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Tribal-State Affairs: American States as 'Disclaiming' Sovereigns

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The history of tribal-state political relations has been contentious from the beginning of the republic. As a result of these tensions, the relationship of tribal nations and the federal government was federalized when the U.S. Constitution was ratified in 1788. Thus, a number of states, especially in the West, were required in their organic acts and constitutions to forever disclaim jurisdiction over Indian property and persons. This article analyzes these disclaimer clauses, explains the factors that have enabled the states to assume some jurisdictional presence in Indian Country, examines the key issues in which disclaimers continue to carry significant weight, and argues that the federal government should reclaim its role as the lone constitutional authority to deal with indigenous nations.

In *Native American Church v. Navajo Tribal Council* (1959)[1], a federal district court stated that "Indian tribes are not states. They have a status higher than that of states." Notwithstanding this statement, states have often acted as if they were the political superiors of tribal nations. Such assertions of state jurisdiction in Indian Country,[2] absent tribal and federal consent, are problematic, however, because they violate the doctrine of inherent tribal sovereignty,[3] run afoul of the treaty relationship between federally recognized tribes and the federal government, damage the federally recognized trust doctrine,[4]

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[1]272 F. 2d 131 (1959).

[2]Broadly, it is country within which Indian laws and customs and federal laws relating to Indians are generally applicable. It is also defined as all the land under the supervision and protection of the United States government that has been set aside primarily for the use of Indians. This includes all Indian reservations and any other area under federal jurisdiction and designated for Indian use (Title 18, U.S. Code, Section 1151).

[3]Tribes, as preexisting polities, exercise a number of political and legal powers that only sovereigns may wield, such as the power to adopt a form of government; to define the conditions of tribal citizenship/membership; to regulate the domestic relations of the tribe's citizens/members; to prescribe rules of inheritance with respect to all personal property; to levy dues, fees, or taxes on tribal citizens and non-Indian residents; and to administer justice. For details, see the Solicitor's Opinion, "Powers of Indian Tribes," *Opinions of the Solicitor,* 25 October 1934, 55 I.D. 14, vol. 1 (Washington, D.C.: U.S. Department of the Interior, 1974), pp. 445-477.

[4]The "trust doctrine" or "trust responsibility," as defined by the U.S. Supreme Court in *Seminole v. United States,* holds that there is a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited peoples. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of the Congress, and numerous decisions of this Court, it has charged itself with *moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards,* 316 U.S. 286, 296-297 (1942).

and breach the doctrine of federal supremacy in the field of Indian affairs outlined expressly in the commerce clause and implicitly in the treaty clause of the U.S. Constitution. Those two clauses, the U.S. Supreme Court has held, provide Congress with "all that is required" for complete control over Indian affairs.[5]

Furthermore, and most important for our purposes, state efforts to move into the internal political and economic affairs of tribal nations within their borders appears to violate the Indian disclaimer clauses that 11 Western states (Table 1, Table 2, and Table 3) were required by the federal government to include in their territorial acts, enabling acts, and constitutions. These 11 states are home to more than 80 percent of the United States indigenous population and nearly all of the country's 278 Indian reservations. Those clauses, dating from Wisconsin's territorial disclaimer of 1836, to Alaska's constitutional disclaimer of 1959, expressly declare that these territories—later states—are precluded from extending their authority inside Indian Country. There is some important variation in language in these measures (Tables 1-3). Generally, however, each contains language designed to assure both tribes and the federal government that the territory/state will never, without federal consent and/or a treaty modification, interfere with the internal affairs of tribal nations.

For example, Arizona's disclaimer clause is found in Article 20: Ordinance, 4th and 5th sections, of the state's constitution, which became effective on 12 February 1912 when it was admitted to the Union. It reads:

> The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States...and no taxes shall be imposed by this State on any lands or other property within an Indian Reservation owned or held by any Indian.[6]

The federal government, in requiring certain states to include these clauses, assumed the double duty of "*preserving* to the Indians the quiet possession of the reservation as their future home and *protecting* their persons and property therein, and this duty and obligation still exists, never having been released by the actions of the Indians or by treaty or agreement with them."[7]

[5]See, *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

[6]*Constitutions of the United States: National and State: Alaska* (Dobbs Ferry, NY: Oceana Publications, 1993), p. 75.

[7]*United States v. Ewing*, 47 Fed. 809, 813 (1891), emphasis added.

In a few instances, the federal government has acted to delegate its constitutional authority over Indian affairs to states, though there is a question as to whether the United States government may legitimately make such a delegation without attaching to such delegation the existing treaty and trust protections guaranteed to tribes by the United States in the Constitution, treaties, statutes, executive orders, and court decisions.[8]

As President Bill Clinton noted in an executive order issued on 18 May 1998, "the United States has a unique legal relationship with Indian tribal governments...in treaties our Nation has guaranteed the right of Indian tribes to self-government."[9] Thus, if the states are indeed constitutionally intertwined with the national government, then an argument can be made that the treaty and trust commitments of the United States to tribes should not be terminated unilaterally absent a mutually agreed upon treaty modification with the tribes' informed consent. As the Supreme Court held in *The Kansas Indians*, Indian treaty rights may not be adversely affected except "by purchase or by a new arrangement [treaty] with the United States."[10]

HISTORICAL BACKGROUND OF DISCLAIMERS

Federalism in the United States has had a fluid history, and tribal political fortunes have sometimes hinged on how the balancing contest has worked out between states and the federal government. From the Articles of Confederation through the American Revolution, to the current Indian gaming controversies,[11] the colonies, territories, and later states have frequently vied with the federal government for jurisdictional control of Indian people, lands, and resources.

Tribal nations are frustrated by the repeated federal and state assertions of political dominance over their peoples and resources, but insist on maintaining the nation-to-nation political relationship established by treaties and sustained by the trust doctrine with the federal government. The federal government maintains that it is the superior sovereign *vis-à-vis* the tribes and also the states with respect to the tribes. It also has acted to acknowledge the sovereignty of the tribes (through treaties and the trust relationship)

[8]The U.S. Supreme Court, *Parker v. Richard*, 250 U.S. 235 (1919), held as much when it determined that state courts act practically as a federal agency when the Congress delegates authority for them to act regarding Indian oil and gas royalties. "That the agency which is to approve or not is a state court is not material. It is the agency selected by the Congress and the authority confided to it is to be exercised in giving effect to the will of the Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency.... Plainly, the restrictions have the same force and operate in the same way as if Congress had selected another agency, exclusively federal, such as the Superintendent of the Five Civilized Tribes" (p. 239).

[9]Office of the President, Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments," *Weekly Compilation of Presidential Documents*, 18 May 1998, vol. 34, no. 20, p. 869.

[10]5 Wall. 787 (1867).

[11]See, for example, Heidi L. McNeil, "Indian Gaming: Prosperity and Controversy," *American Indian Relationships in a Modern Arizona Economy*, ed. Malcolm Merrill (Phoenix, AZ: Arizona Town Hall, 1994), pp. 105-121.

and is constitutionally bound to acknowledge state sovereignty, but historically has vacillated in supporting the tribes or the states in tribal-state conflicts.

The states have been frustrated by the persistence of tribal nations as separate geographical, political, and racial enclaves within their borders, despite the federal government's intensive assimilation campaign from the early 1800s to the late 1950s aimed at forcing indigenous nations to jettison their cultural identities and part with their communal lands.[12] States have felt hampered by the federal government's vacillating policies for tribes: Are tribes to be legally terminated and their members assimilated, or are they to be respected as extraconstitutional sovereigns generally free of state jurisdiction? Finally, how are the states to cope with the reality that Indians have citizenship rights in all three polities?

When the U.S. Constitution was drafted, the framers made a clear declaration of federal supremacy over all matters relating to commerce with Indian nations (i.e., the commerce clause). Some of the 13 original states, however, especially Georgia and New York, continued to act as if they had retained sovereignty over Indian affairs, and they continued to conduct relations with tribes as if the commerce clause were not present.[13]

Nevertheless, when the Congress of the Confederation enacted the Northwest Ordinance of 1787,[14] it provided for three stages of government for the territories and states into which the region was to be divided. First, authority was to be exercised by federal appointees. In the second stage, authority was to be shared by these appointees and a representative assembly, with the governor still appointed by the president. Finally, the state was to be admitted to the Union on an equal footing with the old states.[15] This third stage was fulfilled only after the territory had attained a population of 60,000 free inhabitants and adopted a constitution, created a republican form of government, and determined the qualifications for voting and holding office.

Article Three of the ordinance stated that the federal government would always observe the "utmost good faith" toward Indians and that their lands and property would never be taken without tribal consent. Thus, while a few of the 13 original states would continue to contest federal supremacy in the nation's commercial and political affairs with tribes, the Northwest Ordinance, alongside the commerce clause and treaty relationship, unequivocally acknowledged that the federal government was in charge of the nation's Indian policy in the territories.

[12]See, for example, Francis Paul Prucha, ed., *Americanizing the American Indians: Writings by the 'Friends of the Indian:' 1880-1900* (Lincoln: University of Nebraska Press, 1973); Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (New York: Cambridge University Press, 1984).

[13]See Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, 1996).

[14]See Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington: Indiana University Press, 1987); Daniel J. Elazar, ed., "Land and Liberty in American Society: The Land Ordinance of 1785 and the Northwest Ordinance of 1787," *Publius: The Journal of Federalism* 18 (Fall 1988): entire issue.

[15]Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Government Printing Office, 1968), p. 72.

All new states were admitted "on an equal footing" with the original states, being guaranteed a republican form of government, adequate lands for schools, a percentage of the net proceeds from the sale of public lands for constructing roads, and so on. However, a precondition of territoriality and then statehood was the federal government's reservation of power and authority over Indian affairs. The equal footing doctrine, in other words, does not interfere with the federal government's authority under the commerce clause, the property clause, the supremacy clause, or the treaty-making authority.

Although the states have been constrained by the Constitution's delegation of Indian policy to Congress, there are few instances where a state has actually expunged or modified its disclaimer clause. Congress, on a few occasions, has delegated a measure of its constitutional authority over Indian affairs to states, but aside from these few explicit exceptions, states have no constitutional authority inside Indian Country absent congressional invitation, an amendment of the state's statutes or constitution, and, arguably, absent a modification of existing Indian treaties.

WHY THE NEED FOR DISCLAIMERS?

Commentators who have researched disclaimers have provided several explanations for why the federal government crafted territorial and state disclaimers. We can group the explanations into three interrelated categories: expediency, treaties/trust, and exclusive/supremacy.

Expediency

This argument holds that the Indians were to be protected in their lands only until such time as they were ready to be removed or assimilated. However:

> As the removal policy was winding down, the pace at which states were being settled, formed, and admitted to the union began to outstrip the speed with which the federal government could remove tribes from the states prior to statehood. Thus, beginning with the admission of Wisconsin and Kansas, Congress began to insist that *some* states disclaim authority and jurisdiction over lingering vestiges of Indian country by including such disclaimers in the enabling or statehood legislation in their state constitutions.[16]

This explanation does not tell us, however, why the Congress insisted that only some states agree to such a disclaimer. Presumably, as Justice William J. Brennan put it, it had "more to do with historical timing than with

[16]Robert N. Clinton, Nell Jessup Newton, and Monroe E. Price, *American Indian Law: Cases and Materials*, 3rd ed. (Charlottesville, VA: Michie, 1991), pp. 500-501.

deliberate congressional selection."[17] Brennan here is referring to the *McBratney*[18] decision of 1881, which appears to have played a pivotal role in determining which states were required to have disclaimers. This case will be discussed later.

Treaties/Trust

According to Carole Goldberg-Ambrose, "at the time Congress required the disclaimers, they were necessary to protect Indian populations from homesteaders and settlers. By demanding the disclaimers, the federal government acknowledged its obligation to stand between these two hostile groups and prevent continuing exploitation of the Indians."[19] Congress, says Goldberg-Abrose:

> Began insisting on disclaimers of state jurisdiction over Indian reservations immediately after United States Supreme Court decisions first indicated the possibility that such jurisdiction could be exercised. Viewed in this light, the disclaimers are more than protection against Indian loss of real property interests; they are congressional insulation against state jurisdiction over reservation Indians.[20]

For example, in *United States v. Stahl*,[21] a United States circuit court held that when Kansas was admitted to the Union, it came in on an equal footing with the original states and although the federal government retained title to the land it owned within the state, it relinquished jurisdiction over it insofar as the general purposes of government were concerned with certain exceptions. "The first exception reserved the lands of Indian tribes which had treaties exempting them from state jurisdiction; the second, the power to tax the lands of the United States and of the Indians."[22]

It is the treaty dimension that receives the slightest amount of treatment in contemporary judicial, state, or congressional discussions about tribal-state relations; yet, it is a most important dimension. The Cherokee Treaty of 1828[23] contained explicit language in this regard. The Cherokee were guaranteed a "permanent" home in their newly acquired western lands, and they were assured by the federal negotiators that "under the most solemn guarantee of the United States," it would remain theirs forever. It would be a home "that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State."[24]

[17] *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 562 (1983).
[18] 104 U.S. 621 (1881).
[19] Carole Goldberg-Ambrose, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," *UCLA Law Review* 22 (October 1974): 570.
[20] Ibid.
[21] 27 Fed. Cas. No. 16, 373 (1868).
[22] Ibid., 1289.
[23] 7 Stat. 311-15.
[24] Ibid., 311.

Three years later, the Shawnee Nation negotiated a treaty with the United States in which the Shawnee were guaranteed under Article 10 that their lands "shall never be within the bounds of any State or territory, nor subject to the laws thereof."[25] Many other treaties contained provisions in which the tribes were assured that their relationship was solely with the federal government. For example, a treaty with the Apache in 1852 acknowledged this nation-to-nation status. Article One states: "Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America."[26]

This argument is also supported by the language found in congressional reports like those accompanying debates on statehood. An adverse report attached to a House report[27] on the "Admission of Dakota, Montana, Washington, and New Mexico," written by Representative William Springer of the Committee on the Territories, recognized the extraterritorial and nontaxable nature of Indian Country, which had been confirmed in Dakota's territorial disclaimer clause of 1861. That measure provided that:

> Nothing in this act contained shall be construed to impair the rights or person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Dakota, until said tribe shall signify their assent to the President of the United States to be included within the said Territory or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights by treaty law, or otherwise, which it would have been competent for the government to make if this act had never been passed.[28]

Thus, Springer, in authoring his negative report, was reminding his fellow committee members of both the sovereign and the separate proprietary interests of the Indians who had not consented to any alteration of their land base. He further noted that a major reason against statehood was the fact that there were nine Indian reservations in the territory, the jurisdiction over which was reserved exclusively in the federal government so long

[25]Ibid., 355.

[26]10 Stat. 979.

[27]U.S. Congress, House, Committee on Territories, *Admission of Dakota, Montana, Washington, and New Mexico into the Union*, 50th Cong., 1st sess., 1888.

[28]U.S. Government Printing Office, "Temporary Government for the Territory of Dakota," *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies*, ed. Francis N. Thorpe, vol. 5 (Washington, D.C.: Government Printing Office, 1909), pp. 28-46.

as Indian title exists. Springer said, "the State can not tax the lands in these reservations, or derive any advantages from them. These reservations comprise over 26,847,105 acres, or 41,984 square miles....White population is prohibited upon all these Indian reservations, and so far as the government and the State of South Dakota is concerned, the Indian reservations might be excluded entirely."[29]

Exclusion/Supremacy

Maxwell Carr-Howard states that Congress' protection of its absolute control over the nation's relations with tribes was evidenced in the fact that "many western states were given a clear message to avoid any involvement in tribal lands and governments when Congress required, as a condition of their admittance into the Union, that each state 'forever disclaim all right and title to Indian lands within their borders.'"[30] Michael Lieder corroborates this view by maintaining that the "scanty evidence available indicates that Congress [in making disclaimers] intended only to ensure that the United States retained jurisdiction over Indians and Indian affairs that it already enjoyed in other states."[31]

Finally, Glen Davies has argued that Congress, as a result of the *McBratney* decision of 1881, required each state admitted to the Union between 1881 and 1912 to guarantee in its constitution that absolute jurisdiction over Indian lands would remain lodged in the federal government until such time as the Indians gained a measure of proprietary independence from federal trust restrictions on their lands.[32]

There is more evidence supporting this third rationale than for the first two. For example, in *The Kansas Indians*,[33] which combines elements of exclusive/supremacy and treaties/trust, the Supreme Court held that the various treaties made between the Shawnee and other tribes and the United States required that the federal government protect the persons and property of the Indians upon their reservations and that this duty was not terminated by the admission of Kansas into statehood. In the Court's words:

> There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights....While the general government has a superintending care over their interests,

[29]U.S. House, *Admission of Dakota*, p. 24.

[30]Maxwell Carr-Howard, "Tribal-State Relations: Time for Constitutional Stature?" *New Mexico Law Review* 26 (Spring 1996): 294-295.

[31]Michael Lieder, "Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts are Better Than One," *Georgetown Law Journal* 71 (February 1983): 1031.

[32]Glen E. Davies, "State Taxation on Indian Reservations," *Utah Law Review* (July 1966): 137.

[33]72 U.S. (5 Wall.) 737 (1866).

> and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.[34]

In *United States v. Ewing*, a case involving larceny on the Yankton Sioux Reservation, the federal district court ruled in favor of federal jurisdiction over such matters. In discussing the impact of the disclaimer clause found in South Dakota's territorial and state organic acts, the court ruled that the disclaimers were "unquestionably included therein for the purpose of preventing any question arising as to the construed power and control of the United States over the Indian Country."[35] Such absolute power was necessary, said the court, in order for the United States to fulfill its treaty obligations and other duties to the Indians.

The U.S. Supreme Court, in *United States v. Sandoval*,[36] affirmed that the United States had a trust obligation to protect the lands of the Pueblo nations from non-Indian intruders. The court also held that the disclaimer clause in New Mexico's enabling act unquestionably confirmed that the state assented to the federal government's exercise of exclusive authority to regulate commerce with the Indians.

Finally, in *McClanahan v. Arizona State Tax Commission*,[37] the U.S. Supreme Court again confirmed the exclusive nature of the tribal-federal relationship by holding that "since the signing of the Navajo treaty, the Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation."[38] This was most clearly evidenced in Arizona's disclaimer clause in which the state's entry to the Union was expressly conditioned on the promise that the state would "forever disclaim all right and title to...all lands lying within said boundaries owned or held by any Indian or Indian tribes."[39]

Whichever reason or combination of reasons is accepted, the common denominator among all is that Congress intended to retain its exclusive relationship with tribal nations based on treaties, trust, and preemption, and that states were completely removed from this dyadic affair. However, because of federalism's fluidity—sometimes supporting a strong national

[34]Ibid., 755-757.
[35]*United States v. Ewing*, 47 Fed. 809, 813 (1891).
[36]231 U.S. 28 (1913).
[37]411 U.S. 164 (1973).
[38]Ibid., 175.
[39]Ibid.

government, sometimes stressing states' rights—along with demographic changes (non-Indians moving into Indian Country), the independence of federal courts, and state agitation for greater jurisdiction over Indian lands and their inhabitants, there have been congressional and judicial moments when some states have been granted a measure of jurisdiction inside Indian Country, despite extant disclaimers and treaty rights, and absent express tribal consent.

In the ensuing sections, we closely examine the disclaimer clauses themselves, beginning with those found in the territorial acts, then in the admission acts, and finally in the state constitutions.

TERRITORIAL DISCLAIMERS

Territorial governance was carried out by a few federal officials who resided in each of the territories—a governor, a secretary, and three or more justices, each appointed by the president. Surveyors, revenue collectors, attorneys, and other officials came from Washington and provided services in territories.[40] The territorial governors were assigned a multitude of duties. For instance, the governor of the Oregon Territory, which was established in 1848, was commander-in-chief of the militia, served as the superintendent of Indian affairs, could grant pardons for offenses against the territory's laws, and was chief executive officer.[41] The most distinctive feature of the territorial system was its transitional and progressive character, looking toward statehood. Under the U.S. Constitution, Congress retained supreme power over the territories, which makes the insertion of disclaimer clauses in the territorial acts all the more interesting given that Congress and the president already had exclusive authority under the U.S. Constitution.

Twelve territorial acts (Table 1) contained express Indian disclaimer clauses. The act establishing the territorial government of Wisconsin, for example, had two references to Indians. Section 4 contained a clause similar to that found in the U.S. Constitution in two places in which Indians are excluded from official population enumeration for determining congressional representation.[42]

The enumeration clause of the Wisconsin statute, which is also found in the other territorial acts, stated that "an apportionment shall be made...among the several counties for the election of the council and representatives, giving to each section of the Territory representation in the ration of its population, Indians excepted, as nearly as may be."[43]

[40]Earl S. Pomeroy, *The Territories and the United States: 1861-1890* (Philadelphia: University of Pennsylvania Press, 1947).

[41]Thorpe, *Federal and State Constitutions*, p. 2986.

[42]Article 1, sec. 2, clause 3; Fourteenth Amendment, sec. 2.

[43]5 Stat. 10.

Table 1
Territories with Indian Disclaimer Clauses

Territory	Date	Key language
Wisconsin	1836	Indian rights not to be impaired until extinguished by treaty.
Iowa	1838	Same as above.
Oregon	1848	Same as above.
Washington	1853	Federal government retains power to make Indian policy by treaty or law .
Kansas	1854	Indian rights not to be impaired until extinguished by treaty: Indian lands not to be included in territory without tribal consent.
Nebraska	1854	Same as above.
Colorado	1861	Same as above.
North Dakota	1861	Indian rights not to be impaired.
Idaho	1863	Same as above.
Montana	1864	Indian rights not to be impaired until extinguished by treaty: Indian lands not to be included in territory without tribal consent.
Wyoming	1868	Indian rights not to be impaired.
Oklahoma	1890	Indian rights not to be impaired until extinguished by treaty.

The disclaimer clause is found in Section 1 which, among other things, demarcated the territorial boundaries of Wisconsin:

> Nothing in this act contained shall be construed to impair the rights of person or property now appertaining to any Indians within the said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or anywise to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, or law, or otherwise, which it would have been competent to the Government to make if this act had never been passed.[44]

Federal lawmakers were warning the territorial residents and their leaders not to interfere with the treaty relationship between the tribes and the federal government, which outlined the duties and responsibilities of both parties. The United States' exclusive and constitutionally grounded authority to enact regulations dealing with tribes and their property or rights, whether derived from treaties or laws, was not to be intruded upon either.

[44]Ibid., 11.

Iowa's territorial disclaimer of 1838 was identical to Wisconsin's.[45] Oregon's, enacted in 1848,[46] was substantially similar, though it did not repeat the section found in Wisconsin's and Iowa's, which stated: "or to impair the obligations of any treaty now existing between the United States and such Indians." Washington's territorial act contained an even more abbreviated disclaimer and excluded the section on impairing the rights of Indians, absent a treaty change.[47]

The 1854 territorial act for Kansas and Nebraska,[48] however, returned to the lengthy recognition of Indian treaty rights and the securing of Indian consent that had been deleted from Washington's act. It emphasized the extraterritorial nature of Indian Country until and unless the tribes requested otherwise. The relevant phrases were that nothing would impair Indian rights "so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries...until said tribe shall signify their assent to the President of the United States."[49]

The acts for Colorado (1861), Dakota and Idaho (1863), and Montana (1864) read virtually identical to the one for Kansas and Nebraska. Wyoming's 1868 act returned to the brevity of Washington's measure. The act said simply "that nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."[50]

Interestingly, territories such as New Mexico (1850), Arizona (1863), Michigan (1805), Alaska (1854), and Minnesota (1844), which were the aboriginal home of many indigenous groups, contained no express disclaimers. The only references to Indians in those territorial acts were contained in the enumeration section (Indians cannot be counted for purposes of determining the number of representatives) and a statement declaring that the governor of the territory was also the superintendent of Indian affairs.

A major exception to what has just been discussed is the unique development of the Indian Territory (later Oklahoma). While this area has been admirably treated by a number of scholars,[51] suffice it to say that a majority of the Indian nations now inhabiting Oklahoma either migrated there or were

[45]Thorpe, *The Federal and State Constitutions*, vol. 2, 1112.
[46]9 Stat. 323.
[47]Thorpe, *The Federal and State Constitutions*, vol. 7, 3963.
[48]10 Stat. 277.
[49]Ibid., 277-278.
[50]Thorpe, *The Federal and State Constitutions*, vol. 7, 4106.
[51]See, for example, Grant Foreman, *The Five Civilized Tribes* (Norman, OK: University of Oklahoma Press, 1934); Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton, NJ: Princeton University Press, 1940).

forcibly relocated there during the Indian Removal period of the 1830s-1860s. In 1834, the Congress passed an act for the government of the Indian Country, which recognized that the land belonged solely to the Indians, and it established regulations for trade and intercourse with the tribes.[52]

Years later, in 1890, as white settlement had increased substantially in Indian Territory, and despite treaty assurances, whites desired to establish their own governing mechanisms. By the act of 2 May 1890, a sizable portion of the Indian Territory was transformed into the new Territory of Oklahoma. This territorial act contained an express disclaimer, intended to assure tribes in the area that their remaining lands, resources, and rights would be respected. It read like many of the others described above, although coming in the wake of the direct treaty violations, the failure of the federal government to protect Indian lands and its establishment of a foreign territorial government out of tribal lands, the words had a hollow ring. The clause reads as follows:

> That nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the Government of the United States to make any regulation or to make any law respecting said Indians, their lands, property, or other rights which it would have been competent to make or enact if this act had not been passed.[53]

ENABLING ACT DISCLAIMERS

These organic laws strike at the heart of the tension between tribes and states as well as the doctrine of federalism. Enabling acts outline the steps a territory's citizenry must take to become a state. Thus, the inclusion of disclaimer clauses in these core political documents was an explicit recognition of the supremacy of the federal government over Indian affairs. Although states chafed at this reservation, claiming that it was an infringement on their rights, as a federal court noted in *United States v. Board of Commissioners of Osage County*,[54] "there cannot be an invasion of State rights because a condition of statehood was the reserving by the Federal Government of power and authority over Indians, their lands and property."[55]

The Congress passed the first enabling act on 30 April 1802. This act authorized the inhabitants of the eastern district of the Northwest Territories to elect representatives to a convention and to draft a constitution. The act

[52]4 Stat. 729.
[53]Thorpe, *The Federal and State Constitutions*, vol. 5, 2940.
[54]26 F. Sup. 270 (1939).
[55]Ibid., 275.

Table 2
State Enabling Acts with Indian Disclaimer Clauses

State	Date	Key language
Kansas	1861	Indian rights not to be impaired unless extinguished by treaty; Indian lands not to be included in state without tribal consent. Tribe must signify their assent to the President to be included in the State.
North Dakota	1889	The People and the State forever disclaim all rights to Indian lands; those lands remain under absolute federal jurisdiction. State may only tax land of individual Indians who have severed tribal relations but not if that land was granted by the Congress with an express tax exemption.
South Dakota	1889	Same as above.
Montana	1889	Same as above.
Washington	1889	Same as above.
Utah	1894	Same as above.
Oklahoma	1906	Indian rights are not to be impaired so long as they have not been extinguished. Federal government retains exclusive authority to make Indian policy by treaty, agreement, or law.
New Mexico	1910	Same as Utah.
Arizona	1910	Same as above.
Alaska	1958	The People and the State forever disclaim all right to Indian land and to any land or other property (e.g., fishing rights) held in trust by the United States. All lands and property under absolute federal jurisdiction, except when held in fee simple title.

also specified how the members were to be appointed among the counties, determined when elections were to be held, specified the time and place for the convention, and stipulated that the constitution must be republican.[56]

Although the Congress easily created territories, it was far more reluctant to create states. Before developments in the late 1880s, only four western states had entered the Union: two during the Civil War (Kansas in 1861 and Nevada in 1864) and two after the war (Nebraska in 1867 and Colorado in 1876.)[57] Six territories finally gained statehood in 1889 and 1890, and each had a disclaimer clause in its constitution.

Nine of the eighteen western states had disclaimer clauses in their enabling acts (Table 2). Wyoming and Idaho were admitted to statehood without enabling acts because their territorial governments launched statehood and proposed constitutions that were largely in compliance with federal policies.[58] Both states included disclaimers, however, in their constitutions.

The first enabling act containing an explicit disclaimer clause was the

[56]Gates, *History of Public Land Law*, 289.

[57]Clyde A. Milner II et al., eds., *The Oxford History of the American West* (New York: Oxford University Press, 1994), p. 184.

[58]Felix S. Cohen, *Handbook of Federal Indian Law*, ed. Rennard Strickland, et al., revised ed. (Charlottesville, VA: Michie, Bobbs-Merrill, 1982), p. 268.

act authorizing Kansas to be admitted to the Union in 1861. Like its 1854 territorial disclaimer, the 1861 measure declared that nothing in the act should be read to impair any preexisting Indian rights or "to affect the authority of the government of the United States to make regulations respecting such Indians, their lands, property, or other rights."[59] This measure reflected congressional intent to abide by preexisting treaties with Kansas tribes and to remind states of federal supremacy in the field of Indian policy. None of the other three states admitted between 1861 and 1889 (Nevada, 1864; Nebraska, 1867; or Colorado, 1876) were required to insert similar disclaimers in their organic acts, though it is not clear from the legislative record why such disclaimers were not a part of these states' enabling acts.[60] When Congress terminated treaty-making with tribes in 1871,[61] most Indian property was located, or soon would be, in the territories and remained under the federal government's jurisdiction. However, as territories prepared for statehood, the leaders of these political units pushed for exclusive jurisdiction over all territory—including Indian lands. This coincided with stepped up federal efforts to assimilate Indians into white society.

The Cherokee Tobacco decision of 1871[62] confirmed that Indian treaties could be implicitly abrogated by later federal laws. Furthermore, an enabling act granting a new state jurisdiction over all territory within its boundaries might be construed as an express grant to the state of jurisdiction over Indian land, invalidating any treaty provision to the contrary.[63] Such a scenario arose in 1876 when Colorado was the first state admitted after the treaty-termination measure of 1871. Although Colorado's territorial act contained a disclaimer, the Colorado Constitution did not. In 1881, the U.S. Supreme Court ruled in *United States v. McBratney*[64] that because Colorado had not expressly disclaimed jurisdiction over the Ute Indian Reservation, state law prevailed on the reservation.

Every state, except Hawai'i, admitted after *McBratney* was required to acknowledge the federal government's "absolute jurisdiction and control" over Indian reservations.[65] There is a fairly clear correlation between *McBratney* and the inclusion of Indian disclaimer clauses. Davies argues that the insistence on disclaimers after *McBratney* was a direct response to the federal government's loss of jurisdiction to the states after the decision,[66] while Lieder asserts that the "temporary conjunction of *McBratney* and the clauses strongly suggests they were a response to that decision."[67]

[59]12 Stat. 126-127.
[60]Lieder, "Adjudication of Indian Water Rights," 1032-1033.
[61]16 Stat. 544.
[62]70 U.S. (11 Wall.) 116 (1871).
[63]Davies, "State Taxation on Indian Reservations," 136.
[64]104 U.S. 621.
[65]Lieder, "Adjudication of Indian Water Rights," 1033.
[66]Davies, "State Taxation on Indian Reservations," 137.
[67]Lieder, "Adjudication of Indian Water Rights," 1033.

The 1889 enabling act of North Dakota, South Dakota, Montana, and Washington[68] was the first post-*McBratney* law. The second clause of section four entails the disclaimer for these fledgling states:

> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof...and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States....But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation.[69]

This provision guarantees that the federal government retains undivided jurisdiction over Indian lands until the Indians are granted their land free and clear of all restrictions. Said Indian lands would also be exempt from state taxation because of the trust doctrine. The lands were further protected because, in some cases, specific laws had been enacted by the Congress exempting the lands from taxation for specified periods of time. The only way a state could tax an Indian's property under the disclaimers was when an individual had chosen to terminate his or her membership with their tribe or, in the case of allotted tribes, land was subject to taxation once an individual received a patent to his other allotment. However, unlike most of the territorial disclaimers, there is no mention in this 1889 act of the treaty that originally established the basis of Indian rights, nor is there any mention of the fact that Indian consent would be required before either the state or the federal government could act against Indian rights. These last points reflect the general policy tenor of the times, with the federal government intent on civilizing, privatizing, and Christianizing Indian peoples. Indian consent was rarely sought, and treaty rights, while still theoretically intact, were frequently ignored and often terminated during this period. Utah's enabling act of 16 July 1894 was virtually identical to the one above. However, Oklahoma's act of 16 June 1906, which spliced together

[68]25 Stat. 676.
[69]Ibid., 677.

Oklahoma Territory and Indian Territory, did mention treaties and read more like the territorial disclaimers discussed earlier. It provided:

> That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.[70]

The disclaimers for New Mexico and Arizona, contained in the enabling act of 20 June 1910,[71] were similar to those contained in the 1889 Dakota enabling act. Both emphasized the state's permanent agreement never to claim Indian lands or to tax Indian territory so long as Congress holds it in trust status. The clause, however, did include a brief reference to Indian lands recognized by "any prior sovereignty," a recognition that many Pueblos and Spaniards in New Mexico had received land grants from Spain, title to which was to be respected under federal law.[72]

Alaska was the last state (1958) to have an enabling act containing an express disclaimer provision. Although similar in language to that of New Mexico and Arizona, it contained a couple of distinctive aspects. First, it included not only Indians but Eskimos and Aleuts as well. Second, a specific property right—the right to fish—was recognized as being held in trust by the federal government and, thus, was exempt from state jurisdiction.

CONSTITUTIONAL DISCLAIMERS

State constitutions not only protect rights, they more importantly "create a framework for state and local government, allocate powers, announce broad policy commitments and, not infrequently, prescribe the means by which those commitments will be met. At the most fundamental level, they may embody the political identity and aspirations of the state's citizenry."[73]

Congress insisted on the insertion of disclaimer clauses in 11 of the 18 Western state constitutions (Table 3). Generally, the disclaimer provisions of a state's enabling acts were simply appended to the newly drafted constitution. For example, Article One of Montana's Constitution, called the Compact with the United States, declares that "all provisions of the enabling act of Congress...including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under

[70]34 Stat. 267-268.
[71]36 Stat. 557.
[72]Ibid., 559.
[73]G. Alan Tarr, ed., *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns* (Westport, CT: Greenwood Press, 1996), p. xiv.

Table 3
States with Constitutional Indian Disclaimer Clauses

State	Date	Key language
North Dakota	1889	The People forever disclaim all right and title to Indian held lands; they remain subject to U.S. disposition and under absolute federal jurisdiction. State may only tax individual Indian land if person has severed tribal relations and has title to land. Lands granted by Congress containing tax exemption, however, are not taxable by state.
South Dakota	1889	Same as above.
Montana	1889	All lands owned or held by Indians remain under absolute jurisdiction and control of the Congress until revoked by consent of the United States and people of Montana.
Washington	1889	Same as North Dakota.
Wyoming	1890	People forever disclaim all right and title to Indian lands; those lands subject to absolute federal jurisdiction
Idaho	1890	People and State forever disclaim all right and title to Indian lands; those lands subject to absolute federal jurisdiction.
Utah	1896	Same as North Dakota.
Oklahoma	1907	The People forever disclaim all right and title to Indian lands; they remain subject to United States jurisdiction.
New Mexico	1912	Same as North Dakota.
Arizona	1912	Same as North Dakota.
Alaska	1959	State and People disclaim all right and title to any property, including fishing rights; such property subject to absolute federal jurisdiction. State will not impose taxes on Indian property unless directed by the Congress, except for lands held in fee simple title.

the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana."[74] The state was bound to adhere to this clause until both the federal government and the citizenry of Montana agreed to modify the provision.

Similarly, North Dakota's enabling act, including the disclaimer, with only minor word changes, was incorporated as Article XIII, a Compact with the United States, and its provisions were declared to be "irrevocable without the consent of the United States and the people of the state."[75] In fact, with only stylistic alterations, the constitutional disclaimers of the other western states, including South Dakota, Washington, Oklahoma, New Mexico, Arizona, and Alaska, all very closely resembled the disclaimers found in their enabling acts. Idaho and Wyoming, which had been admitted without

[74]*Constitutions of the United States, National and State, Montana, 1995* (Dobbs Ferry, NY: Oceana Publications, December 1995), p. 1.
[75]Ibid., March 1995, 36.

enabling acts, each nevertheless included clauses which looked very similar to those of the other disclaiming states.

For example, Section 19 of Idaho's Constitution declared that "the people of the state...do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes."[76] Idaho goes on to admit that Indian lands shall remain under the "absolute jurisdiction and control" of Congress and that those lands will never be subject to state taxation as long as they remain under federal jurisdiction.[77]

Notwithstanding these clauses, the federal government has, in a few express instances, delegated a measure of its constitutional authority over Indian affairs to the states, thus giving the states some jurisdiction inside Indian Country.

FEDERAL DELEGATIONS OF EXCLUSIVE AUTHORITY

The first major action by federal policymakers involving a reading of disclaimer clauses that negated the territorial sovereignty of Indian tribes was *United States v. McBratney.*[78] This criminal case raised the issue of whether Colorado had jurisdiction over a non-Indian who had murdered another non-Indian on the Ute Indian Reservation. The United States argued that existing law, both statutory and treaty, gave it jurisdiction over McBratney. The government also cited Colorado's 1861 territorial act, which contained a provision expressly disclaiming jurisdiction. However, neither Colorado's 1875 organic act, which admitted that territory to the Union, nor the state constitution, which was approved the following year, included disclaimer clauses.

The U.S. Supreme Court held that because Colorado had been admitted on an equal footing with the original states and had not expressly disclaimed jurisdiction over the Ute Reservation, and because no Indians were directly involved in the case, state law and not federal law governed such crimes on the reservation.

Four years later, in 1885, the U.S. Supreme Court handed down another ruling which recognized that in some limited respects, states could wield a measure of jurisdiction in Indian Country. In *Utah and Northern Railroad v. Fisher,*[79] the Court stated that the Idaho Territory had a legitimate interest in regulating the affairs of whites, even if those activities took place on a reservation. In this case, the Court upheld Idaho's authority to tax a non-Indian railroad company, which ran its line through the Fort Hall Indian Reservation. Idaho's 1863 territorial disclaimer,[80] like that of Colorado's,

[76]Ibid., January 1994, 40-41.
[77]Ibid., 41.
[78]104 U.S. 621 (1881).
[79]116 U.S. 28 (1885).
[80]12 Stat. 808.

protects the treaty rights, resources, and tax-exempt status of the Indians, but in the Court's reading of that provision, it allowed the tax on the railroad to stand because Indians were not directly involved in the case.

The next major era in which states gained a measure of power over some portion of Indian Country was during the 1950s—the termination period. Termination, Congress' effort to sever federal benefits and support services to certain Indian groups, was official federal policy from 1953 to the mid-1960s. A key act during the termination period was P.L. 280,[81] which conferred upon several designated (mandatory) states—Arizona, Minnesota, Nebraska, Oregon, and Wisconsin—full criminal and some civil jurisdiction over most reservations in their borders, and consented to the assumption of such jurisdiction by any other (optional) state that chose to accept it. The language of the act regarding the mandatory states appears to be self-executing; that is, it confers "immediate jurisdiction on the [five] states without the need for state legislation to make it effective."[82] In other words, these mandatory states were not required to repeal their disclaimer clauses before assuming jurisdiction.

However, optional states were required to address the disclaimer clause issue. Section 6 declared that:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by an such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.[83]

Thus, in authorizing the optional states to assume jurisdiction if they chose, the Congress specifically identified those states with constitutional or statutory disclaimers, and then required those states to repeal their disclaimers by a constitutional amendment before the act became operational.[84] These states were informed that to assume such jurisdiction would require "the people of the State...by affirmative legislative action" to act accordingly.

Carole Goldberg-Ambrose, who has written extensively about P.L. 280,[85] states that tribes were upset with the law because their consent was not

[81]67 Stat. 588.
[82]Goldberg-Ambrose, "Public Law 280," 563.
[83]67 Stat. 588.
[84]Schwartz, "State Disclaimers of Jurisdiction," 188.
[85]See, for example, "Public Law 280," p. 538; Carole Goldberg-Ambrose, *Planting Tail Feather: Tribal Survival and Public Law 280* (Los Angeles, CA: American Indian Studies Center, 1997).

required before states assumed jurisdiction.[86] States, for their part, were dissatisfied because they were not given complete jurisdiction because reservation lands retained their trust status. Tribal lands held in trust may not be taxed by a state. States also learned that treaty rights to hunt and fish, for example, survived P.L. 280 and could not be regulated by the state.

Although tribes continued to question the federal government's authority to vest in some states civil and criminal jurisdiction, Congress clearly saw state disclaimer clauses as independent obstacles to a state's assertion of such jurisdiction otherwise. As Orme Lewis, assistant secretary of the Interior, put it in response to a query by Representative Arthur Lewis Miller, Chairman of the Committee on Interior and Insular Affairs, when asked his office's views on H.R. 1063—the bill that became P.L. 280:

> In each instance [states with disclaimer clauses] the State constitution contains an appropriate disclaimer. It would appear in each case, therefore, that the Congress would be required to give its consent and the people of each State would be required to amend the State constitution before the State legally could assume jurisdiction.[87]

The Interior and Insular Affairs Committee echoed this sentiment in its report, which stated that the "effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given to future action to assume jurisdiction—is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure."[88]

Despite the clarity in the language of P.L. 280 and the congressional record regarding the conditions under which both mandatory (original five states) and optional (all remaining states) states could assume jurisdiction in Indian Country, six of the eight optional states (Arizona, Montana, North Dakota, South Dakota, Utah, and Washington) with disclaimer clauses have passed legislation claiming full or, in some cases, partial jurisdiction over Indian residents on reservation lands.[89] Of these six states, however, only South Dakota has acted to amend its constitutions as required under the 1953 law.

The noncompliant states claim, contrary to the law's explicit language, that a constitutional amendment is not required to assume jurisdiction under P.L. 280. They claim that, in fact, their disclaimers only require that reservation lands remain under the "absolute jurisdiction and control

[86]This crucial dimension was changed with amendments to the act in 1968, the Indian Civil Rights Act (ICRA) (82 Stat. 77). One of the ICRA's provisions is that future assertions of state jurisdiction under P.L. 280 will require Indian consent. States can also return jurisdiction to the federal government if they desire.

[87]U.S. Congress, Senate, Committee on Interior and Insular Affairs, *Conferring Jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, With Respect to Criminal Offenses and Civil Cases and Action Committed or Arising on Indian Reservations Within Such States*, 83rd Cong., 1st sess., 1953, S. Rep. 699, p. 7.

[88]Ibid., 6.

[89]Goldberg-Ambrose, "Public Law 280," 569.

of the United States." While agreeing that their disclaimers preclude the alienation or taxation of Indian trust land, the states believe that they retain a governmental interest over all lands within their borders; therefore, they need not amend their constitutions or statutes because the Congress may repeal P.L. 280 at any time and reclaim jurisdiction.[90]

Some case law supports this interpretation.[91] Nevertheless, such an interpretation clashes with the literal language of the congressional record, contradicts the historical evidence, presented above, which led to the introduction of disclaimers in the first place, and contravenes the federal government's ongoing treaty and trust relationship with tribes. Furthermore, such a reading runs contrary to one of the basic principles of federal Indian law—that treaties and statutes should be read and interpreted as Indians would understand them.[92] As Goldberg-Osborne observed:

> The language of P.L. 280 clearly requires constitutional amendment, and the legislative history confirms the congressional intent to impose that requirement. Without question Congress has the power to impose conditions on a State's assumption of jurisdiction over reservation Indians, regardless of the soundness of congressional understanding of state law. Thus, the burden would seem to fall on the states to demonstrate why the clearly manifest intent of Congress should be disregarded.[93]

The U.S. Supreme Court reentered the fray a few years later. In *Organized Village of Kake v. Egan*,[94] it adopted a narrow view of the clauses, thus creating a broad view of state power over indigenous people so long as that power does not interfere with reservation self-government. Alaska's Statehood Act, like those of a number of western states, contains a disclaimer in which the state disavowed "all right and title" to Indian lands. It also provides that indigenous land shall remain subject to the "absolute jurisdiction and control" of the United States. Upon review of the legislative history preceding Alaska's statehood, the U.S. Supreme Court held that "the disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest."[95] This language was intended to ensure that statehood would neither extinguish nor establish claims by Indians against the United States. The Court proceeded to note that Congress had paid little attention to the disclaiming language vesting "absolute jurisdiction and control" over Alaskan native lands in the United States. The Court maintained that

[90]Golberg-Ambrose, "Public Law 280," 569-570.

[91]See, for example, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1961).

[92]See, for example, *Worcester v. Georgia*, 582, where Chief Justice John Marshall said that "the language used in treaties with the Indians should never be construed to their prejudice...How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

[93]Goldberg-Ambrose, "Public Law 280," 573.

[94]369 U.S. 60 (1961).

[95]Ibid., 69.

the words "absolute jurisdiction" did not mean "exclusive jurisdiction," and were not intended to deny the state the right to regulate the natives' hunting and fishing rights.[96]

Under the Court's ruling, Alaska did not need the assistance of P.L. 280 to exercise jurisdiction over the fishing area in dispute because the territory had never been reserved for the natives by Congress. But two commentators[97] have raised questions about the *Kake* decision. They note, first, that the scope of the disclaimer was irrelevant to the result, and need not have been brought up because Alaskan natives were not isolated or hostile to the rest of the population as were Indians in the other western states.[98] As a result, "Congress may have had no interest in requiring Alaska to disclaim jurisdiction over Indians which the Alaska territory had always exercised and which the State of Alaska was expected to continue exercising."[99] Thus, it could be argued that states relying on *Kake* "have been misinterpreting their disclaimers in order to escape the need to repeal them before accepting P.L. 280 jurisdiction."[100]

Second, a close reading of the congressional record suggests that the *Kake* interpretation is only partially accurate.[101] Finally, and presumably, if state disclaimers were deemed to limit only a state's proprietary interest in Indian lands, their repeal would be unnecessary to the state's assumption of civil and criminal jurisdiction over those lands.[102] Moreover, two later U.S. Supreme Court cases, *Kennerly v. District Court*[103] and *McClanahan v. Arizona State Tax Commission,*[104] emphasize the preemptive effect of P.L. 280 on state attempts to gain jurisdiction over reservation lands, without expressly challenging the *Kake* ruling.

Despite these few cases, the preponderance of constitutional, treaty, statutory, and judicial evidence, plus the ongoing extraconstitutional status of tribes as preexisting sovereigns, support the view that the relationship between tribes and the United States remains a federalized one. Disclaimer clauses occupy an important position of validity confirming the nation-to-nation relationship. Until these clauses have been deliberately expunged out of the enabling act, with federal approval, and jettisoned from the state's constitution, with the consent of the state's citizenry and the federal government's permission, they remain the law of the land.

[96]Ibid.

[97]Schwartz, "State Disclaimers," 187-190; Goldberg-Ambrose, "Public Law 280," 571-573.

[98]Goldberg-Ambrose, "Public Law 280," 571.

[99]Ibid.

[100]Ibid.

[101]Schwartz, "State Disclaimers," 187-188, says that Ralph Barney, then chief of the Indian Claims Branch of the Justice Department and the author of Alaska's enabling act disclaimer, testified during Senate hearings that the disclaimer was meant to preserve the federal government's police power over Alaskan natives on reservations. This testimony seems contrary to the view expressed in *Kake* that the disclaimer limited only the state's "proprietary" interest in indigenous lands.

[102]Ibid., 188-189.

[103]400 U.S. 423 (1971).

[104]411 U.S. 164 (1973).

AN EXCLUSIVE TRIBAL-FEDERAL RELATIONSHIP

The U.S. Supreme Court's 1832 *Worcester*[105] opinion confirmed that state law was inapplicable inside Indian Country and that any attempt by the states to assert jurisdiction would be rebuffed on account of tribal sovereignty, the nation's treaty-based relationship with tribes, and congressional exclusivity in determining the United States' Indian policy.

The constitutionally affixed tribal-federal relationship remains largely federalized despite the sporadic case and statutory examples given in the previous section, and notwithstanding the reality that the Rehnquist Court, since 1989, presumes a share of state authority in Indian Country unless the state has been expressly precluded from exercising jurisdiction.[106] Absent a constitutional amendment to the commerce clause, a bilateral renegotiation of the treaty relationship, or agreed-upon amendments to state enabling and constitutional disclaimer clauses, the relationship between tribes and the federal government will remain the key partnership. Although Congress will sometimes pass measures, like the Indian Gaming Regulatory Act,[107] which require tribes and states to negotiate compacts for certain types of gaming, this measure's very existence is a reminder to states that the federal government has ultimate responsibility for Indian policies.

For example, in *United States v. Rickert*,[108] the U.S. Supreme Court held that the federal government's constitutional power to dispose of and make all needful rules for property belonging to the United States, when combined with South Dakota's constitutional disclaimer clause, prohibited the state from taxing Indian land. "No authority exists," said the Court, "for the State to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians."[109]

In *Dick v. United States*,[110] a liquor-law case, the Court sustained federal liquor statutes protecting lands ceded by the Nez Perce Indians against liquor introduction for a 25-year period. The Court held that even though a state is admitted on an equal footing with other states, the Congress' power to regulate commerce with Indian tribes is "superior and paramount to the authority of any State within whose limits are Indian tribes." Two years later, in *United States v. Sutton*,[111] the Court construed the disclaimer clause in Washington State's enabling act to mean that the federal government retained exclusive jurisdiction and control over the matter of liquor introduction on a reservation.

[105] *Worcester v. Georgia*, 515.

[106] See, for example, *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992).

[107] 102 Stat. 2475.

[108] 188 U.S. 432 (1903).

[109] Ibid., 441.

[110] 208 U.S. 340 (1907).

[111] 215 U.S. 291 (1909).

In *United States v. Chavez*,[112] the U.S. Supreme Court held that New Mexico had no authority to prosecute non-Indian defendants charged with larceny committed within the Isleta Pueblo because the U.S. Constitution vests exclusive authority over such crimes in the federal government. Although the state's enabling act admitted New Mexico into the Union "on an equal footing" with the original states, "the principle of equality is not disturbed by a legitimate exertion by the United States of its constitutional power in respect of its Indian wards and their property."[113]

It was not only federal courts which confirmed the tribal-federal relationship. There is also some corroborating case law from states. In *State v. Arthur*,[114] the Idaho Supreme Court declared that the admission of Idaho into the Union did not operate to repeal hunting rights reserved by treaty to the Nez Perce Indians. Although Idaho's admission act was silent regarding Indian rights, both the organic act and the state's constitution "recognize their rights which arise under the Treaty of 1855 and subsequent agreements and treaties prior to statehood."[115]

In *Chino v. Chino*,[116] the New Mexico Supreme Court, in discussing that state's enabling act, which contained a disclaimer clause, held that the state had declined to assume jurisdiction over the Indian reservations in the state by failing to take "affirmative steps under Public Law 280" or under more recent congressional acts. Thus, "the treaties and statutes applicable in this case preclude the state from exercising jurisdiction over property lying within the reservation boundaries."[117]

In closing, the New Mexico court gave a multifaceted rationale on why the state is precluded from assuming jurisdiction over forcible entry and wrongful detainer actions on fee-patented lands within reservations. This list of reasons confirms many of the arguments identified above: (1) inherent tribal sovereignty; (2) treaties, which vest in the federal government exclusive jurisdiction; (3) no affirmative delegation by the federal or tribal governments authorizing the state to act; (4) the state can only act where asserted tribal relations are not involved and where the rights of Indians would not be jeopardized; (5) the state may not act where the United States has preempted the field by treaties or relevant statutes; and (6) state enabling and constitutional disclaimers expressly deny states the power to assume such jurisdiction.

[112]290 U.S. 357 (1933).
[113]Ibid., 365.
[114]261 P. 2d 135 (1953).
[115]Ibid., 138.
[116]90 NM 203 (1977).
[117]Ibid., 206.

CONCLUSION

We have examined a significant body of historical, legal, and political evidence regarding the tribal-state relationship and the role of the federal government in overseeing that relationship. In 1836, the Congress began to insert disclaimer clauses in territorial acts, followed by similar clauses in state enabling acts in 1861 and state constitutions in 1889. The result was that 11 Western state constitutions contain a disclaimer clause. The inclusion of such clauses appears to be due primarily to the U.S. Supreme Court's 1881 *McBratney* decision, which held that in the absence of a state constitutional disclaimer clause, state law can prevail on an Indian reservation in cases involving non-Indians. The primary purposes of these clauses are to reiterate exclusive federal authority over Indian affairs, reaffirm tribal sovereignty *vis-à-vis* the states, and remind states that their sovereignty in the federal system does not extend into Indian Country. Although states have often chafed at these limits, the disclaimer clauses have helped to protect tribal sovereignty.

Nevertheless, over the last two centuries, certain congressional policies, such as termination, allotment, and especially P.L. 280, as well as some U.S. Supreme Court decisions, have variously assaulted or eroded the protections afforded tribes by the disclaimer clauses. As a result, there is concern among tribes about the ability of the disclaimer clauses to help protect their sovereignty, especially in light of the controversy surrounding Indian gaming and Indian assertions of both sovereign rights and treaty rights in recent decades. Tribes, therefore, have taken a number of legal, political, and educational steps to strengthen protection of their sovereignty.

Some tribes have worked out sovereignty accords with their host states in which both parties agree to respect the sovereignty of the other.[118] Such action significantly augments tribal sovereignty and is, therefore, a step toward improving tribal-state relations. But it is only a step because intergovernmental relations with tribes as a recognized party is a difficult field to navigate due to the preconstitutional and extraconstitutional status of tribal nations whose members/citizens also enjoy rights as United States citizens.

The tribes' treaty-recognized sovereignty, which is not generally subject to the federal or state constitutions[119] is, however, subject to being reduced or completely eliminated by federal action[120] and increasingly by state

[118]The Navajo Nation, for example, in 1994, worked out such an accord with the governors of Arizona, New Mexico, and Utah. The idea behind the accord, according to the Navajo president, Peterson Zah, "is that since we must coexist as neighbors we must recognize the sovereignty of one another in order to effectively meet the needs of our common constituents and resolve our common problems." (Author has copy of accord and Zah's memorandum describing the policy.)

[119]See, for example, *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Elk v. Wilkins*, 112 U.S. 94 (1884); *Talton v. Mayes*, 163 U.S. 376 (1896); *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[120]See, for example, *United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

action.[121] Hence, tribes must rely not only on the rule of law, but also on the "good faith" of the federal and state governments to protect their remaining sovereign rights. State constitutional disclaimers are an important piece of the protective barrier originally erected by the federal government acting as the trustee to tribal beneficiaries. Along with the extant treaties and the placement of tribes in the commerce clause, the combination of these political, legal, and moral forces work, at least sporadically, to secure to tribes their remaining political, legal, and resource rights.

Although states have increased their jurisdictional presence in Indian Country in recent years as a result of tribal-state compacts necessitated by the Indian Gaming Regulatory Act[122] and several U.S. Supreme Court opinions allowing states to tax fee-simple land inside an Indian reservation,[123] the relationship between tribal nations and the federal government remains fairly exclusive. States may get involved only with express federal permission.

[121]See, for example, *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[122]102 Stat. 2475.

[123]See, for example, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 251; *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 118 S.Ct. 1904 (1998).