Space, Indigenous Sovereignty, and Paradoxes of American Constitutionalism

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Paper prepared for the Graduate Student Workshop,
Penn Program on Democracy, Citizenship, and Constitutionalism

December 5, 2012

Introduction

The paper sketches what I am calling a paradox of American constitutionalism: the simultaneous, and co-constitutive, reliance on and disavowal of indigenous sovereignty for U.S. sovereignty claims.[1] In order to show this, I reframe the "founding" of the U.S. in terms of space and indigenous peoples, downplaying more typical framings like taxation or representation. Drawing on work in legal and political history and theory, this reframing highlights the settler character of the American project, showing how taxes, representation, and federalism were intimately connected to the politics of land and indigenous title, and how expansion was a fundamental premise of the American project.

The paper moves through three sections: first, an examination of the imperial crisis and the break from the British empire with a focus on the ways in which settlers' conceptions of their rights and their relationship with the Crown developed in relation to questions of indigenous title and legal status; next, a discussion of the territorial problems inherited from the empire: the "western lands" controversy, political union, and the problem of republican expansion; and finally, an overview of the role treaties and "Indian diplomacy" played in the territorial and sovereignty claims of the new republic, with the very territorial presence of the U.S. in need of reinforcement from the groups being deterritorialized. Taken together, these arguments show the unstable "ground" of U.S. sovereignty and territorial jurisdiction, with the legal geography of the Constitution acting prospectively on unsettled lands but justifying territorialization retrospectively via claims of constitutional supremacy and self-evidence.

Land and Settler Rights

As scholars of settler colonialism[2] have argued, settler projects are *land-centered*: "more than other regimes...a settler colonial project is predominantly about territory," where the territorialization of the settler community entails the "parallel and necessary" deterritorialization of indigenous outsiders.[3] The territorialization of space creates a normative order, where particular types of property and political relationships are considered legitimate, while others are deemed illegitimate or lacking. Over time, the practices of territorialization in the North American settler colonies of the British empire created both widely shared understandings of settler rights among settlers themselves, but also growing confusion about the status of the colonies within the domain and whether the English constitution applied outside the realm. The increasing distance between settler and imperial understandings of rights, land title, and legitimate authority formed the context for the imperial crisis of the late eighteenth century.

Most accounts of the imperial crisis begin with the Royal Proclamation of 1763, and for good reason – the shift in imperial policy marked a departure from previous practice, and settler response was both sharp and widely shared.[4] However, as Craig Yirush has recently shown in a masterful reconstruction of the development of early American political theory, the century prior to the Proclamation is crucial to understanding the depth and breadth, as well as the character, of the colonies' reactions to the Proclamation and related policies. In a series of policy and legal debates with imperial officials, settler elites developed a conception of their rights that turned on understandings of the origins of title to land and the legal and political status of indigenous peoples. This understanding of rights drew increasingly on

natural rights and natural law in its reading of the British constitution and legitimate authority in the colonies.[5]

As Zuckert shows, "The conflict leading up to the Revolution was a battle over the true character of the constitution of the British empire."[6] The question of whether the "rights of Englishmen" traveled with emigrants when they left the realm was confronted by people on both sides of the Atlantic. The British constitution was particularly ill-suited to answer this question, as it had formed in relation to the realm, not to a wide-ranging dominion.

While early Crown interpretations of colonial rights tended to tolerate settler autonomy, by the last decade of the seventeenth century new attempts were made to bring the colonies more under imperial control. Through a number of these episodes over the next century, ranging from movements to revoke charters to attempts to control trade, the Crown would argue that its authority was grounded in the doctrine of discovery and the right to conquer "infidel-held" lands, with settler rights being grants by the Crown, and thus susceptible to prerogative power.[7] As the disputes over rights intensified, influential English jurists like William Blackstone would argue (1765) that the common law applied only in England, not the dominions, whether near like Wales or distant like America.[8]

The settler response to the question of colonial rights, on the other hand, was a complex formulation with two main strands. One strand involved appeals to common law and to rights of consensual government, sentiments that grew with the increasingly prevalent practices of colonial self-government and representation in colonial assemblies. The second strand involved the sixteenth century revival of natural law theory under the newly

developed law of nations (*ius gentium*), which, because universal, was held to be applicable to "newly discovered" lands as well as the indigenous peoples living there.[910] For the settler elites formulating this body of theory, it was not a matter of the rights of Englishmen *versus* natural rights, but rather an amalgam of the two, where common law rights and the English constitution were read through the lens of natural law and natural rights.[11]

The question of indigenous peoples and their land played a crucial role in the development of settler conceptions of rights.[12] Drawing on tenets of natural law, the settlers made a number of claims about indigenous rights, not always consistent theoretically but all sharing "the same end: to base the legal foundation of the colonies on the right of the settlers – via purchase, labor, or conquest – to replace indigenous authority with their own," and to contest Crown claims to prerogative power in North America.[13] On the one hand, settlers often claimed that indigenous peoples did have rights to property, and thus that any Crown claims through the doctrine of discovery were a violation of those rights. However, this argument was used to make a related, and crucial, one: that when the settlers purchased land from indigenous peoples, individual settler action, not colonial charters or grants, formed the basis of land title. Perhaps the most common argument invoked some variant of a Lockean theory of property, wherein indigenous peoples may have had a natural right to *occupancy*, but because their cultivation was not intense enough to establish property rights, they did not possess true title. Under Locke's doctrine of appropriation without consent, individual settler labor generated superior property rights, as well as replacing a savage land with civilized government and society.[14]

For Blackstone, the constitutional status of the settlers also turned on the presence of indigenous peoples in North America. Only in an "uninhabited country," "discovered and planted by English subjects," can English law go immediately into force, as it is the "birthright of every subject," carried wherever the subject goes. In a habited country, on the other hand, where there are already laws in force, the act of conquering leaves the king with the discretion of instituting new laws or leaving old laws in place. This discretion means that whatever laws exist, the ultimate authority is the (king-in-)Parliament, not the traditional constitution and common law. Since North America was habited by indigenous peoples when the English arrived, Blackstone argued, settlers lived under parliamentary authority, not the common law.[15] Many settlers also drew on the common law tradition in order to contest such arguments, however, invoking the right of conquest on their own behalf, against the Crown. As conquerors, these settlers argued, they could not only claim title to the lands they conquered, they could choose whichever legal system they wished. Their choice to live under the English constitution and to give their allegiance to the king was therefore a compact, revocable if protection was not forthcoming. The compact understanding of allegiance also meant that the ties in the empire were between individual colonies and the king, not through Parliament; this allowed the colonies to claim legislative independence from Parliamentary interference.[16]

The outcome of this century-long debate was the emergence of two visions of the empire: the Crown's, wherein royal prerogative could trump settler rights because the colonies were but "subordinate polities," their existence thanks to grants of the king; and the settlers', that of a nascently federal, decentralized empire of "equal dominions tied together by allegiance to a common monarch, an allegiance which in turn was conditional on the Crown's respect

for colonial rights."[17] The development of these two visions of empire was predicated on contested and changing interpretations of indigenous political and legal status, as well as on the presumption of English settlement of the continent.

This account of the source and scope of settler understandings of their rights makes it clear why the Royal Proclamation of 1763 elicited such a broad and sharp settler response. The Proclamation of 1763 was part of an attempt to assert royal authority in the colonies following the Seven Years' War. Imperial officials considered more strict rule in the colonies important to ensuring more economic gain from the colonies, to securing the borders with France and Spain, and to cultivating crucial alliances with indigenous peoples and confederacies, both to bolster Anglo settler safety and to undermine similar French and Spanish alliances, as many indigenous groups that had for some time successfully negotiated the French presence would now be under English jurisdiction.[18] For imperial officials, colonial self-government and autonomy were seen as undermining these goals, particularly as unruly settlers and speculators moved west without regard for indigenous land claims and their effects on inter-imperial rivalries or indigenous retaliation.

The Proclamation created a boundary line along the mountain ranges to the west of the colonies, beyond which no English settler could purchase land or settle without London's approval. More than this, though, it set aside the vast majority of the land recently acquired from France as an "Indian reserve," partly in recognition of the pivotal role indigenous alliances had played in the war with France. In addition, no western land sales in the future would be allowed to occur without the actions of Crown officials, and there would be new regulations for carrying on trade relations with indigenous peoples.[19] Enforcing the limits on

settlement and the border with Spain would require large numbers of troops and many additional forts. Imperial officials saw this troop presence as working in the interests of the colonies, which meant the colonies should pay for their presence. The need to fund the new land and indigenous policies in the west is what precipitated the explosive Stamp Act of 1765 and the crisis that followed.[20]

What to imperial officials seemed a reasonable solution to a dangerous set of circumstances elicited outrage and resentment from settlers. Given the content of what they understood to be their rights – that the empire only existed because they made it with their labor; that the lands of North America were not the king's to give or keep; that their rights to expansion were more important than preserving "hunting grounds" for Indians who weren't using the land fully; that the decisions about taxation were made in Parliament, not their own colonial assemblies – the proclamation of the end of western settlement hit the settlers where it hurt the most. Further, though there had been limited attempts at imposing more imperial control over the previous century, after settler resistance, none of them had come to much. The Proclamation was the first "parliamentary legislation that seriously affected [the colonies'] internal governance," and the settlers were shocked and offended.[21]

The Proclamation's boundary line went against what most settlers had come to see as their right and, at least in part, their purpose on the North American continent: to cultivate new lands, to increase the settler population, to establish new farms and towns in the name of colonial civilization. As Richard Immerman has suggested, the widespread use of the term "empire" at the time to describe the union of colonies-turned-states was not simply another word for "state." The leaders of the new polity had more than government consolidation in

mind; rather, they envisioned a type of state that would *grow*.[22] As settlers defended their autonomy against claims of prerogative power in the late eighteenth century, they also gave empire a "wholehearted embrace," as long as it was an empire "in which the settlers were its agents and not subalterns whose liberty and property was subject to metropolitan control."[23]

In the years before the Revolution the problem of limitations on settlement was overtaken rhetorically and politically by questions of taxation, representation, and, ultimately, sovereignty. However, the pivotal grievance of an imposed limitation on expansion is among the injuries and usurpations in the Declaration of Independence: "[King George III] has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands."[24] That 1763 marks the beginning of the "Revolutionary era" in American history seems apt, given the role of land and indigenous relations in the development of a theory of settler rights.

Land and Political Union

Given this settler presumption of expansion and embrace of empire, it should come as no surprise that the problems that confronted the Crown as they sought to manage vast expanses of "unsettled" territory and establish a unitary empire and did not disappear with independence. Indeed, the problem of the west vexed the new confederation of states, leading many political elites to question the possibility of a political union altogether. Unruly settlers, separatist movements, strong indigenous confederations, imperial rivalries, competing states' land claims, fears of republicanism's dilution with territorial expansion, and the question of increasing the number of states together created a politically combustible situation. The new republic came to a series of successful political compromises regarding

the west and expansion, but in the process basic questions of rights and jurisdiction were often left unanswered.

When these political compromises regarding land title, the origins of property, and the status of indigenous peoples became enshrined in the Constitution and in judicial decisions, what had been contingent compromises became precedents, shaping U.S.-indigenous relations for more than two centuries. The presumption of expansion written into the U.S. Constitution creates a prospective jurisdictional imaginary, wherein jurisdictional claims are projected into the future and into "unsettled" lands, to be justified later, retrospectively, using the very text that projected the jurisdictional claim in the first place. This section unpacks the problems and politics of land that confronted the new union of states, showing how the question of "the west" and the indigenous peoples in it were central to the creation of the new federal republic and a new legal geography.

Discussions about the status of western lands and the formation of new governments were taking place in Congress by early 1775, before independence was declared.[25] The terms of the debate transitioned fairly rapidly from disputes with Parliament about new colonies in the west to discussion about new (state) governments.[26] Though there was broad (though not absolute) agreement about the desirability of the addition of new states, the western lands issue was one of the most divisive that the Framers faced.[27] With some states claiming western lands based on colonial charters of uncertain value after declaring independence (the landed states), other states shore-locked and without room for expansion (the landless states), overlapping and competing claims among the landed states, and with the entire system of the Articles of Confederation up in the air, the often vitriolic and mistrustful

disputes among the states threatened to bring the already fragile union apart.[28] Some within the Continental Congress feared that land disputes would lead to war.[29] For the new confederation of states to succeed, the landed states would need to cede their charter claims to the national government, which in addition to clearing up inter-state disputes would give the Congress not only a new and much-needed power, but also a means to raise money and pay off the war debt.

Even without a solution to the problem of western land claims, though, Congress outlined principles for western expansion. The first congressional guidelines for disposal of public lands or a national domain came in the Public Lands Resolution of 1780, which set the framework for subsequent public land statutes. The Public Lands Resolution contained two fundamental, and crucial, resolutions: that the public lands would be settled as sovereign states, and that these states would be republican.[30] In addition to the problem of not having "public lands" because no state had ceded any land yet, the resolution was in tension with the constitutional form of the Confederation as a league of sovereign states. How can a league of independent sovereign states create new states which cannot join the league until after their creation? Robert Hill suggests that this mismatch between the existing constitutional form and the dynamics of western expansion contributed to the sense of need for a new constitution.[31] I suggest that it also shows the existence of a prospective, settler jurisdictional imaginary, a legal geography that encompasses territories not yet claimed, but already imagined "inside."

Further, the Public Lands Resolution and Virginia's land cession of 1781 (not accepted until 1784) both took place before the Treaty of Paris in 1783, and thus before the U.S. could

claim any kind of undisputed authority over its own states or its western claims. Indeed, the Public Lands Resolution was passed six months before the Articles of Confederation were even ratified. This jurisdictional mapping was a prospective assertion of settler sovereignty, even though that sovereignty was unclear internally (authority relations between the states and the Congress) and externally (an ongoing war, and indigenous claims of autonomy).

The eventual agreement among the states in 1784-5 on a plan for land cessions gave Congress the only "significant addition to its authority" after the Articles went into effect.[32] It could begin the process of selling the national domain, and, it was hoped, generate revenue. The land cession resolution has significance beyond this, though, in that it revived the doctrine of discovery and the right of conquest in U.S. constitutional thought. On the eve of the revolution, at least three theories existed regarding indigenous peoples' legal status and rights: the Crown's claim of prerogative power, based in the right of conquest; landed colonies' claims that their colonial charters, combined with settlers' natural-law rights to title, gave the colonies, not the Crown, prerogative power; and the idea that Indians were included in natural law and had natural rights as sovereigns to the title over their soil, which could therefore be sold to whomever they wished, without an imperial or colonial governmental intermediary.[33] During the debates about the western lands, the argument that indigenous peoples have natural rights was taken up by land speculators who hoped that Congress would rule against Virginia's expansive claim of title through discovery and conquest and instead support the notion of natural rights and its corollary, individual settlers creating title themselves through purchasing land from indigenous peoples.[34]

The ability of Virginia to win the battle for recognition of its charter claims is important because the legal principle of discovery and conquest, not the politicking of Virginia and Maryland, is what is treated as precedent in American constitutional doctrine. The 1784-5 resolution of the western lands problem was a political and not a principled one, in that it was arrived at through bargaining and recognition of mutual self-interest, not because one theory of indigenous legal status was considered the correct one. The use of precedent means that after the resolution favoring the doctrine of discovery was institutionalized, and the related territorial policies approved under the new U.S. Congress, the doctrine of discovery became a norm to be turned to in judicial opinions, which has happened on a number of occasions in relation to indigenous land claims.[35]

Of the three discourses of indigenous legal rights around the time of the Revolution, then, only one was totally lost: that indigenous peoples had natural law rights to land.[36] The consensus was instead that indigenous peoples lacked the natural law right to sell to whomever they pleased, unmediated by some (European or American) constituted authority.[37] This political compromise – a "compromised discourse of conquest," says Williams – settled key parts of indigenous legal status and rights in U.S. law and gave the federal sovereign the claim of exclusive rights to extinguish Indian occupancy claims. Further, by not re-visiting the issue of the western lands and by claiming federal exclusivity in relations with indigenous peoples, the Constitutional Convention of 1787 ratified the compromise of 1784-5, in favor of national authority in relation to indigenous peoples, and against land speculators.[38]

With the resolution of the western lands controversy, the Continental Congress was faced with the question of how to organize the ceded territory politically and how to control the settlers and speculators who went west ahead of the law. The same set of questions vexed the Crown and set off the series of events that tore the empire apart. The question for Congress, then, was how to avoid the same situation.

Congress passed a series of three Land Ordinances to address the question of settling the Northwest Territory and creating new states. The Ordinance of 1785 is known mostly for instituting the rectangular survey as the method of mapping land prior to sale. Most important of the ordinances is the Northwest Ordinance of 1787, for it both superseded the Ordinance of 1784 and was made law by the first Congress under the new Constitution. The Northwest Ordinance established a process by which states would form out of the Territory, involving direct Congressional authority that diminishes in stages until entrance into the union as a state equal politically to the others.

The principle of new state equality was the solution to the problem of expanding settler republican government in a large territory, the problem that ultimately tore the empire apart.[39] First outlined in the Public Lands Resolution in 1780, the idea that settlement would occur through sovereign, republican states created an "entirely new notion of empire and solved the problem of relating colonial dependencies to the central authority that Great Britain had been unable to solve in the 1760s and 1770s."[40] The principle of new state equality would bring an end to permanent second-class colonies, and by making the Northwest Ordinance law, the first Congress created an expectation that new states would enjoy this status. The American government was no more willing to allow unregulated

settlement of western lands than the Crown had been; but unlike the Royal Proclamation, which created colonial resentment by seeming to stop new settlement and was an imperial encroachment on colonial autonomy, the Northwest Ordinance promised not only new settlements, but future political equality. As Bunke points out, the principle of new state equality was unprecedented and radical: "a people in the process of establishing a new nation, adopting an essentially permanent mechanism for the progressive incorporation of large and undefined new areas into their polity on terms that would inevitably lead to the relative diminution of the charter states."[41] There is no doubt that this decision *was* radical, as each new state would diminish the influence of the original states in the Senate. However, the decision to formulate this principle should be seen in the context of separatist threats, widespread squatting, imperial meddling, still-powerful indigenous collectives, and the recent memory of what happens when permanent colonies are kept from expanding; all of these were issues that could lead to wars the U.S. was in no financial position to wage. The background agreement about the U.S. as a settler project made the principle of new state equality a worthwhile risk.

The provisions for new state admission in the Land Ordinances and the Constitution's Admissions Clause point to a tension (if not a paradox) within American territorial expansion. New states were to be admitted as equal members of the union and were to have republican governments, but the provision for this ran ahead of actual settlement. Within this framework, nascent states are both always-already part of the United States *and* destined to become one of those United States. The administrative mapping of territorial and constitutional jurisdiction has always run ahead of itself, offering a blueprint for the actual creation of jurisdiction *and* the assumption that normatively this jurisdiction already exists.

This prospective administrative mapping has affinities with the imperial maps Winichakul describes, maps that "anticipated a spatial reality" rather than represented one already in existence, maps there were a "model for rather than a model of what [they] purported to represent."[42] Prospective mappings are politically and jurisdictionally important, for they allow retrospective legitimation claims, as the imperial maps of Virginia's western charter claims show.

Treaties and Political Presence

Though the political compromise of 1784-5 re-established the doctrine of discovery and right of conquest in U.S. constitutional thought, the rhetoric of sovereignty continued to be used in relation to indigenous peoples. Rather than a shift in principle, however, this was primarily a pragmatic move, necessary for the U.S. to establish diplomatic presence in international politics and to help protect its legitimacy in the eyes of other states, as well as a less expensive way to acquire land than through war. This section shows how the use of indigenous sovereignty by the U.S. helped it makes its own sovereignty claims, but also how those U.S. claims reinforced the belief in a lack of indigenous sovereignty.

It has been well-established that diplomacy and national defense were critical in the formation of both the Articles of Confederation and the U.S. Constitution.[43] In addition to the disputes about western lands, questions of territorial policy, and ongoing separatist threats, the union was also in danger from the "outside." Following the revolution, other European nations continued to make treaties with indigenous peoples, which threatened to impinge on the United States' ability to draw indigenous groups on the frontier to their side.[44] Treaties are important because they are a distinctive type of power that can do things

other legal acts cannot; namely, "legally bind foreign sovereigns or future American governmental actors." This distinctiveness makes treaties "an essential means for implementing national powers in the international arena."[45] The treaty power is a diplomatic power, which makes treaty-makers representatives of their *collectives*. This collective representation function, combined with the power to bind future actors, gives the treaty power a special status and a particularly important role in a national government. The government under the Articles could achieve none of these goals with the existing treaty system, and the borders in particular was consistently under threat. The "machinations" of Spain, England, and France, particularly their attempts to enlist indigenous groups to their side and in opposition to the U.S., meant that "Indian diplomacy" was of prime importance to the new republic, as it offered economic, diplomatic, and military benefits to counteract the imperial powers surrounding the new nation.[46]

The problem, however, was that the treaty system under the Articles of Confederation was worse than ineffective – it was frequently dangerous and often counterproductive. Because treaties were not yet the "supreme law of the land," they had no coercive force. States consistently undermined federal authority by negotiating their own treaties, and with the lack of enforcement power under the Articles, nothing could be done about illegal treaties.[47] When states negotiated illegal treaties with indigenous peoples, the outcomes were often violent, weakening the position of the U.S. in relation to indigenous confederacies and potentially strengthening the position of imperial rivals. This weakness, coupled with the fear of spies and subversion from within, separatist movements and illegal alliances with imperial rivals, and a nearly nonexistent army and navy, created a national mood in the 1780s

of apprehension and vulnerability, a sense of living in the midst of "hostile monarchs" and often hostile indigenous groups, with no clear sense of who may be a true ally.[48]

The overall weakness in the area of foreign affairs "contributed substantially" to calls for reform of the Articles.[49] In particular, at the Continental Congress, there was "overwhelming consensus" that treaty enforcement was one of the key areas where increased national power was necessary.[50] Lack of enforcement and of national supremacy in treaty matters undermined any claims of being "one nation in respect to other nations,"[51] as well as risked fomenting indigenous and settler resentment. A further concern was voiced at the Continental Congress in March of 1788, when a message was relayed that implied the overall American treaty policy with indigenous peoples was failing because the of the use of the language of conquest. The problem, beyond a lack of consent not matching the republic's self-image, was that European states could take the opportunity and side with a confederation of indigenous groups against the Americans, creating the danger of a massive Indian war.[52]

Treaty provisions under the new Constitution were crafted to fix these weaknesses, putting the federal government in a position of clear supremacy diplomatically. By making state-generated treaties unconstitutional, the federal government claimed *exclusivity*, a privilege of sovereignty. Not only would this ensure a relatively uniform policy in relation to various indigenous groups, it would help establish the U.S. as "internally" superior in relation to the states. As multivalent institutions, treaties would also offer economic benefits only the federal government could negotiate, would create the possibility for consistent political alliances, would assert the territorial boundaries of the new republic by (theoretically)

obtaining throughout the land, and could help to push the Europeans out of the frontier equation, as land cession treaties with indigenous peoples required exclusivity in regard to other nations.

By the mid-1790s, following the ratification of the Constitution and in part because of significant, successful treaties with the Choctaws and Cherokees, the U.S. looked like a state on the upswing. Britain and Spain made military and trade concessions they had resisted for years, and internally, separatist movements were quashed or disappeared as the position of European rivals looked less strong.[53] While clearly not the only or even the most important reason the U.S. looked stronger than it had been before, treaties with indigenous peoples *were* important to fostering a diplomatic presence. The U.S. lacked options in terms of its European imperial rivals, and without treaties to establish land claims on the frontier and secure rights of exclusivity in dealing with indigenous groups, the U.S. faced a hostile environment in which to conduct its "republican experiment."

The paradox of this formulation, however, is that the work that the treaties did for U.S. sovereignty claims was only possible because some sort of indigenous sovereignty was assumed to obtain. Without sovereignty on each side of a treaty, the agreement cannot hold. So while the U.S. in some contexts allowed for the doctrine of discovery and the right of conquest to hold, in others it proclaimed indigenous sovereignty. If such conflicting claims were only for economic gain or short-term benefits, the term hypocrisy would be more apt than paradox. But because fundamental premises of political and territorial existence were on the line, the idea of a paradox of constitutionalism seems to hold. Further, U.S. and indigenous sovereignty claims had an inverse relationship over time, where U.S. claims

strengthened as indigenous claims weakened. Such a relationship has the potential to destabilize the normative claims being made, but because the U.S. engages in practices of strategic disavowal typical of settler polities, the "grounding" of its territorial and sovereignty claims in indigenous lands and rights is largely unnoticed, and thereby further disavowed.

Conclusion: Normative Orders and Strategic Disavowals

This paper has highlighted the ways indigenous legal and political status is a key component of American political and legal institutions, as well as its legitimacy claims. Settler colonialism is and has been the "condition of possibility"[54] for "America," and what we know as "rights" are bound up with claims about indigenous peoples. The claims of the U.S. Constitution to supremacy and jurisdiction rely on the prospective jurisdiction asserted over "unsettled" lands in the late eighteenth and early nineteenth centuries. The self-evidence of judicial opinions and their retrospective justifications of what had been prospective assertions create a horizon of political and legal possibility that takes settler norms for granted, and sees indigenous claims as alien and/or lacking.

To make sense of these contested jurisdictions and rights claims, it is necessary to see territory as a normative order: a contingent nexus of material, philosophical, economic, cultural, and political claims that add up to more than the sum of their parts. As a normative order, it is not enough to claim space, or even to "settle" it. In the world of contemporary politics, such claims need to be considered legitimate (by those inside and outside the territory), and therefore appeals must be made beyond realpolitik or might making right. If we can see the ways in which U.S. claims to normativity rely on both the exclusion of indigenous political, cultural, and economic formulations, as well as the ways those same

claims have needed to *invoke* those formulations – then, perhaps, the disavowals can stop, and a fuller understanding of the content of our rights and responsibilities can be constructed.

[1] It is beyond the scope of this paper to pursue in any depth, but the notion of indigenous "sovereignty" is not an uncontested one among indigenous scholars and activists, as well as some non-indigenous scholars working on indigenous politics. Like them, I question the use of "sovereignty" to refer to indigenous political autonomy and self-determination. As a theoretical construct of European-oriented politics and international law, "sovereignty" collapses a plethora of indigenous political orientations and practices under a framework that, unsurprisingly, finds indigenous peoples lacking many or most of the attributes of sovereignty. I will use the term here in part because many actors in the pre- and post-Revolutionary era used it, and in part to highlight how U.S. claims to a sovereign grounding rest on an often disavowed status: indigenous sovereignty itself. On these doubts, see Thomas Biolsi, "Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle," *American Ethnologist*, 32(2005):239-259; Mark Rifkin, *Manifesting America: The Imperial Construction of U.S. National Space* (Oxford, UK: Oxford University Press, 2009); and Rifkin, "Indigenizing Agamben: Rethinking Sovereignty in the Light of the 'Peculiar' Status of Native Peoples," *Cultural Critique* 73(2009):88-124.

[2] The literature on settler colonialism has grown dramatically over the last decade and is still growing; much of it points to parallels and connections between the U.S. political experience and that of other settler polities, due to shared "problems" of land and indigenous peoples. My own research has drawn on Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007); Edward Cavanagh, "Discussing Settler Colonialism's Spatial Cultures," *Settler Colonial Studies* 1(2011):154-167; Annie E. Coombes, "Memory and History in Settler Colonialism," in *Rethinking Settler Colonialism: History and Memory in Australia, Canada, Aotearoa New Zealand and South Africa*, ed. A. Coombes (Manchester, UK: Manchester University Press, 2006); Ford, *Settler Sovereignty*; Alyosha Goldstein, "Where the Nation Takes Place: Proprietary Regimes, Antistatism, and U.S. Settler Colonialism," *South Atlantic Quarterly* 107(2008):833-861; Frederick E. Hoxie, "Retrieving the Red Continent: Settler Colonialism and the History of American Indians in the US," *Ethnic and Racial Studies* 31(2008):1153-1167; Aziz Rana, *The Two Faces of American Freedom* (Cambridge, MA: Harvard University Press, 2010); Rifkin, *Manifesting America*; Rifkin, "Indigenizing Agamben"; Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880* (Lincoln: University of Nebraska Press, 2007); Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave Macmillan, 2010); Lorenzo Veracini, "Settler Colonialism and Decolonisation," *Borderlands* 6(2007); Lorenzo Veracini, "On Settlerness," *Borderlands* 10(2011)1-17; Lorenzo Veracini, "Introducing *Settler Colonial Studies*," *Settler Colonial Studies* 1(2011):1-12; Michael Warner, "What's Colonial about Colonial America?" in *Possible Pasts: Becoming Colonial in Early America*, ed. R. B. St. George (Ithaca, NY: Cornell University Press, 2000); Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999); Patrick Wolfe, "Settler Colonialism and the Elimination of the Native"; Patrick Wolfe, "*Corpus Nullius*: The Exception of Indians and Other Aliens in US Constitutional Discourse," *Postcolonial Studies* 10(2007)127-151; Patrick Wolfe, "After the Frontier: Separation and Absorption in US Indian Policy," *Settler Colonial Studies* 1(2011):13-51; and Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (Cambridge, UK: Cambridge University Press, 2011).

[3] Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* 81; see also Patrick Wolfe, "Settler Colonialism and the Elimination of the Native."

[4] Robert A Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford, UK: Oxford University Press, 1990); Michael Kammen, "The Meaning of Colonization in American Revolutionary Thought," *Journal of the History of Ideas* 31(1970):337-358.

[5] Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (Cambridge, UK: Cambridge University Press, 2011); see also Michael Zuckert, "Natural Rights and Imperial Constitutionalism: The American Revolution and the Development of the American Amalgam," *Social Philosophy and Policy* 22(2005):27-55.

[6] "Natural Rights and Imperial Constitutionalism," 33.

[7] Williams, *The American Indian in Western Legal Thought*; Yirush, *Settlers, Liberty, and Empire*; Zuckert, "Natural Rights and Imperial Constitutionalism."

[8] Yirush, *Settlers, Liberty, and Empire*, 44.

[9] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005), ch. 1; Williams, *The American Indian in Western Legal Thought,* ch. 2; Yirush, *Settlers, Liberty, and Empire*, 12, ch. 2.

[10] Yirush, *Settlers, Liberty, and Empire*, 17.

[11] Zuckert, "Natural Rights and Imperial Constitutionalism," 34. In a related point, Kammen, "The Meaning of Colonization in American Revolutionary Thought," suggests that the divergent understandings of imperial officials and settlers of what the colonial project *was* led to different understandings of the present status of settler rights.

[12] Zuckert, "Natural Rights and Imperial Constitutionalism," 28.

[13] Yirush, *Settlers, Liberty, and Empire*, 18.

[14] John Locke, *Second Treatise of Government*, (1690; Indianapolis: Hackett Publishing, 1980), esp. Book V; James Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground," *Social Philosophy and Policy* 11(1994):153-180; Williams, *The American Indian in Western Legal Thought*, chs. 6 and 7; Patrick Wolfe, "Settler Colonialism and the Elimination of the Native"; Yirush, *Settlers, Liberty, and Empire*, 18, 76-77, 99-101.

[15] William Blackstone, *Commentaries on the Laws of England* (Chicago: Chicago University Press, 1979), 93, quoted at Yirush, *Settlers, Liberty, and Empire*, 47. Also see Williams, *The American Indian in Western Legal Thought*, ch. 6.

[16] Kammen, "The Meaning of Colonization"; Yirush, *Settlers, Liberty, and Empire*, 47; Zuckert, "Natural Rights and Imperial Constitutionalism."

[17] Yirush, *Settlers, Liberty, and Empire*, 16-17; see also Kammen, "The Meaning of Colonization"; and Zuckert, "Natural Rights and Imperial Constitutionalism."
[18] Williams, ch. 6; Yirush, 16.

[19] Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford, UK: Oxford University Press, 2009), 19-21; Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, UK: Harvard University Press, 2007), 92-94; Williams, ch. 6.

[20] Fred Anderson, *The Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766* (New York: Vintage Books, 2000); Williams, ch. 6; Yirush ch. 8.

[21] Yirush, 218.

[22] Richard H. Immerman, *Empire for Liberty: A History of American Imperialism from Benjamin Franklin to Paul Wolfowitz* (Princeton, NJ: Princeton University Press, 2010), 8.

[23] Yirush, 18; see also 110-111.

[24] "Declaration of Independence," in *The Federalist: A Commentary on the Constitution of the United States,* ed. Robert Scigliano (New York: Modern Library, 2001), 569.

[25] Robert F. Berkofer, "Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System," *The William and Mary Quarterly* 29(1972):231-262, 233; Nobles, *American Frontiers*, 92.

[26] Berkofer, "Jefferson, the Ordinance of 1784," 233.

[27] Williams, 231.

[28] Hill, "Federalism, Republicanism, and the Northwest Ordinance"; Onuf, "Toward Federalism: Virginia, Congress, and the Western Lands." It should be noted that competing state claims based on overlapping colonial charters were a byproduct of mapping claims without knowing the territory being mapped.

[29] Williams, 289-90.

[30] Robert Hill, "Federalism, Republicanism, and the Northwest Ordinance," *Publius* 18(1988)41:52, 43.

[31] Hill, "Federalism, Republicanism, and the Northwest Ordinance."

[32] Jack Rakove, "The Legacy of the Articles of Confederation," *Publius* 12(1982):45-66, 47.

[33] Williams, 287. While it is important to note that there is not one settler position on the status of indigenous rights, it also must be noted that each position presumes that settlers will eventually acquire indigenous land.

[34] Williams, 272-5.

[35] The most infamous is *Johnson v. McIntosh*, 1923, in part because it was overturned only a decade later in *Worcester v. Georgia*, 1832, and both majority opinions were written by Chief Justice Marshall. For a discussion of the cases that complicates the triumphalism of many commentators who see in *Worcester* an argument in favor of indigenous sovereignty, see Ford, *Settler Sovereignty*. For one triumphalist account, see Tully, "Aboriginal Property and Western Theory."

[36] Williams, 307. Remnants of Crown discovery and conquest passed to Virginia in its claim of a "devolved" right to conquest, so Crown discovery was not entirely lost.

[37] Williams 307.

[38] Williams 306.

[39] This debate is best known through *Federalist* no. 10 and Madison's arguments about large territories and faction. Space constraints prohibit real engagement with this issue, but there is clearly work to be done that places the debates about the size of a republic in the context of a settler background agreement about land and rights.

[40] Wood, *Empire of Liberty*, 122. Wood places the principle of new state equality as originating with the Northwest Ordinance, but as described earlier, the Public Lands Resolution outlined this principle in 1780.

[41] Bunke, "Federal Ownership of Public Land and Western Sectionalism," 18.

[42] Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (Honolulu: University of Hawai'i Press, 1994), 130.

[43] See Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York, NY: The Free Press, 1975) and Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (1973; Louisiana State University Press, 1986) on the dismal state of the military in the early years of the republic, as well as the inability of the Continental Congress to do anything about it.

[44] Vine Deloria Jr. and David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin, TX: University of Texas Press, 1999), 9-10.

[45] Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American History* (New Haven: Yale University Press, 2004), 36.

[46] Marks ch. 1.

[47] Marks, 1-2.

[48] Marks 97-112.

[49] Marks 47.

[50] Marks 143.

[51] James Madison, *Federalist* 42, 266.

[52] Deloria and Wilkins 11-12.

[53] Marks 212-3.

[54] See Wolfe, *Settler Colonialism and the Transformation of Anthropology,* on settler colonialism as the "condition of possibility for Australia.