, 1905): 574–606; Alfred Byron Sears, *The Blount Conspiracy* (Madison: University of Wisconsin Press, 1928). A contemporaneous account of the conspiracy, possibly written by Blount himself, “A Short Account of the Origin and Progress of a Speculation That Terminated in a Project That Was Called Blounts Conspiracy,” N.D., Undated Material, WBP:LC.

<sup>16</sup> “Deposition of Doctor Nicholas Romayne,” July 15-20, 1797; William Blount to James Carey, April 21, 1797, in *Report of the Committee of the House of Representatives*, xlvi-xlvi.



gets,” Blount warned, “will be against our plan.” Blount also counseled Carey to prevent word of the plan from reaching Silas Dinsmore, the federal Indian agent among the Cherokees, or anyone else in Spanish or U.S. employ; he further told the interpreter that, if the Cherokees were upset about the line of the Treaty of Holston, then being run, Carey should cast all responsibility for any dissatisfaction away from Blount onto former President Washington.<sup>17</sup>

Blount’s letter to Carey proved his undoing. Rather than following Blount’s instructions to burn the letter, Carey determined that his oath to the federal government required that he report it. The letter quickly traveled through the ranks of the federal bureaucracy in Tennessee’s Indian country, ending up in the hands of David Henley, Silas Dinsmore, and Benjamin Hawkins, who soon dispatched word to Congress. A political scandal followed, much of which focused on the fraught relationship between the United States and Britain, which, because British officials had briefly entertained Chisholm’s proposal, was seen to be involved in a conspiracy that affronted U.S. sovereignty and autonomy. Blount was expelled from the Senate, but the House of Representatives impeached him nonetheless, for violating, among other laws, the Trade and Intercourse Act and the Treaty of Holston, as well as for attempting to “seduce” James Carey from his official duties. Ultimately, in the first impeachment trial under the

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<sup>17</sup> James Grant to William Blount, May 24, 1797, in *Report of the Committee of the House of Representatives*, liii-liv; “Examination of James Carey” August 3, 1797, *Report of the Committee of the House of Representatives*, ci-cv; Blount to Carey, April 21, 1797. On Blount’s earlier friendship with Hawkins, see Benjamin Hawkins to Elizabeth House Trist, November 25, 1797, in C. L. Grant, ed., *Letters, Journals, and Writings of Benjamin Hawkins* (Savannah, Ga.: Beehive Press, 1980), 1:162-64.

Constitution, the Senate determined it lacked jurisdiction over Blount. Blount returned to Tennessee and suffered no further punishment.<sup>18</sup>

Blount's Conspiracy, as it came to be called, fit oddly within a federalist frame. Though some Tennesseans argued that Blount's plan "would have promoted the interest of the State," his actions were less a defense of Tennessee's sovereignty than a quixotic effort at self-aggrandizement. In this regard, Blount's cockamamie scheme bore a striking resemblance to the grandiose dreams of Zachariah Cox, with whom, in a striking and ironic reversal, Blount was now "upon the best of Terms." Governor Sevier in fact disapproved of Blount's actions, calling them "imprudent[]." But Sevier's defense of state autonomy and independence provided a flag of convenience for all those who, like Blount, had soured on federal authority. After his scheme collapsed, Blount began to identify as an ever-more ardent Republican and adopt the party rhetoric. "The State of Tennessee is affected to the federal Government as it ought to be," he later wrote, "alive to their Duties & their Rights, ready to perform one and defend the other." Notwithstanding his national disgrace, Blount secured election to the Tennessee Senate, where he became speaker. There, he and Governor Sevier soon made common cause in their struggle against federal authority within Tennessee. Whether motivated by principle or personal animosity, the two politically prominent men sought to rid the state of what they regarded as the pernicious remnants of federal rule. Blount's conspiracy thus serves as an

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<sup>18</sup> On Carey's actions, see "Deposition of James Carey," September 29, 1797; on Hawkins's response, see Benjamin Hawkins to James McHenry, June 4, 1797, in Thomas Foster, ed., *The Collected Works of Benjamin Hawkins, 1796-1810* (Tuscaloosa: University of Alabama Press, 2003), 177-78. For a thorough analysis of Blount's impeachment and subsequent trial, focused primarily on the constitutional issues that the case occasioned, see Buckner F. Melton, *The First Impeachment: The Constitution's Framers and the Case of Senator William Blount* (Macon, Ga.: Mercer University Press, 1998). Blount's actions infuriated George Washington, especially the attempt to undermine Hawkins's influence among the Indians, which Washington described as "a crime of so deep a dye as no epithet can convey an adequate idea of to my mind." George Washington to Secretary of War [James McHenry], July 7, 1797, George Washington Collection, MS-1033, Rauner Special Collection, Dartmouth College.

excellent example of how federalism channeled the intensely personal, occasionally bizarre, and often-venal politics of the borderlands into the frame of dual sovereignty.<sup>19</sup>

Though the Tennesseans sometimes spoke about federal land ownership and federal supremacy over Indian affairs as separate questions, they were in fact closely interrelated. Underneath the abstract rhetoric about state sovereignty was the state's most pressing political issue, one that united issues of title and federal diplomacy: the property rights of Anglo-American settlers living within disputed Cherokee territory under the Treaty of Holston. These settlers had legal title to their lands, derived from the North Carolinian grants protected under North Carolina's act of cession. But, by living within lands guaranteed the Cherokees under the Treaty of Holston, the settlers were also violating the federal Trade and Intercourse Act. These settlers' legally tenuous position dominated politics in early Tennessee. Their petitions preoccupied the early sessions of the state legislature; their plight appeared in Governor Sevier's Inaugural Addresses; securing their relief was the "chief[]" and "grand object" of the new state's congressional delegation.<sup>20</sup>

At stake, then, in the ownership of Tennessee's lands was which sovereign would weigh the equities of the settlers' and the Cherokees' respective claims. The Assembly's early congressional petition made this linkage clear by moving quickly from the abstract

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<sup>19</sup> James McHenry to Oliver Wolcott, September 22, 1797, Box 2, James McHenry Papers, Clements Library, University of Michigan; William Blount to John Gray Blount, November 7, 1797, in *JGBP*, 3:174-86; John Sevier to John Overton, August 17, 1797, Box 2, Folder 12, Murdock Collection of Overton Papers, Tennessee State Library and Archives. Blount's half-brother Willie Blount, who served as Tennessee governor in the early nineteenth century, would later assert that the core of Blount's plan was an effort to relocate the tribes west of the Mississippi, prefiguring Indian removal. "Memo. from Writings of Willie Blount," n.d., 4XX42, Draper Manuscripts, Reel 116, Wisconsin Historical Society.

<sup>20</sup> "Memorial of David Campbell," 1797, in Robert H. White, ed., *Messages of the Governors of Tennessee* (Nashville: Tennessee Historical Commission, 1952), 29; John Sevier, "Second Inaugural Address," September 22, 1797, in *Messages of the Governors*, 24-26; Andrew Jackson to David Campbell, January 11, 1798, in *PAJ*, 1:164.

language of sovereignty to a discussion of Cherokee lands under the Treaty of Holston. The Assembly's positions on the merits of the respective claims was equally clear. If the Indians held any land claim at all, the Assembly insisted, it was as "tenants at will," while the claimants under North Carolina's grants deserved "every right, privilege, and advantage, which they are entitled to by constitutional laws."<sup>21</sup>

As Tennesseans knew and feared, Congress was much less sympathetic to the legality of the settlers' claims. In early 1796, mere months after Tennessee drafted its constitution, Congress revisited the Trade and Intercourse Act, which criminalized settlement on Indian lands; the statute had a sunset provision that required frequent reauthorization. The Washington Administration, frustrated by flagrant violations of treaty boundaries, urged Congress to enhance the Act's penalties. In the freewheeling debate over Indian property rights that followed, the House of Representatives focused exclusively on the Southwest Territory and the problem of settlers claiming under North Carolina's grants, the Act's national reach notwithstanding. North Carolina's representatives echoed Tennessee's arguments that the Indians lacked ownership rights, but most in Congress, especially New England Federalists, adopted the view that North Carolina's grants provided a right to enter and take possession only once the federal government had purchased the land—a preemptive right entirely consistent with Indian ownership. Confirming this view, the final version of the Act significantly bolstered the penalties for illegal settlement on Indian lands. It authorized the President to expel illegal settlers using military force, and, in one of the law's most controversial aspects, provided that any claimants who sought to settle or survey beyond the boundary would forfeit any

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<sup>21</sup> "Address and Remonstrance of the General Assembly of the State of Tennessee," [August 9, 1796].

property rights in these lands. This provision targeted the Tennessee settlers in particular; it was hoped that stripping them of rights under North Carolina's grants if they violated the Treaty of Holston would remove the incentive to seize Native lands.<sup>22</sup>

The renewal of the Trade and Intercourse Act also made the position of Tennessean claimants precarious because the statute called for the President to survey and clearly mark treaty boundaries with Native nations. Many Tennessee settlers could only guess at their status, because, even though the Treaty of Holston had been concluded six years earlier, its boundary had never been officially surveyed and marked, for reasons common for Indian treaties of the time. After signing the treaty, William Blount and the Cherokees had agreed to each send commissioners to run the line, to meet in late 1792. According to commissioners selected by Blount, the Cherokees never arrived, and so they proceeded to run what they called a "line of experiment," although they did not formally mark the boundary. But there was another version of the process, supposedly conceded by one of the commissioners in a moment of weakness. In this account, the commissioners ran the line "secretly" before the Cherokees arrived, and, when they met the Native representatives in the woods, the commissioners sought to hide their surveying equipment. Whatever the reason, the result was that no formal boundary separated Cherokee and U.S. lands.<sup>23</sup>

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<sup>22</sup> *Annals of Congress*, 3rd Cong., 2nd Sess., 1147-59, 4th Cong., 1st Sess., 891-92; Act of May 19, 1796, 1 Stat. 469. For an additional account of this debate, see Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Belknap Press of Harvard University Press, 2005), 166-69. It is unclear why the Trade and Intercourse Act contained a sunset provision. The evidence suggests that this aspect stemmed less from political opposition to the statute—which the first Congress enacted with little debate or discussion—than from the Washington Administration's desire to frequently revisit the law and modify its provisions based on experience. See, e.g., George Washington to Edmund Randolph, October 10, 1791, in *PGW:PS*, 9:68-70.

<sup>23</sup> *Letter from the Secretary at War, Accompanying His Report Relative to the Running of a Line of Experiment from Clinch River to Chilhowee Mountain* (Philadelphia: Joseph Gales, 1798); "Letters of Benjamin Hawkins," April 6, 1797, in *The Collected Works of Benjamin Hawkins*, 116-17.

In 1797, President Adams dispatched Indian superintendent Benjamin Hawkins to survey officially the boundary established under the Treaty of Holston. Determined to avoid any appearance of bias, Hawkins ran the line anew, insisting that it be based on the text in the “instrument itself,” not on “interested reports” by either Cherokees or Anglo-American settlers. He and his assistants concluded their survey in late summer 1797 and dispatched a report to the Secretary of War. Neither Cherokees nor settlers were contented with the result. As one Cherokee leader reported, “[T]here was much talk in the nation about the line.” Hawkins’s actions reopened long-standing Cherokee complaints about the boundaries drawn at Holston, which Cherokee leaders reiterated in a dispatch to President Adams. Nonetheless, while insisting that they never assented to the treaty, the Cherokees acquiesced in Hawkins’s efforts, likely hoping for the removal of illegal settlers across the boundary.<sup>24</sup>

The Cherokees’ mild resistance paled compared to the overheated and vituperative rhetoric of the Tennesseans. Hawkins, who had expected “much opposition,” still found the resistance “more powerful than I expected.” Though thronged by anxious settlers, Hawkins discovered that the loudest complaints came not from those affected by the line but from Tennessee state officials. The state legislature dispatched its own commissioners to retrace and find fault with Hawkins’s route, informing Congress that the Tennesseans had “less confidence” in Hawkins “than in the Indians themselves.” Much of this opposition stemmed from the continued influence of William Blount, whose earlier dislike for Hawkins had hardened to hatred for his role in unmasking Blount’s

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<sup>24</sup> “Journal of the Proceedings of the Commissioners Appointed to Ascertain and Mark the Boundary Lines Agreeably to Treaties Between the Indian Nations and the United States,” February 28, 1797, in *The Collected Works of Benjamin Hawkins*, 148, 163.

Indian country plottings. It was Blount, though at this point still out of office, who had drafted Tennessee's complaint to Congress. Blount scrawled even harsher views on his personal copy. "Never was Man more execrated in any Country than Hawkins in this," Blount stated, accusing Hawkins of weeping "Crocodile tears" over the settlers' situation.<sup>25</sup>

Undaunted, the Adams Administration moved to enforce the newly surveyed boundary line. On August 19, 1797, Col. Thomas Butler, the commander of the federal soldiers in Tennessee, issued a proclamation ordering all white settlers within the Cherokee lands—an estimated 2,500-3,000 people—to remove by October 25 or face military expulsion. He attempted to reassure the settlers that their land titles would be unimpaired and would have full force whenever the Indian title had been purchased.<sup>26</sup>

Butler's proclamation transformed the simmering controversy over Indian title into a full-blown constitutional crisis. The struggle was not between customary frontier legal practices and formal law. As Hawkins acknowledged, the purported violators of the Trade and Intercourse Act had legal justification for their actions: "Heretofore," he observed, "intrusions [onto Indian lands] were always countenanced by the government in the provision made to give [the settlers] a preference in all the land laws." The settlers' champions in fact urged them, in their resistance, to "depend principally on the legality of your claims: they are founded on . . . laws which cannot be controverted." Nor

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<sup>25</sup> *Ibid.*, 153; *The Remonstrance and Petition of the Legislature of the State of Tennessee, to the Senate of the United States*. (Philadelphia: John Fenno, 1797); "Report of the Commissioners Appointed to Trace the Line Lately Designated by the Commissioners of the United States," 1797, Box 193.28, Business/Legal/Land/Miscellaneous Records, John Gray Blount Papers, North Carolina State Archives, Raleigh, N.C.

<sup>26</sup> *To the Settlers Within the Cherokee Boundary, as Established by the Treaty of Holston, on the Second Day of July, One Thousand Seven Hundred and Ninety-One*. (Knoxville, Tenn: Printed by George Roulstone, 1797). The estimate of the number of residents within the Indian lands—potentially inflated—comes from *The Remonstrance and Petition of the Legislature of the State of Tennessee*, 4.

was the dispute at root a controversy over the nature of Indian ownership. Even as they suggested that the Cherokees were not the lands' true owners, Tennessee officials implicitly acknowledged Cherokee sovereignty by alleging (albeit on thin evidence) that the Cherokees had subsequently given authorization for the illegal settlers to remain. By enshrining Native title in federal law, Congress transformed a legal struggle over Native land tenure into a federalist controversy over legal supremacy. As a result, even though the seemingly inescapable issue of Native rights once again served as the impetus for the confrontation over sovereignty, federal and state actors fixated on the struggle as a conflict between federal and state law to govern Tennessee's territory, relegating Natives to mere backdrop.<sup>27</sup>

The Supremacy Clause of the U.S. Constitution ostensibly resolved this question, mandating that the Trade and Intercourse Act prevail over North Carolina's land grants. Many Tennesseans, however, rejected this conclusion. In the pages of Tennessee's only newspaper, *The Knoxville Gazette*, a series of pseudonymous writers spun out a legal theory that insisted the federal statute was unconstitutional. The Tennesseans' arguments reflected the promiscuousness of early American constitutional culture, drawing on the "law of nature, of nations, the statutes of North Carolina . . . [and t]he Constitution of the State of Tennessee" for vindication. But their fundamental attack on the constitutionality of the federal actions rested on two interrelated claims, both of which relied less on specific legal provisions than on structural principles. First, they insisted that the federal

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<sup>27</sup> "Journal of the Proceedings of the Commissioners Appointed to Ascertain and Mark the Boundary Lines Agreeably to Treaties Between the Indian Nations and the United States," 153; Campbell, "To the Citizens of the State of Tennessee, Who Are about to Be Alienated and Dismembered by the Acts and Proceedings of the Federal Government," *Knoxville Gazette*, March 13, 1797; Gov. Sevier reported to the Assembly a purported message from the Cherokee leader Doublehead, stating, "Let the people know, who appear to be upon our lands by the extension of the line, that we do not wish them to remove." *The Remonstrance and Petition of the Legislature of the State of Tennessee*, 12.



law was “unconstitutional, because they deprive us of property, for which we had a legal right before the Treaty of Holston.” Despite a brief reference to “just compensation,” this argument did not seem to rest primarily on the Fifth Amendment but rather on an “unalienable right[.]” to property that the Trade and Intercourse Act violated. In this reading, the Treaty of Holston had the nature of a *ex post facto* law: “The treaty of Holston was made subsequent to our claims,” one commentator wrote, “and the rights of our property no power on earth can justly violate.”<sup>28</sup>

Second, the Tennesseans questioned the legitimacy of the exercise of federal power over lands within the state of Tennessee. “We ask from whence does the Federal Government derive the power to exercise legal jurisdiction over the land on which we are settled, in any other than the general mode in which other states of the union are governed[?]” wrote an author writing on behalf of the “*Frontier People of Tennessee*.” “It is a distinction new and incomprehensible to us, that a grant from a sovereign and independent State, can convey a right without the power to enjoy it.”<sup>29</sup>

David Campbell, a judge on Tennessee’s highest court writing as the barely disguised “Campbell,” offered the most legally sophisticated argument on this aspect of the “dispute . . . betwixt the general and state governments.” Campbell had a paradoxical role in the controversy: as a federal territorial judge, he had urged upholding the Treaty of Holston, but privately he defended the “right of intrusion,” and had long

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<sup>28</sup> “To Captains Richard Sparks and John Wade,” *Knoxville Gazette*, February 27, 1797; Andrew Rights, “For the Knoxville Gazette,” *Knoxville Gazette*, March 6, 1797; The Frontier People of Tennessee, “To the People of America,” *Knoxville Gazette*, March 6, 1797. The arguments that the Tennesseans marshaled clearly echoed some of the contemporary debates over federal power and state authority prompted by the Virginia and Kentucky Resolutions. And, as recent scholarship has demonstrated, Tennessee’s Assembly in fact heeded the Resolutions’ call to enact legislation calling for the repeal of the Alien and Sedition Acts. Wendell Bird, “Reassessing Responses to the Virginia and Kentucky Resolutions,” *Journal of the Early Republic* 35, no. 4 (Winter 2015): 519–51. But, as Tennessee was already a firmly Republican state upon admission, it is difficult to draw any direct connection between the state’s resistance to federal power over land and Indian affairs and its support of the Republican opposition to the statutes.

<sup>29</sup> The Frontier People of Tennessee, *Knoxville Gazette*, March 6, 1797.

lived illegally on Cherokee lands. In the *Gazette*, he framed his argument in federalist terms. In his view, because the Treaty of Holston “dismember[ed] the state of Tennessee,” it represented an effort by the federal government to “arrogate . . . the barbarous right of alienating . . . any part of an individual state.” Citing diverse constitutional provisions—among others, Article III’s provision extending the judicial power of the U.S. over cases and controversies, the Guarantee Clause of Article IV, the Enclave Clause of Article I—Campbell argued that “the constitution of the United States, does not authorize military force, or diplomatic authority to decide the right of property,” and insisted that the controversy could only be resolved by trial, in state court. “The Frontier People of Tennessee” likewise insisted that only a “jury of our country” could resolve the respective rights as the sole “tribunal which in our governmental compact we have made the arbiter of right and wrong.”<sup>30</sup>

These heated legal claims did not deter the Administration from enforcing the Trade and Intercourse Act. Secretary of War McHenry mocked these “repeated publications” and disdained their legal theory as the claim that the “United States alone were wrong in every proceeding that respected [the settlers].” In early 1798, his officers began forcibly removing settlers on the Cherokee side of Hawkins’s line. Violence ensued, as settlers killed several army horses and wounded a federal soldier. Predictably, federal actions also outraged Tennessee state officials. The state’s assembly denounced the removals as “an act of violent oppression”; Governor Sevier excitedly exclaimed,

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<sup>30</sup> Campbell, “To the Citizens of the State of Tennessee”; Campbell, “For the Knoxville Gazette,” *Knoxville Gazette*, April 3, 1797; Campbell, “For the Knoxville Gazette,” *Knoxville Gazette*, May 22, 1797; Campbell, “For the Knoxville Gazette,” *Knoxville Gazette*, June 12, 1797; The Frontier People of Tennessee, “To the People of America.” On Hawkins’s history of living on Cherokee lands, see Benjamin Hawkins to Thomas Butler, November 9, 1797, in *Letters, Journals, and Writings of Benjamin Hawkins*, 148-49. On David Campbell’s authorship of the newspaper pieces, see John Sevier to John Adams, Esq., President of the United States, April 1798, in “Executive Journal of Gov. John Sevier,” 140-41

“[S]urely there never was an instance of such mistaken policy, in any other government, since governments had an existence.”<sup>31</sup>

The conflict reached its climax when, on 10 p.m. on the evening of February 3, 1798, two army officers arrested Judge Campbell, detaining him in a military camp overnight. For state officials, this arrest of a state officer was an explicit affront to the state’s dignity, provoking angry missives to President Adams. “Representing as we do, the Sovereignty of the State of Tennessee,” the state’s congressional delegation wrote, “[we] Consider that Soverieghty as haveing been Outra'd, by the Conduct of Colonel Butler, on the person of one of the Supreme Judges of the State, as also the rights of Civil liberty, most unwarrantably Violated.” The congressmen demanded an investigation into this “Military Tyranny,” which they received: the Secretary of War promised to explore Butler’s conduct.<sup>32</sup>

Campbell’s arrest underscored that rigorous enforcement of the Treaty of Holston boundary was becoming too politically costly for the Adams Administration. With the state’s entire congressional delegation constantly agitating on the subject, abandoning the Treaty of Holston, and its protection of Cherokee land rights, proved easier. President Adams authorized another treaty with the Cherokees to purchase the illegally settled lands; the Secretary of War deemed the right for settlers to return to be the treaty’s “first stipulation,” to be obtained even before negotiations began in earnest. Not content to rely on federal officers, Governor Sevier sent state representatives to the treaty negotiations,

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<sup>31</sup> *Remonstrance and Petition of the Legislature of the State of Tennessee. 4th December, 1797, Referred to Mr. Pinckney, Mr. Venable, Mr. Nathaniel Smith, Mr. Wm. C.C. Claiborne, and Mr. Bayard* (Philadelphia: William Ross, 1797), 192; John Sevier to Andrew Jackson, William Claiborne, and Joseph Anderson, April 5, 1798, in *PAJ*, 1:191; John Sevier to Andrew Jackson, William Claiborne, and Joseph Anderson, February 5, 1798, in *PAJ*, 1:176.

<sup>32</sup> Andrew Jackson to John Adams, March 5, 1798, in *PAJ*, 1:185-86; John Sevier to President John Adams, February 6, 1798, in “Executive Journal of Gov. John Sevier,” 170; Sevier to Jackson, April 5, 1798.

with instructions to challenge the “constitutionality” of the Treaty of Holston as a measure “that prostrated the guaranteed rights of the whole state.” Sevier also dispatched a state agent into Cherokee territory. The agent pretended to be another Indian trader, but the true object of his mission was to convince the Cherokee leaders to sell their lands.<sup>33</sup>

But even with the federal and state governments united in their aim to secure rights to the settlers’ lands from the Cherokees, they nearly failed. At the first meeting in July, the Cherokees “would not relinquish or sell one inch of land.” The commissioners convened another meeting in September, where they succeeded in inveigling the Cherokees to cede the contested territory for an immediate payment of \$5,000 in goods and a \$1,000 annual annuity. Why the Cherokees changed their mind is unknown (the record of the treaty negotiations was later destroyed). There are hints in the letters from Sevier’s agent of internal power struggles between the Cherokee chiefs and warriors, which he believed the state could exploit. What is clear is that the Cherokees secured a considerably larger compensation, for a much smaller tract of land, than they had at the Holston negotiations.<sup>34</sup>

Despite this limited Cherokee success, the Treaty of Tellico represented a greater victory for Tennessee, as it secured federal support for its aims and legitimated the settlers’ property rights. Yet even this triumph failed to quell controversy over the settlers, which continued to convulse Tennessee politics even as the debate shifted from the treaty ground to the courts. The very first cases in the Nashville district of

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<sup>33</sup> James McHenry to Alfred Moore, John Steel, and George Walton, March 30, 1798, in *ASP:LA*, 1:639–40; John Sevier to James Robertson, Lachlan McIntosh, and James Stewart, July 4, 1798, in *Messages of the Governors*, 64–65; Colonel Ore to John Sevier, May 31, 1798, in *ibid*, 60–62.

<sup>34</sup> John Sevier to Joseph Anderson and William Claiborne, July 15, 1798, in *Messages of the Governors*, 65; Treaty of Tellico Blockhouse, Cherokees-U.S., 7 Stat. 62 (Oct. 2, 1798).

Tennessee's new federal court were two prosecutions against Archibald Lackey and Robert Trimble for crossing into Cherokee territory without a passport, thereby violating, as the indictment recounted at length, Treaty of Hopewell and the Trade and Intercourse Act. William Blount observed that two men's "cause" had received "serious attention" from the "people in general," who felt that their "civil rights" were at stake in the case. Defense counsel was Lachlan McIntosh, a recent Georgia transplant who had served on Sevier's commission to redraw Holston boundary and who was also heavily involved with Zachariah Cox and Tennessee Company. Based on his "thorough knowledge" of the law, Blount predicted the two men would go free. Defying this prediction, the jury convicted and fined both men, though the federal judge's refusal to admit evidence of the supposed "line of experiment" produced predictable howls of outrage from the Tennessee bar.<sup>35</sup>

In the meantime, William Blount sued Elisha Hall, the secretary of the federal treaty commissioners, in state court for slander for alleged statements that western leaders wished the treaty to fail. Judge David Campbell—the same man who had attacked federal authority over Indian affairs in the *Gazette* and been arrested by federal officers—dismissed Blount's complaint on the ground that Hall was a federal ambassador, immune from state suit under the law of nations and the federal Judiciary Act. Blount, now serving as Speaker of the Tennessee Senate, initiated impeachment proceedings against Campbell, arguing that Campbell's action violated the provisions of the state constitution

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<sup>35</sup> United States v. Lackey & Trimble, January-October 1798, Minute Book of the Nashville Division (microfilm), U.S. District Court of Tennessee, 4-9, M1213, U.S. National Archives; Lachlan McIntosh to Andrew Jackson, November 6, 1798, in *PAJ*, 1:211-14; William Blount to General Robertson, March 12, 1798, in "The Correspondence of Gen. James Robertson," *The American Historical Magazine* 4, no. 4 (October 1, 1899), 351-53; John Sevier, "Legislative Message," December 18, 1798, in White, *Messages of the Governors*, 88-90.

concerning writs. Yet even as he was suffering political retribution for defending federal authority, Campbell was formally accused of being *too* zealous in his advocacy for the frontier settlers. The charges against him included failing to hold a court session because he had been away supposedly inveigling with the federal commissioners to secure Cherokee lands at the Treaty, and maligning Governor Sevier by asserting in a grand jury charge that, had Sevier done his duty, “the people would not have been removed from their lands” by federal soldiers. With Blount both prosecuting and presiding over the trial, Campbell nonetheless escaped removal from office by a single vote.<sup>36</sup>

The swirling political controversies provoked by the question of the Holston boundary—accusations of federal military tyranny, Campbell’s impeachment, the constitutionality of the Trade and Intercourse Act—may all seem remote from the abstract question of sovereignty and ownership of Tennessee lands through which Sevier and Jackson framed the original dispute. But even as these issues of federalism refracted oddly and unpredictably through the complicated personal politics of early Tennessee, many officials retained their focus on freeing Tennessee’s lands from federal control. In this view, the Treaty of Tellico vindicated Tennessee’s claim that the state’s sovereignty granted it ownership of all the land within the boundaries. “It is time for this government to assert her just rights & claim of domain of country included in her chartered limits,” Governor Sevier told the Tennessee legislature shortly after the Treaty. The legislature

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<sup>36</sup> For documents from Campbell’s impeachment, see White, *Messages of the Governors*, 74-88; Carroll Van West, “Judge David Campbell,” *The Tennessee Encyclopedia of History and Culture, Version 2.0* (2009), <http://tennesseencyclopedia.net/entry.php?rec=186>.

responded to Sevier's call, within a month enacting a statute to open state land offices on the North Carolinian model.<sup>37</sup>

Congress, however, did not back down. Learning of Tennessee's law, the House and Senate appointed a committee to investigate the state's claims. The committee, which consisted of two Federalist senators from Kentucky and Vermont as well as the Republican Senator Anderson of Tennessee, issued a report thoroughly rebuffed the arguments advanced by Sevier and Jackson. It began with the act of cession, which it insisted unambiguously granted title to the unappropriated lands to the United States. To challenge North Carolina's right to transfer title, the committee observed, "is to question the title of every man in Tennessee who holds the soil by deed from North Carolina." But the report's main target was Tennessee's equal footing argument. "The right of jurisdiction, and the right of soil, are distinct rights, and may be severed," the committee insisted against Tennessee's effort to conjoin them. Indeed, prior to cession, North Carolina had retained jurisdiction over the land even as it alienated large portions of the territory. Because of this distinction, when the Southwest Territory attained statehood on equal footing, "in the opinion of the committee, the State of Tennessee acquired jurisdiction over, but not the right of soil, within the said territory." By virtue of North Carolina's original cession, "the right of soil remained in the United States."<sup>38</sup>

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<sup>37</sup> John Sevier, "Legislative Message," December 18, 1798, in *Messages of the Governors*, 88-90; "Act for Establishing Offices for Receiving Entries and Claims for All Vacant Lands within the Several Counties in This State, and Ascertaining the Method of Obtaining Titles to the Same," ch. 24, *Tennessee Statutes* 2nd General Assembly, 2nd Session (January 5, 1799): 174.

<sup>38</sup> 10 *Annals of Cong.* 53-54, 66, 531-32 (1800); "No. 57: Sales of Lands Acquired by the Cession of North Carolina," May 9, 1800, in *ASP:PL*, 97-99. There was an additional argument in favor of federal title that the committee ignored: the sole federal right to purchase lands from Natives. The Secretary of War had specifically stated that unoccupied lands purchased at Tellico would remain under federal control until "sold by, and under the authority of, the United States." McHenry to Moore, Steel, and Walton, March 30, 1798.

In addition to this sharp distinction between jurisdiction and ownership, the committee also adopted a subtler argument against Tennessee's position. Tennessee had claimed the right of ownership "on the principle that a grant of jurisdiction over territory possesses the right of soil therein." As we have seen, this reasoning had a strong basis in earlier practice and law: the colonial charters had conjoined jurisdiction and ownership, as had the state cessions to the federal government. But the committee rejected this claim on the ground that the "State of Tennessee does not derive even her jurisdiction from the Government of the United States, but has it by operation of the act of cession from the State of North Carolina." In other words, according to the committee, the federal government had acted purely as a trustee, exercising "only a limited and temporary jurisdiction over the said territory" that had transferred "of right" to Tennessee once it had satisfied the population requirement. This argument elegantly employed Tennessee's own insistence that its admission was a legal entitlement beyond congressional control to undermine the state's claim to land ownership. Downplaying formal federal authority, in this instance, served to expand the federal government's effective power.<sup>39</sup>

The report's recommendations, however, did not match the firmness of its legal conclusions, which perhaps explains why Senator Anderson seems to have endorsed it. It did urge opening a land office for the only unappropriated lands in the state that were outside Indian country, the contested French Broad lands, but it also recommended codifying the existing settlers' right to preemption. And it requested that the attorney general gather all laws related to the land claims, and it urged that a report be sent to Tennessee's governor, inviting a response. Congress did none of these things; it dithered,

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<sup>39</sup> "No. 57: Sales of Lands Acquired by the Cession of North Carolina."



perhaps because of the Republican ascendancy but more likely because congressional and executive attention were fully occupied resolving Georgia's western land rights, especially the extremely complicated aftermath of the Yazoo debacle. Over the next few years, a near-unanimous Congress, with the sole exception of Tennessee's delegation, agreed to create new committees that gathered voluminous evidence of Tennessee's and North Carolina's land laws, even as Congress continued to receive, and defer, alarmist petitions on ongoing conflicts between Cherokee lands and North Carolina grants in Tennessee.<sup>40</sup>

The dispute dragged on in large because there was no neutral arbiter to resolve it. Despite his confidence in Tennessee's claim, Sevier believed that a resolution by the "supreme judiciary of the united States" would likely prove "very problematical." That left only Congress, where the "United States were, in this case, made a judge in their own cause," as one congressman had put in an earlier dispute over Tennessee lands.<sup>41</sup>

Yet Tennessee did not accept that conclusion, refusing to passively accept Congress's verdict. Writing to Governor Sevier, citizens around Nashville who had evidently followed the debate "with some concern" pressed the governor to make some response to Congress, anxious that silence would be interpreted as a "virtual acknowledgement of the right of the General government and a final relinquishment." This, they feared, would be disastrous, echoing earlier anxieties that the federal

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<sup>40</sup> *Ibid.* For the Congress's actions on Tennessee's lands during this period, see 11 Annals of Cong. 255-56, 259-64, 425-26 (1802); *ibid.*, 14:27-32; *ASP:PL*, 148, 164-66, 193-96; Thomas Jefferson to Levi Lincoln, April 17, 1802, in *PTJ:MS*, 37:251. The history of Congress's involvement with the Yazoo claims during this period is extremely involved. A high-level summary can be found in C. Peter Magrath, *Yazoo: Law and Politics in the New Republic: The Case of Fletcher V. Peck* (Providence, R.I: Brown University Press, 1966), 20-49. Numerous reports and original documents appear in *ASP:PL*, 1:62, 100, 113, 145, 163, 185, 191, 193, 197, 201, 536, 2:610, 740, 743, 753; 3:247, 272, 383, 482, 541, 562,

<sup>41</sup> John Sevier to Joseph Anderson, William Cocks, and William Clairborn, March 20, 1800, in "Executive Journal of Gov. John Sevier," 110-11; 4 Annals of Cong. 1147-59 (1795).

government was insufficiently solicitous of their property rights. A federal land office would, they anticipated, fail to make “necessary provision for individual claims,” presumably preexisting preemption and land grant rights, “thereby involv[ing] us in lasting difficulties.”<sup>42</sup>

Though it probably did not require urging, the Tennessee legislature acted to protect its constituents’ interest. Its preferred method to resolve the dispute was negotiation: it appointed its senators and representative as “agents” with “full power and authority” to assert the state’s “absolute right of disposing of [its] vacant and unappropriated soil.” These agents were given discretion to have the respective claims “examined and determined,” and allowed to determine terms and manner of an agreement that would secure some sort of federal “relinquishment of [the U.S.] claim.” In proposing a negotiated settlement with the federal government, Tennessee’s legislature was following earlier precedent, since such bilateral contracts between states and the national government were how state cessions had been worked out. But it was also a presumption of equality—an assertion of Tennessee’s independence in which disputes between state and national government were to be resolved through agreement on both sides rather than by fiat.<sup>43</sup>

As legal theory, Tennessee’s view was increasingly seen as dubious: as one congressman observed during the debate over Tennessee’s admission, “all compacts between a nation and a part of its citizens” were not legally binding, since the two parties

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<sup>42</sup> Citizens of Mero to John Sevier, October 14, 1800, Box 2, Folder 5, John Sevier Papers, 1796-1801, First Administration, Governor’s Papers, Tennessee State Library and Archive.

<sup>43</sup> Henry D. Whitney ed., *The Land Laws of Tennessee: Being a Compilation of the Various Statutes of North Carolina, the United States and Tennessee, Relative to Titles to Lands Within the State of Tennessee, from the Second Royal Charter to the Present Time* (J. M. Deardoff & Sons, printers, 1891), 118

were not equal: there was “no other security for the other contracting but the obligations of good faith and the ingreity of the Government.” But perhaps equally significantly, Tennessee was reliant on congressional power even as it denied it. This dependence stemmed from the reality that Tennessee and the federal government were not the only claimants to sovereign ownership of Tennessee’s land: North Carolina cited the act of cession to claim the authority to continue to issue grants to military bounty lands located in Tennessee, an action that angered Tennessee officials nearly as much as the federal claims. Governor Sevier now turned his equal footing argument against North Carolina: its purported authority over the “most important business in the state of Tennessee” violated the principle that Tennessee enjoyed “every power, privilege, sovereignty and jurisdiction that any of the original states in the union enjoy.” This dispute manifested in a bizarre tussle over control over the state land grant records, which a group of Tennesseans attempted to steal away from an armed North Carolinian escort. In 1804, the two states concluded an agreement, under which North Carolina could continue to issue military land warrants but Tennessee would fulfill them, without showing any preference to its own citizens. Yet under the U.S. Constitution, this agreement could only be valid with congressional consent.<sup>44</sup>

In 1806, Congress at last brokered an agreement between the three claimants to the land—the federal government, Tennessee, and North Carolina. The statute ratified the 1804 agreement between North Carolina and Tennessee. The law also split the

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<sup>44</sup> 5 Annals of Cong. 1300-30 (1796); John Sevier, “Legislative Message,” September 22, 1801, in White, *Messages of the Governor*, 97; “Governor Ashe to the General Assembly,” 1798, in *JGBP*, 3:591-94; “An Act ratifying and confirming an act of the General Assembly of the State of North Carolina,” 1804, ch. 14, in *The Land Laws of Tennessee*, 55-56; U.S. Const., Art. I, § 10. The Tennesseans had motives beyond merely securing the records; they sought to avoid being implicated in North Carolina’s investigation into land frauds. Russell S. Koonts, “An Angel Has Fallen! The Glasgow Land Frauds and the Emergence of the North Carolina Supreme Court,” *The North Carolina Historical Review* 72, no. 3 (July 1, 1995): 301–28; Masterson, *William Blount*, 324-47.

difference between the federal government and Tennessee, drawing a line in west-central Tennessee. Lands west of the line became part of what was known as the “congressional reserve,” to which Tennessee relinquished all “right, title, or claim” and agreed that these lands would be “at the sole and entire disposition of the United States.” In return, Congress ceded and conveyed Tennessee “all right, title, and claim” to lands east of the line, granting the state the same power to issue “perfect titles” within this district “as Congress now have.” The cessions contained a number of provisos that secured both federal and state aims. Even as the statute guaranteed the preemptive rights of settlers south of the French Broad, it promised that nothing in the statute “shall be construed to affect the Indian title, or to subject the United States to the expense of extinguishing the same”; it also stipulated that Tennessee use portions of the public lands to support education.<sup>45</sup>

The 1806 statute largely settled the contested question of the formal ownership of land within Tennessee. As a capstone to the saga of “federal” lands in Tennessee, it reflects, in one sense, federal weakness when confronted with state intransigence. In principle, both the Constitution and the Northwest Ordinance enshrined the supremacy of federal land ownership. In practice, federal officials found their power of ownership significantly limited: by the intricacies and breadth of North Carolina’s cession; by their political inability to use raw force to enforce federal law; and by the rhetorical potency of appeals to state sovereignty, especially alongside the equal footing doctrine.

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<sup>45</sup> Act of April 18, 1806, ch. 31, 2 Stat. 381. For more discussion of the tripartite contest between Tennessee, North Carolina, and the federal government, see Thomas B. Jones, “The Public Lands of Tennessee,” *Tennessee Historical Quarterly* 27, no. 1 (April 1, 1968): 19-24.

Yet reading the 1806 statute as a hollow victory for the federal government ignores the significance of formal law in constructing early American federalism, which was still deeply unsettled. In fact, proponents of state sovereignty had little to be satisfied about the resolution. The 1806 law was, after all, a statute, not a contract, though nearly a year after its enactment Tennessee's representatives filed a vestigial and meaningless "consent" with Congress. Moreover, Tennessee had proved dependent on the federal government to determine the scope and nature of its land rights; in the end, Congress *was* the sole judge in its own cause. Subsequent events only further entrenched the statute's supremacy. When disputes over the ownership of Tennessee lands recurred in later years, as when North Carolina in 1818 sought to seize on an ambiguity to once again assert the right to grant state lands, the U.S. Supreme Court rebuffed these efforts by citing the 1806 compact. Tennessee, in other words, now needed the federal authority it had earlier spurned to safeguard the integrity of its land ownership. Like other land claimants, it, too, had come to rely on the federal government as the legitimate and final arbiter of claims of land ownership.<sup>46</sup>

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As Congress and Tennessee tussled over the state's public lands, the eastern portion of the Northwest Territory itself sought admission as a state, in a process that culminated in 1802. But the path to statehood for what became known as "Ohio" differed sharply from Tennessee's. In Tennessee, statehood had been a shared political project and the aim of nearly all territorial citizens; disagreements emerged only at the national

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<sup>46</sup> *Burton's Lessee v. Williams*, 16 (3 Wheat) 529 (1818). I rely heavily here on Jones's account of the subsequent history of Tennessee lands. Jones, "The Public Lands of Tennessee," *passim*.

level. By contrast, Ohio's admission was, from start to finish, a partisan affair that divided both territorial citizens and Congress into antagonistic camps based on affiliation with clearly defined political parties.<sup>47</sup>

Ideology and interest were complicatedly entangled in the rise of partisanship in the Northwest Territory. As we have seen, many citizens had chafed under what they perceived as the heavy-handed practices of St. Clair and Sargent. But these disagreements did not harden into clear political factions until the rise of a number of transplanted Virginians within the Virginia Military District. These men grew rich from the property chaos that existed within the District; St. Clair despised them as having “suddenly raised fortunes by speculations in lands, and many of those not the most honorably.” Led by Thomas Worthington, these men were ideologically “democrats,” in St. Clair's view, but they also resented St. Clair's stranglehold on territorial patronage, as well as his refusal to move the territorial capital to their new county town of Chillicothe.<sup>48</sup>

Although not the cause of hostility, the federal land system quickly became the focus for much of this contention. In 1800, Congress had amended the abortive 1796 land sale statute and adopted the Harrison Land Act, named for William Henry Harrison, the Northwest Territory's non-voting delegate who had largely crafted the statute's provisions. The Act occasioned very little of the lengthy debate that marked the enactment of its predecessor. The only substantive discussion occurred when

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<sup>47</sup> Accounts of Ohio's statehood that focus on its partisan context appear in Andrew R. L. Cayton, *The Frontier Republic: Ideology and Politics in the Ohio Country, 1780-1825* (Kent, Ohio: Kent State University Press, 1986), 68-80; Onuf, *Statehood and Union*, 67-87.

<sup>48</sup> Arthur St. Clair to Paul Fearing, December 25, 1801, in *SCP*, 549-51; Arthur St. Clair to James Ross, December 1799, in *ibid.*, 2:48-84. Thomas Worthington, for instance, complained that St. Clair had “near 700” offices and officers “under his controul.” Thomas Worthington to Secretary of the Treasury, May 17, 1802, in *TP: Vol. III*, 224-27.

Tennessee’s representative William Claiborne proposed an amendment that would have granted preemption rights to the “intruders”; his fellow Republicans, led by Albert Gallatin, quickly rebuffed him. Otherwise, the lengthy contentions that had marked all previous discussions of federal land sales had seemingly settled into a rough and tenuous consensus on the basic structure of governing the public domain.<sup>49</sup>

The Act’s most important provision was to open, at long last, federal land offices. The earlier plan to sell large plots of land in Philadelphia, never realized, was abandoned. Instead, offices located in four towns in the Northwest Territory—Cincinnati, Chillicothe, Marietta, and Steubenville—would sell to the public the lands that Rufus Putnam and his assistants had furiously surveyed into rectangular plots. In a concession to small purchasers, lands were to be sold in sections and half-sections of 640 and 320 acres, respectively. Available sections would be sold first in three-week-long “public vendue”—land auctions—with all unsold lands thereafter available at the land office for “private sale.” The minimum price for all sales, public and private, was \$2.00 per acre, with yearlong credit terms available; after a year, unpaid lots would be resold. The land offices were to be staffed by registrars, who were supplied with careful and elaborate instructions on how to record land sales in the public ledgers, and required to send detailed quarterly reports to the Secretary of the Treasury.<sup>50</sup>

Soon after it opened, the Chillicothe land office became the center of a power struggle between Thomas Worthington and his cronies on the one hand and Governor St. Clair and his allies on the other. Thanks to the election of 1800, a Republican

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<sup>49</sup> 10 Annals of Cong. 625, 651-52, 681-84 (1800).

<sup>50</sup> Harrison Land Act, ch. 55, 2 Stat. 73 (1800).

administration headed by Thomas Jefferson now controlled the land office, with Albert Gallatin now serving as Secretary of Treasury. Due to his impeccable Republican credentials, Worthington secured a position as the superintendent of public land sales and registrar of the land office. Since the law creating the offices had only just been enacted, much remained uncertain, including when and how the fees should be levied. St. Clair alleged that Worthington had been unlawfully charging fees for public land auctions that properly applied only to private sales. Worthington, angered by this attack on his character by a man he thought had “no concern Whatever in the regulation of My Office,” sought absolution from the Secretary of Treasury. Unfortunately for Worthington, the Attorney General sided with St. Clair, and a lawsuit proceeded against Worthington in the local courts. In the end, though, both the county and General Court disagreed with the Attorney General and vindicated Worthington. Yet St. Clair remained unsatisfied. He later alleged that Worthington was colluding with private purchasers at the land auctions, tamping down bidding on choice lands in return for kickbacks.<sup>51</sup>

The bitter antagonism between St. Clair and the Chillicothe Junto led Worthington and his allies first to attempt to secure the governor’s removal and, when that failed, to press for the Territory’s admission as a separate state. For their part, St. Clair and his Federalist supporters managed to forestall statehood, at least temporarily, by obtaining the division of the territory in the waning days of the Adams Administration. The western portion containing the Illinois and Wabash Countries became the newly

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<sup>51</sup> Thomas Worthington to Secretary of the Treasury, May 11, 1801, in *TP, Vol. III*, 133-36; Attorney General to Secretary of the Treasury, July 29, 1801, in *ibid.*, 156-68; Thomas Worthington to Secretary of the Treasury, August 21, 1801, in *ibid.*, 168-70; Gov. Arthur St. Clair to Secretary of the Treasury, October 11, 1802, in *ibid.* 248-51. On the role of the federal government in furthering Worthington’s political career, see Marion Nelson Winship, “Enterprise in Motion in the Early American Republic: The Federal Government and the Making of Thomas Worthington,” *Business and Economic History* 23, no. 1 (1994): 81–91.



created Indiana Territory, leaving only the eastern portion as the Northwest Territory, with fewer than the 60,000 inhabitants stipulated by the Northwest Ordinance for admission.<sup>52</sup>

Worthington and his allies pressed for the Territory's admission anyway, confident of the support of President and Congress, who they believed would welcome the additional Republican senators and representative. But the legal situation was more tangled. Regardless of whether a territory could, as Tennessee had attempted, claim admission of right with sixty thousand inhabitants, it was clear that the Northwest Territory, still shy of the required population, could be admitted only through act of Congress. A Republican-dominated committee duly met and drafted a bill that would authorize the Northwest Territory to draft a constitution and seek admission.<sup>53</sup>

In the course of drafting the enabling act, the committee consulted with Secretary of Treasury Albert Gallatin. As congressman, Gallatin had been the foremost advocate for permitting the Southwest Territory to achieve statehood of right, without any involvement from Congress other than acknowledgment. But now that he was charged with administering the public lands, Gallatin, writing at the exact same moment when a congressional committee was addressing the issue of land title in Tennessee, emphasized “fervently” the need to enact “effectual provisions” to “secure to the United States the proceeds of the sales of the Western lands.” One provision in the draft Enabling Act explicitly provided that Ohio could not enact laws repugnant to the provisions of the

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<sup>52</sup> On the division of the territory, see Act of May 2, 1800, ch. 41, 2 Stat. 60. On the effort to remove St. Clair, see “Thomas Worthington’s Memorandum to the President,” February 20, 1802, in *TP, Vol. II*, 212-15. The Ordinance *did* permit the admission of the Territory at an earlier stage, but seemed to make it conditional on congressional approval. Northwest Ordinance, ch. 8, 1 Stat 50, 53.

<sup>53</sup> *Annals of Congress*, 7th Cong., 1st Sess., 1097-1100.

Northwest Ordinance. But Gallatin urged, and the committee adopted, additional conditions to the Territory's admission, intended to ensure that the newly admitted state could in no way "interfere with the regulations adopted by Congress for the 'primary disposal of the soil.'" The draft Enabling Act thus further required that all lands sold by the federal government would be immune from state taxes for five years, on the grounds, Gallatin claimed, that state foreclosure proceedings for non-payment would interfere with federal authority over the land system. The bill attempted to sweeten this sweeping restriction on state authority by promising the new state ten percent of the proceeds of federal land sales towards internal improvements—which was later reduced to five percent, instead of accepting the proposal of the Territory's delegate that half the proceeds go toward road-building.<sup>54</sup>

The parties argued over whether Congress held the right to thus condition admission. To avoid colliding with his earlier position against congressional authority, Gallatin argued, and the other Republicans agreed, that the conditions were mere proposals to the Territory's constitutional convention for their "free acceptance or rejection." But Federalist opponents of statehood argued that the Enabling Act represented an unconstitutional interference with the Northwest Territory's right of self-government through their own legislature. The most sustained attack came from Arthur St. Clair, reluctantly permitted to speak before Ohio's Constitutional Convention held in late 1802. In a striking reversal, St. Clair, long the Territory's leading advocate of

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<sup>54</sup> *Ibid*, 1097-1126; Albert Gallatin to William B. Giles, Feb. 13, 1802, in Henry Adams, ed., *The Writings of Albert Gallatin* (Philadelphia: J.B. Lippincott & Co., 1879), 1:76-79. The bill also promised the new state rights to several salt springs, as well as reserving the proceeds of the sixteenth township sold by the United States to support education; this latter provision, however, merely duplicated the stipulations of the Ordinance of 1785. On the simultaneous consideration of Tennessee's land claims, see 11 *Annals of Cong.* 255-56, 259-62, 263-64, 425-26 (1802)

submission to federal authority, offered a defense of local autonomy against congressional interference that could just as easily have come from Sevier or Jackson. Congress's enabling act, he argued, was a "nullity," since the Territory could no more be regulated in its internal affairs by Congress "than we would be bound by an edict of the first consul of France." He continued to attack the attachment of conditions to a "right which is ours by nature and by compact." Conditions, he observed, were unprecedented, an "odious distinction" reserved for the Territory alone: "Were conditions imposed upon Vermont, or upon Tennessee, before they could be admitted into the Union? There was none attempted." The whole reason that Congress had hurried along the Territory's statehood, he argued, was that it was the "only time to saddle us with conditions," since, once they had the requisite numbers, "it would be no longer in their power."<sup>55</sup>

The Convention ignored St. Clair and approved a constitution for the new state of Ohio that accepted Congress's stipulations. "The poor old man has made his last speech and will very soon die politically," Worthington gleefully reported to his allies in Congress. Yet St. Clair's speech touched a nerve in the Jefferson Administration; Gallatin reported on its details to Jefferson, accusing St. Clair of misusing the precedent of Tennessee. Even though St. Clair's post would expire in mere weeks when Ohio assumed statehood, the President, through Secretary of State James Madison, peremptorily dismissed St. Clair anyway, citing his "intemperance and indecorum of language towards the Legislature of the United States." St. Clair thanked the President

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<sup>55</sup> *Annals of Congress*, 7th Cong., 1st Sess., 1097-1126; Arthur St. Clair, "Remarks of Governor St. Clair Before the Constitutional Convention," November 3, 1802, in *SCP*, 592-97.

for “discharge[ing] me from an office I was heartily tired of” six weeks sooner than planned.<sup>56</sup>

The Jefferson Administration’s touchy response to St. Clair’s speech likely reflected some unease over their political position. In insisting on conditions to admission, the Republicans had seemingly proved no more principled than St. Clair, readily jettisoning their ideological commitment to state sovereignty and autonomy for expediency’s sake. The argument that Gallatin advanced—that a constitutional convention that still required congressional approval would “freely” determine whether to accept Congress’s proposal—was, perhaps, too much of a legal fiction to be entirely comfortable. So many Republicans adopted another, less tortured defense of the attachment of conditions: they were, they argued, merely “explanatory” of Northwest Ordinance’s preexisting protection of federal property rights. Or, as the enabling act’s drafter argued on the floor of Congress against suggestions that “mystery and disguise” surrounded the bill, the conditions were simply “additional securities for the national property.” They would obviate the fears expressed by some representatives—who were considering Tennessee’s land claims nearly simultaneously—that “the Territory, when formed into a State, actuated by the inordinate possession of power, will be likely to grasp at our lands.”<sup>57</sup>

Irony abounded in the political posture of Ohio’s admission: the Jeffersonians became the unlikely champions of federal authority over the states, while men like St.

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<sup>56</sup> *Journal of the Convention, of the Territory of the United States North-West of the Ohio, Begun and Held at Chillicothe . . .* (Chillicothe: Printed by N. Willis, 1802); Thomas Worthington to William B. Giles, November 17, 1802, in *TP, Vol. III*, 257-58; Secretary of State to Gov. Arthur St. Clair, November 22, 1802, in *TP, Vol. III*, 260-63; Arthur St. Clair to James Madison, December 21, 1802, in *SCP*, 599-601.

<sup>57</sup> 11 *Annals of Cong.* 1115, 1119-26 (1802); Onuf, *Statehood and Union*, 76-85. This discussion over Ohio’s admission occurred on March 31, 1802; in January, the House had taken up, and referred to committee, the question of Tennessee’s land rights, while the Senate discussed the question beginning on April 7, 1802. 11 *Annals of Cong.* 255-56, 259-62, 263-64, 426 (1802).

Clair converted into improbable acolytes of local sovereignty against Congress. But the consequence of these uncomfortable contortions was to prevent a rehashing of Tennessee's arguments over whether the federal public domain could be reconciled with the equal footing doctrine. It helped, of course, that the Territory's foremost advocate of statehood, Worthington, was also a bureaucrat in the public land office. But it was even more significant that, because of the partisan alignments of Ohio's admission, Republicans both in Congress and in Ohio became staunch defenders of the federal government's land rights within state boundaries. In the process, the congressional right to regulate and condition state entry into the union—uncertain and contested when Tennessee had sought statehood as of right—was now codified into precedent.

Ohio's statehood differed sharply from Tennessee's in another way, as well: there was no discussion of Natives and their lands. In part, this reflected the consequences of the Northwest Indian War and the Treaty of Greenville. Unlike in Tennessee, where most of the state's territory legally remained Indian country, only Ohio's northwestern corner was still owned under federal law by the Wyandots and Miamis. Moreover, the comparative success of the federal land system avoided the problem of two overlapping, legally valid sources of title, as happened in Tennessee's Indian country. A federal infrastructure of forts, Indian agents, and annuity payments still dominated Native territory within Ohio, but Ohioans seemed relatively content with this division of labor. As a federal circuit court observed when the question of jurisdiction over Indian country in Ohio finally came to court thirty years later, "Within this state no collisions on this important subject [of state and federal jurisdiction over Indian country] have occurred."

Through subsequent treaties and cessions, the federal government slowly whittled away at Natives' land base, until only a single portion of Wyandot territory twelve miles square remained as Indian country. In 1842, the federal government extinguished Native title to these lands and removed the Wyandots to Kansas.<sup>58</sup>

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The Southwest and Northwest Territories had been created, in large part, to resolve the seemingly interminable struggles over sovereignty, jurisdiction, and property in the early American West. These questions did not vanish under territorial governance, but they were flattened and submerged into administrative politics, as territorial citizens argued with territorial officials, who in turn debated with cabinet officials and with Congress. Tennessee and Ohio's admissions as states reopened these long-standing issues, albeit it with an altered inflection. The earlier contentions had been polyvocal, as secessionist movements, Native nations, land companies, and multiple states all competed among and with each other for jurisdiction and ownership over the same lands. An echo of these struggles recurred in Tennessee's land struggles with North Carolina. But as even that dispute demonstrated, these confrontations were now framed and resolved not through the horizontal fights among sovereigns, but in the vertical clash between national and state sovereignty. As a result, the burning issue upon the states' admission was how much of the federal government's expansive authority would survive

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<sup>58</sup> United States v. Cisna, 25 F. Cas. 422, 423 (C.C.D. Ohio 1835). On Natives within Ohio after the Treaty of Greenville, see Hurt, *The Ohio Frontier*, 362-68; Karim M. Tiro, "The View from Piqua Agency," *Journal of the Early Republic* 35, no. 1 (Spring 2015): 24-54; Lori Dagggar, "The Mission Complex: Economic Development, 'Civilization,' and Empire in the Early Republic," *Journal of the Early Republic* (forthcoming). For the federal government's purchase of the Wyandots' remaining lands in Ohio, see Treaty with the Wyandots, U.S.-Wyandots, 7 Stat. 607 (March 17, 1842).

now that Tennessee and Ohio were no longer federal dependencies but independent and co-equal states.

In one sense, statehood settled nothing, despite the hope that it would provide definitive precedent. In Indian affairs, although there was no dramatic rupture as had occurred in 1797 and 1798, Tennessee and the federal government continued to tussle over authority well into the nineteenth century. Given the tangled history, many Tennesseans conflated federal and Native sovereignty, viewing both as an intrusion of a foreign jurisdiction within the state's sovereign borders. In the 1820s and 1830s, Tennessee Supreme Court, echoing courts elsewhere in the South, affirmed state jurisdiction over Indian country. At the same time, federal courts in Tennessee and Ohio nearly simultaneously issued the two most important decisions on the meaning and scope of the Trade and Intercourse Acts. Both courts sharply limited federal criminal law's reach and endorsed state jurisdiction, even as the U.S. Supreme Court reaffirmed federal supremacy in the Cherokee cases. Yet few in Tennessee objected to federal power over Indian affairs when their former congressman Andrew Jackson employed it to secure the long-sought-after removal of the Cherokees and Chickasaws from within the state's borders.<sup>59</sup>

In land, too, federal supremacy proved uneven, particularly in Tennessee. Even the 1806 statute's solemn guarantee of federal title in southwest Tennessee proved moot. After a fierce thirty-year battle in Congress, in which Representatives James Polk and

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<sup>59</sup> United States v. Cisna, 25 F. Cas. 422; United States v. Bailey, 24 F. Cas. 937 (C.C.D. Tenn. 1834). On the fights over Indian affairs in Tennessee, see Cumfer, *Separate Peoples, One Land*, 79-97; Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (Athens, Ga: University of Georgia Press, 2002), esp. 198-233. On the federalist struggles over Indian affairs in this period more generally, see Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880* (Lincoln: University of Nebraska Press, 2007).

David Crockett played leading if contending roles, the Tennesseans finally overcame eastern Whig opposition. In 1841, Congress made the state the agent for the sale of the “Congressional Reserve”; in 1846, it simply ceded the lands to Tennessee outright. As a result, formal federal ownership notwithstanding, Congress never created a federally administered land system in the state, and was forced to accede to Tennessee’s policy goals. In the half-century long struggle for the “right of soil,” Tennessee gained the authority and control over the lands within its borders it had long sought.<sup>60</sup>

Tennessee’s success emboldened other states. In the 1820s and 1830s, as proponents of state sovereignty grew more aggressive, Ohioan, and later representatives from Illinois, Indiana, and other public land states carved from the Northwest Territory, began demanding retrocession of the public domain to the states. Their rhetoric echoed nearly verbatim the arguments first advanced by Sevier thirty years earlier: the provisions of the Northwest Ordinance were no longer binding on the states once they were admitted to the Union, and denying states authority over their own lands violated the promise of equal sovereignty and independence pledged under the equal footing doctrine.<sup>61</sup>

In 1796, these arguments might have prevailed—as they did, in a sense. But the federal government’s stubborn refusal to concede the principle, in what seemed a merely symbolic victory, worked toward establishing federal ownership as precedent. Yet, given the continued uncertainty produced by Tennessee’s confrontation with the federal government, the argument from state sovereignty might even have produced results in

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<sup>60</sup> Act of February 18, 1841, ch. 7, 5 Stat. 412-13; Act of August 7, 1846, ch. 92, 9 Stat. 66-67. For this subsequent history of Tennessee’s public domain, see Jones, “The Public Lands of Tennessee,” 24-37.

<sup>61</sup> For the arguments for the cession of federal lands to the states, see John Robert Van Atta, *Securing the West: Politics, Public Lands, and the Fate of the Old Republic, 1785-1850* (Baltimore: Johns Hopkins University Press, 2014); Daniel Feller, *The Public Lands in Jacksonian Politics* (Madison: University of Wisconsin Press, 1984), 39–70; Frederick D. Hill, “William Hendricks’ Political Circulars to His Constituents: First Senatorial Term, 1826-1831,” *Indiana Magazine of History* 71, no. 2 (1975): 124–80; 4 Register of Debates in Congress 151–66 (1828).



1802. Instead, Congress, seemingly anxious to avoid the controversies that had occurred with Tennessee, attached conditions to Ohio's entry, which the proponents of Ohio statehood, eager to avoid any hint of challenge to congressional authority, blithely accepted. This created an even more durable precedent. After Ohio, every state admitted to the union had "voluntary" conditions attached to their entry, even when they had the requisite population of 60,000. No state ever rejected Congress's terms. Nearly all of the conditions related to the public lands; some explicitly required that the states renounce all title to unappropriated lands and acknowledge that they remained at the "sole and entire disposition of the United States." Much later, the federal government would require that western states disclaim all jurisdiction over Indian country as well.<sup>62</sup>

The result was, by the 1820s, it was much harder to challenge the constitutional settlement that Tennessee and Ohio's admission represented, and the arguments for state title failed. Abstractly, these arguments had a compelling logic that reflected how entwined property and sovereignty had been in the territories from the beginning. States had ceded the federal government jurisdiction with the express provision that it would exercise that authority only temporarily; it was anomalous that title was not similarly ceded to the new states. But thirty years on, this argument was largely foreclosed. As their interlocutors frequently reminded them, the opponents of federal title now confronted decades of entrenched precedent, codified under the fiction of state consent in the enabling acts.

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<sup>62</sup> For examples, see Indiana's enabling act, Act of April 19, 1816, 3 Stat. 289; Illinois's, Act of April 18, 1818, 3 Stat. 428; Alabama's, Act of March 2, 1819, 3 Stat. 489. Louisiana's enabling act specifically required that the state "for ever disclaim all right or title to the waste or unappropriated lands, lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States." Act of Feb. 20, 1811, 2 Stat. 641, 42. An identical provision appeared in Mississippi's enabling act, Act of March 1, 1817, 3 Stat. 348, 349. On western states' disclaimers of jurisdiction over Native lands, see David E. Wilkins, "Tribal-State Affairs: American States as 'Disclaiming' Sovereigns," *Publius: The Journal of Federalism* 28, no. 4 (September 21, 1998): 55–82.

The irony was that the critics were right: the new states were not on an equal footing. The territorial system was built on the myth that the federal government would temporarily control all aspects of governance within the territories, but that, upon statehood, this authority would recede, leaving behind a fully independent and coequal sovereign state. But the newly admitted states were not equal to the preexisting states with respect to federal authority and presence within their borders. Instead, the federal authority that had accreted under territorial governance remained, especially over land and Indian matters, forcing the newly admitted states to routinely grapple with federal officials. The result was that the territories—more particularly, the transition from territory to state—became arguably the most important site for the controversies over federalism that consumed the early republic and the antebellum United States. And the federal government retained an outsized presence in the West even after former territories ascended to statehood.<sup>63</sup>

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<sup>63</sup> Increasingly, the controversies over admission to statehood centered on slavery. The validity of the prohibition on slavery in the Northwest Ordinance after statehood was at issue in *Strader v. Graham*, 51 U.S. 82 (1850), where the Supreme Court determined that the continued effect of the Ordinance was inconsistent with the equal footing doctrine. In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Court struck down these provisions altogether as violative of the Constitution: for a comprehensive history, see Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978). Other federalism controversies that centered on statehood included the Missouri Compromise, the Compromise of 1850, and the status of Nebraska and Kansas. For recent work on some of these disputes, see Robert Pierce Forbes, *The Missouri Compromise and Its Aftermath: Slavery and the Meaning of America* (Chapel Hill: University of North Carolina Press, 2006); Don Edward Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (Oxford: Oxford University Press, 2001), 253-94; John Craig Hammond, *Slavery, Freedom, and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007); Michael A. Morrison, *Slavery and the American West: The Eclipse of Manifest Destiny* (Chapel Hill: The University of North Carolina Press, 1999). On the continued presence of the federal state in the West, see Richard White, *"It's Your Misfortune and None of My Own": A History of the American West* (Norman: University of Oklahoma Press, 1991); Heather Cox Richardson, *West from Appomattox: The Reconstruction of America after the Civil War* (New Haven: Yale University Press, 2007); Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: New York: Cambridge University Press, 2009), 151-218.

## Conclusion

In 1804, David Campbell—former territorial judge of the Southwest Territory, advocate for the intruders on Cherokee lands, and arrestee at the hands of the U.S. army—wrote to President Thomas Jefferson. The primary subject of his letter was the lands of the Cherokee Nation. “I will yet call them a Nation,” Campbell observed, “though they are not all together independent in reality, but so in form.” Campbell described the prospects that the Cherokees might exchange their lands within Tennessee for new “hunting grounds” beyond the Mississippi River; currently, he noted, they were resistant, but he believed that this goal could be accomplished “with time.” Such a cession was warranted, he argued, as it would “secure the immediate occupancy of all the lands granted to individuals by the State of No. Carolina before she ceded this part of the Country to the General Government.” This would “silence discontented Citizens,” who were complaining that they were “unjustly deprived from the enjoyment of property.”<sup>1</sup>

Campbell’s remarks, looking forward to a time when Native jurisdiction would no longer interfere with Tennessee’s exercise of its territorial rights, were one of the first discussions of a project of removal that would take thirty years to reach fruition. But they also demonstrated the long-lasting legacy of the debates over sovereignty and ownership that had occasioned the creation of Southwest and Northwest Territories and, later, the states of Tennessee and Ohio. In 1783, citizens of the newly created United States had often spoken of the newly acquired trans-Appalachian West as a vacant land of latent states-in-waiting to be shaped by national policy. What the new nation discovered

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<sup>1</sup> David Campbell to Thomas Jefferson, January 1, 1804, Series 1: General Correspondence. 1651-1827, Thomas Jefferson Papers, Manuscript Division, Library of Congress, <https://www.loc.gov/item/mtjbib013071/>.

instead was land thickly settled with both people—Natives, long-standing French habitants, itinerants from Kentucky, North Carolina, and Virginia—and their varied claims to ownership, governance, and protection. Resolving these conflicting rights had consumed federal territorial governance, as the diverse claimants had pressed federal officials to honor and codify their rights.

As Campbell's remarks indicated, uncertainty—over federal authority, property rights, and Indian affairs—persisted through, and well past, statehood. With respect to land, the significance and durability of property claims meant that it took the better part of a century to unspool the tangle of title created in the 1780s and 1790s. Preemption rights to lands south of the French Broad River; Symmes's loose land practices; the vague boundaries of lands in the Virginia Military District; the confusing titles granted by St. Clair and Sargent in the Wabash Country; rights to U.S. military bounty lands; the Ohio Company's finances—they all produced endlessly complicated histories of lengthy reports and interminable litigation that lasted well into the nineteenth century. The post-revolutionary schemes spawned lawsuits that filled the dockets of state supreme courts. In the U.S. Supreme Court, real property cases, many of them disputes arising under the systems of indiscriminate location from Ohio, Tennessee, and Kentucky, constituted nearly a quarter of the nonconstitutional cases decided between 1815 and 1835.<sup>2</sup>

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<sup>2</sup> The cases and documents on these topics are far too numerous to enumerate. For some of the cases prompted by the French Broad preemption rights, see *George v. Gamble*, 2 Tenn. 170 (1811); *Shields v. Walker*, 2 Tenn. 114 (1811); *Gould v. Hoyle*, 4 Tenn. 100 (1816). For a sampling of the cases involving Symmes's grant, see *Courcier and Ravises v. Thomas Graham*, 1 Ohio (Hammond) 330 (1824); *Ludlow's Heirs v. Kidd's Ex'rs*, 4 Ohio (Hammond) 244 (1829); *Lessee of George N. Hunt. v. Guilford*, 4 Ohio (Hammond) 310 (1831); *Williams v. First Presbyterian Soc'y in Cincinnati*, 1 Ohio St. 478 (Ohio 1853); *Wilson v. Tischbein*, 8 Ohio. Dec. Reprint. 612 (District Court of Ohio, Hamilton 1883). On the very lengthy and complicated saga of Vincennes's land rights, see Leonard Lux, *Vincennes Donation Lands* (Vincennes, Ind.: Vincennes Historical and Antiquarian Society, 1977). Lux observes that some lands still remained without patent to the time of his writing, citing an example of a 1921 land patent signed by Calvin Coolidge. On the military bounty lands, see William Thomas Hutchinson, *The Bounty Lands of the American Revolution in Ohio* (Arno Press, 1979). For a coda on the Ohio Company, "an old land company," and its finances, see *Ward v. United States*, 77 U.S. 593 (1871).

But the legacy of the late eighteenth-century land experiments in the territories extended beyond the confusion they left in their wake in Ohio and Tennessee. In leaping straight from the Ordinance of 1785 to the Harrison Land Act of 1800, historians naturalize these statutes' neat framing of the issues—parcels' size, price, credit terms—that would dominate the public lands' contentions of the following centuries. But the two land laws were built on a fundamental fiction of vacant lands. This vision of empty, saleable parcels, divided by neat gridlines into tidy sections, that could be sustained only once preexisting land rights had been clarified, defined, and, if necessary, extinguished. Through the 1790s, federal officials, along with thirteen of the fifteen land statutes enacted by Congress during the decade, had created this “empty” land by arbitrating the claims of Natives, earlier European settlers, and intruders. Only after fifteen years of this administrative toil could a federal land office come into existence.

But the work did not stop in 1800. The land laws' underlying fiction remained a fiction: as the United States expanded westward across the continent, incorporating new regions obtained through purchase and through force, Anglo-Americans never found the vacant land of their imagination. Everywhere they went, federal officials discovered that the lands they now claimed were part of the United States already had owners—Natives asserting complicated rights under Native law, but also landholders and purchasers whose title traced to a snarl of law and custom established under the continent's earlier Spanish,

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On the numbers of real property cases before the U.S. Supreme Court, see. Edward White, *The Marshall Court and Cultural Change: 1815-35*, (New York: Macmillan, 1988). app'x, 978-79. White records 172 real property cases during the period out of a total of 791 nonconstitutional cases, making it, as White notes, the largest “number of substantive nonconstitutional cases on the Court's docket,” coming only behind civil procedure and eclipsing such vital areas as contracts and credit disputes and admiralty. Though the exact proportion is unclear, White observes that many of these cases arose from “state land grants” from “Virginia [including the Military District in Ohio], Tennessee, and especially Kentucky,” which had employed similar systems of indiscriminate location. *Ibid.*, 753-778. A similar pattern holds for the first fifteen years of the nineteenth century, where George Haskins found that other categories of cases on the Court's docket were “dwarfed in economic magnitude by the great cases involving real property and public land grants.” George Lee Haskins, *Foundations of Power, John Marshall, 1801-15* (New York: Macmillan, 1981), 588-603.

French, British, and Mexican sovereigns. The tangle of these rights in places like Mississippi, Louisiana, Missouri, Arkansas, let alone California and New Mexico, far eclipsed the challenges that had baffled St. Clair and Sargent in Vincennes. But these land rights were ultimately resolved the same way: through the precedent of federal administrative adjudications first adopted, almost thoughtlessly, in the Illinois Country.<sup>3</sup>

There was also another, more abstract legacy of the struggles over the territories. The state cessions had started, but did not finish, the process of creating the federal public domain. As the history of the 1780s and 1790s shows, there was nothing inevitable or natural about federal control over western lands. In taking the vague promises of the Northwest Ordinance as clear consensus, historians have ignored how deeply rooted state ownership of the public domain remained for many in the early republic. “The lands within the United States are holden of the individual states, and not of the United States,” Representative Giles of Virginia, later a key architect of Ohio’s admission, stated in Congress in 1791. And in fact, whether formally, as in the Virginia Military District, or *de facto*, as with all of Tennessee, state ownership of ostensibly federal lands was common. This precedent could, and nearly did, become the model that governed westward expansion. Instead, the federal government met at least partial success in beating back arguments for state ownership when Tennessee and Ohio gained statehood.

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<sup>3</sup> This history, too, is highly complicated. Some overviews appear in Jerry L. Mashaw, “Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829,” *Yale L.J.* 116 (2007): 1636; María E Montoya, *Translating Property: The Maxwell Land Grant and the Conflict Over Land in the American West, 1840-1900* (Berkeley: University of California Press, 2002); Paul W. Gates, *History of Public Land Law Development*. (Washington: U.S. Govt. Print. Off., 1968). As Paul Gates observes, “No problem caused Congress, officials of the General Land Office, and Federal courts more difficulty or took up as much time as the private land claims, that is the grants of land made by predecessor governments in areas acquired from Great Britain, France, Spain, Mexico, and in the Oregon country by agreement with Great Britain.” He estimates that there were 35,000 claims covering 45 million acres, and counts 126 cases that went to the Supreme Court before 1860. Gates also notes a brief experiment in 1824 where Congress sought to shift these claims into the federal district court, only to quickly retreat to a congressionally created Board of Land Commissioners; not until the 1840s would regular judicial review of land claims be established. *Ibid.*, 87-115.

Nothing was definitively settled: there was a good deal left to fight about, as the later, and ongoing, contentions over sovereignty and title attest. But the precedents and law created by Tennessee and Ohio's admissions helped doom efforts to undo the constitutional settlement that had evolved in the 1790s.<sup>4</sup>

Struggles continued in Indian affairs as well, as Campbell's letter indicated. Knox and others had hoped that the federal government would serve as a neutral arbiter in the seemingly intractable disputes between Natives and their non-Native neighbors in the territories. The attempt to fulfill that promise spawned an infrastructure of superintendents, Indian agents, interpreters, and military and trading posts to stand between the two groups. The considerable flow of federal funds and Indian "presents" westward also had some effect. Ironically prompted by Native power, this largesse, though a blunt and often ineffective implement of federal policy, worked to make formerly "independent" Native nations like the Cherokees seem dependent on the federal government, at least to the eyes of outsiders like David Campbell. As Natives found themselves an increasingly administered, they became arguably the first people within the United States to confront the thicket of federal bureaucrats that would later develop into the administrative state. In the process, Native and federal authority became inextricably entangled; though Natives understood the divide all too well, it was increasingly hard for people like Campbell to separate Native and federal sovereignty.<sup>5</sup>

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<sup>4</sup> 2 Annals of Cong. 1945 (1791). For the ongoing use of arguments of the equal footing doctrine to attempt to argue for state control over public lands, see *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997).

<sup>5</sup> On the subsequent administration of Indian affairs, see Stephen J Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (Cambridge: Cambridge University Press, 2010); Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1984); Ronald N. Satz, *American Indian Policy in the Jacksonian Era* (Lincoln: University of Nebraska Press, 1974); Deborah A Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880* (Lincoln: University of Nebraska Press, 2007).

The federal government's attempt to use law and finance to control its own citizens proved less effective. Even while the national government controlled the territories, it could not fully restrain the inhabitants. Notwithstanding their self-serving denunciations of federal officials' "improper leanings" in favor of Natives, territorial citizens proved quite adept at twisting federal power, and securing federal patronage, to serve their own ends. And, in the Southwest Territory, the prospect of increased power for local citizens over Indian affairs was a major impetus toward statehood: territorial citizens had rightly predicted the political influence that an autonomous government and representation in Congress would grant them.

It was arguably the growing clout of the rising western states, as much as the shift to the Jeffersonians, that eroded the Washington Administration's paternalist humanitarianism in Indian policy over the first half of the nineteenth century. Just as federal power and Native autonomy became intertwined, states' rights and Indian dispossession similarly fused, constituting the core principles of an ascendant Democratic Party centered in the Old Southwest. By the 1830s, as Daniel Walker Howe observes, votes on Indian affairs were the strongest predictor of partisan affiliation. As a result, though the rhetoric and ideas exemplified by Knox never vanished—finding substantial echoes, for instance, in Marshall's Cherokee cases—Knox's successors found themselves stymied when they sought to follow his precedents. There were simply too many barriers to enforcing Knox's legal legacy: hostile and uncooperative state governments, a partisan and divided Congress, and ultimately a Presidency held by a former federal official from



the Southwest Territory—Andrew Jackson—who had fought Knox’s program from the beginning.<sup>6</sup>

There was a lot more at work here than simply the long shadow of the fights of the territorial period. Controversies of federal power over land and Indian affairs, though fierce in former territories like Tennessee, Alabama, Indiana, and Michigan, also raged hotly in Georgia, which had never been a territory at all. But these struggles also reflected legacies of the territorial period, particularly in the lingering footprint of a federal state that had come early and, despite the promises of equal footing with the original states, never quite left. “[H]appy it would have been for the people of this Country,” John Sevier told the Tennessee legislature in 1804, in the thick of the fight over Tennessee’s lands, that “after conquering the savages and supporting our independence without the aid of the parent,” Tennesseans might have been allowed to realize “the fruits of our labour.” Instead, the federal government sought to deny the state “our justly acquired rights,” even as “other States in similar circumstances” received “without molestation the benefits and rewards of their struggles.”<sup>7</sup>

Sevier’s rhetoric of self-reliance was a fantasy version of Tennessee’s history, but one with considerable power: it helped secure Tennessee both ownership and eventually sovereignty over its lands, once the Cherokees and other Native groups that the Tennesseans no longer considered nations were removed from the state’s territory. That both these processes occurred through federal law was irrelevant: a state arguably

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<sup>6</sup>Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford: Oxford University Press, 2007), 357. On the Marshall cases, see *ibid.*, 413-21; Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, 1996).

<sup>7</sup>John Sevier, “Legislative Message,” July 23, 1804, in *Messages of the Governors of Tennessee*, ed. Robert H. White (Nashville: Tennessee Historical Commission, 1952), 182-84. Interestingly, in using the term “parent,” Sevier seemed to be referring to North Carolina as well as to the federal government.

spawned by the federal government proved a willful and disobedient child, eager to cast out “the parent” that had nurtured it.

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In 1940, Tennessee marked the sesquicentennial of the Southwest Territory. It was a respectable affair, a gathering at Rocky Mount in eastern Tennessee with an address to two thousand attendees. But it was far outshone by the Northwest Territory’s sesquicentennial three years earlier. For those celebrations, a “pioneer caravan” of re-enactors retraced Rufus Putnam 1787-88 route to found the Ohio Company’s settlement. Beginning with services at Manasseh Cutler’s church in Ipswich, Massachusetts, they journeyed in a wagon train to western Pennsylvania, where they chopped down trees to construct a raft, and, in the spring, they began to float down to the Ohio. En route, the caravan stopped at towns to perform a pageant entitled “Freedom on the March,” which depicted eight scenes including the Treaty of Fort McIntosh and the enactment of the Northwest Ordinance. On April 7, 1938, the convoy reached Marietta, 150 years after Putnam and his men, where they were reportedly met by Delaware Indians. Everywhere it went, the caravan caused a tremendous sensation. National radio broadcast updates on their progress, and hundreds of thousands of people turned out to see the caravan: in the end, an estimated two million people had come to see the caravan as it passed from Massachusetts to eastern Ohio.<sup>8</sup>

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<sup>8</sup> For the sesquicentennial celebration of the Southwest Territory, see Russell Cherrington Driver, *Leslie Rowles Driver: The Fruitful Prince* (Maryville, Tenn. Script Press, 2002), 300 n.839. Letters from the college students serving as re-enactors in the pioneer caravan appear in Northwest Territory Celebration Letters, 1937-1938, William L. Clements Library, University of Michigan. For accounts of the pageant and caravan by the organizers, see Northwest Territory Celebration Commission, *Final Report of the Northwest Territory Celebration Commission . . .* (Marietta, Ohio: Federal Writers’ Project, WPA in Ohio, 1938). An overview of the

The contrast between the two celebrations reflected how central the Northwest Ordinance and the Northwest Territory had become to national and regional identity, even as Tennessee turned its attention from its territorial interlude to the later illustrious career of native son Andrew Jackson. But the focus of Northwest Territory Celebration was not the men in Congress who had crafted the Ordinance, nor the leaders of the Ohio Company. It was a celebration of the pioneers—the “plain American citizens . . . who pushed [democratic] government westward across a continent and to eminence among the nations of the earth.” Amid the speechifying at Marietta was an embrace of the local pioneer values against the encroaching reach of the New Deal.<sup>9</sup>

In its celebration of the common man, the “pioneer caravan” reflected the times, although it differed sharply from the original Ohio Company, whose leaders like Winthrop Sargent had lacked the common touch. But there was nonetheless an important parallel between the two. The sesquicentennial celebration of autonomous, democratic expansion was organized by the Northwest Territory Celebration Commission, established by congressional resolution. Congress also foot the bill, appropriating \$100,000.<sup>10</sup>

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celebration appears in John Bodnar, *Remaking America: Public Memory, Commemoration, and Patriotism in the Twentieth Century*, Reprint edition (Princeton, N.J.: Princeton University Press, 1993), 126-34.

<sup>9</sup> Bodnar, *Remaking America*, 126-34.

<sup>10</sup> Joint Resolution of August 2, 1935, ch. 429, 49 Stat. 511.

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3. George Washington Collection. MS-1033.

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4. Letters Sent by the GLO to Surveyors General, 1796-1816. Microfilm. M027.
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3. James Patten Papers, 1788-1799.
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5. Josiah Harmar Papers, 1681-1937.
6. Moses Warren, Jr., Letters, 1796-1797.
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