Legal Associations:
Modern United States Indian Policies and their Seventeenth-Century Antecedents

Samuel P. Walters

ABSTRACT

After establishing its first permanent colony in North America, the English government in the seventeenth-century began creating a legal context for their relationship with the Native Americans living in close proximity to the colonists. In a similar fashion, the United States government, immediately following independence from Great Britain, focused on developing policies to address its legal relationship with the Native American nations that resided within and on the borders of the United States. By examining the statutes, treaties, and court rulings regarding North American Indians used by both the United States and England, this thesis will highlight the close similarities that exist between modern federal policies and seventeenth-century English policies. Each chapter focuses on an important modern United States Indian policy and then presents corresponding evidence from seventeenth-century legal sources.
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Introduction

Immediately following independence from Great Britain, the newly-formed United States government focused on developing policies to address its legal relationship with the Native American nations that resided within and on the borders of the United States.¹ That these policies would not benefit the Indians is evident from a letter written by George Washington in 1783 in which he classified all Native Americans as “Savage as the Wolf.”² In spite of such hostile attitudes, United States leaders, like Washington, recognized the loss of economic revenue and American lives that would result from large-scale hostilities with still-powerful tribes of the Ohio Valley. In order to ensure that neither state governments nor individual citizens antagonized Indian nations, the federal government inserted provisions into the Constitution and enacted legislation that placed all dealings with Indians—whether for trade, land transfers, or treaties—solely under the jurisdiction of the United States Congress and subject to judicial review by the Supreme Court.³ This authority stems from Article 1 of the United States Constitution, more generally known as the commerce clause, which states that only Congress can “regulate … the Indian Tribes.”⁴ Unlike the Articles of Confederation, which encouraged individual states to deal directly with Indian Nations, the Constitution makes clear the

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¹ This thesis will use individual tribal names when specifically referring to a particular tribe. When referring to the native peoples of North America in general, it will use the term ‘Indian’ along with ‘Native American’ because these terms are used by Native Americans to refer to themselves.
³ Despite these laws, states such as Georgia and Virginia continued to deal directly with Indians up through the first half of the nineteenth century. For examples, see Cherokee Nation v. Georgia 30 United States (5 Pet.) 1 (1831). As well as, Helen Rountree and Thomas E. Davidson, Eastern Shore Indians of Virginia and Maryland, (Charlottesville: University Press of Virginia, 1997), 191.
federal government’s exclusive right to regulate relations with Indians.\(^5\) To clarify its exclusive right to regulate Native Americans, Congress passed a series of Trade and Intercourse acts between 1790 and 1834. These acts also asserted exclusive federal provenance over Indian affairs, and furthermore, represent the most important piece of legislation, which codified Congress’ intent to centralize Indian policy.\(^6\)

Although scholars generally agree that modern Indian policies stem from these colonial examples, few authors look earlier than the French and Indian War (1754-1763) to provide specific detail to support this assertion. For instance, David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr. asserted that “the general framework defining the legal and political relationship between American Indian tribes and the United States emerged out of the English North American colonizing experience,” these scholars offered few particular examples.\(^7\) One exception to this lack of specific connection between modern United States policy and its seventeenth-century origins concerns Helen Rountree’s 1973 dissertation. Rountree’s study connected federal practices concerning the accumulation of Indian lands to colonial Virginians’ accrual of Indian lands. This dissertation represents one of rare, detailed examinations of the influence of pre-French and Indian War colonial policies on federal doctrines.\(^8\) In particular, Rountree demonstrated that like later Americans, seventeenth-century colonists used legislation, court rulings, and treaties to define their relationships to the

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Indians within their spheres of influence. The records of these legal artifacts are found in a varied but limited number of sources such as official correspondence, personal accounts of early colonists, and legal records. Treaties between Europeans and Indians generally fell into two categories: peace treaties and land treaties.\(^9\) Like later United States political leaders, colonists entered into peace treaties with Indians to end periods of violence, pledge mutual military support, and initiate trade relations. Land treaties, the larger of the two categories, dealt with land transfers, access, and use. Along with treaties, the British used statutes to give Indians a specific status in colonial society and court rulings that enforced those laws in order to define the social and legal relationships between the colonists and the Native Americans as well as to define what if any obligations colonial governments owed to Indians with whom they entered into relationships.

Aside from Rountree’s look at federal Indian land policy and its early precursors, scholars examining pre-French and Indian War era influences on United States Indian policies most often focus on the Discovery doctrine. In its earliest form, this doctrine asserted that when a representative of a Christian nation located lands controlled by non-Christians that Christian nation could claim ownership of those lands and control over the actions of the non-Christian population.\(^\text{10}\) Then in the early sixteenth-century, the Spanish crown ordered Franciscus de Victoria, a highly regarded legal expert, to formulate the government’s policy outlining what land rights if any the American Indians


\(^\text{10}\) Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, (New York: Oxford University Press, 1990), 14-17.
possessed. De Victoria concluded, in contrast to earlier policies, that the Indians did own their land, but if the Indians chose to relinquish title to their land, they could only sell it to the Christian government that *discovered* their lands. The Spanish government further stated that Indian lands could only be taken by force under certain circumstances defined as a “just war.” Most often a just war referred to a situation whereby Indians initiated hostilities against the Spanish and were then militarily conquered by the Spanish. In these cases, colonists were legally allowed to confiscate lands belonging to the conquered Native Americans.\(^\text{11}\)

When the British first developed permanent colonies in North America, they turned to these Spanish legal theories to determine the land rights of Indians. For instance in “Tributary Indians in Colonial Virginia,” W. Stitt Robinson pointed out that colonial authorities often slightly modified Spanish policies in regard to Indian land ownership rather than create entirely new legal theories.\(^\text{12}\) In 1823, the Supreme Court decided a case that challenged the trade and intercourse acts. In this case, the plaintiff had bought a 43,000 square mile section of land directly from Indians in the present-day states of Illinois and Indiana during the Revolutionary War,\(^\text{13}\) while the defendant had received a congressionally approved title to the same land following the ratification of the Constitution and the early trade and intercourse acts.\(^\text{14}\) In its decision, the Supreme Court, led by Chief Justice John Marshall, upheld the federal government’s exclusive power to control land transfers and invalidate transfers made without its consent.

\(^\text{14}\) Johansen, 172.
Furthermore, the Court ruled that by defeating Great Britain in the Revolutionary War, the federal government inherited England’s claims to preemptive purchase of Indian lands in specific parts of North America as dictated by the Discovery doctrine. However, in *Johnson v. McIntosh* (1823) and later in *Tee-Hit-Ton v. United States* (1955), the Supreme Court established a modified interpretation of the Discovery doctrine that has been “used to deny indigenous nations any legal title to their land.”¹⁵ In particular, proponents of this viewpoint maintain that despite their United States citizenship, Native Americans do not legally own the land they inhabited prior to the arrival of Europeans. Rather, they are “merely tenants” and the United States government owns the land.¹⁶

More recently, some scholars have begun to reexamine the language of treaties and court cases to urge the federal government to adopt a different interpretation of the Discovery doctrine. This interpretation suggests that reservations and tribal lands are owned by the Indians and they have the right to refuse to sell their lands.¹⁷ In addition, this position maintains that instead of controlling the title to tribal lands, the United States government merely holds “the right of first purchase.”¹⁸ This means that if the Indians choose to sell their lands to anyone they must first gain Congressional approval.¹⁹ To support the official adoption of this interpretation, scholars pointed out previous examples of when the federal government espoused this position. In particular, as early as 1789 a treaty negotiated between the United States and the Wynandots, Delawares, Ottawas, Chippewas, Pattawatimas, and Sacs established that “the said nations, or either

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of them, shall not be at liberty to sell or dispose of the same [i.e. the tribes’ remaining land], or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States.”\textsuperscript{20} Johnson v. McIntosh furthered this argument, stating, that only the United States had the “exclusive right to extinguish the Indian title of occupancy … by purchase.”\textsuperscript{21}

Robert A. Williams, Jr. has highlighted examples from the seventeenth-century that closely resemble modern interpretations. In 1619, Virginia governor, George Yeardley, agreed to demands from the Powhatan Indians to allow this tribe authority to agree or disagree to the locations of English settlements. Yeardley consented to this demand to persuade the hesitant Powhatan leader to enter into a treaty that would allow for the peaceful English settlement of an area, still controlled by this militarily powerful tribe.\textsuperscript{22} By recognizing the right of the Powhatans to refuse to release land to the colonists, this treaty revealed that the colonists acknowledged that Indians had rightful title to their land, just as the interpretation, urged for adoption in modern policies and drawn from language in the 1789 treaty with the Wynandots, Delawares, Ottawas, Chippewas, Pattawatimas, and Sacs, also states that Indian land ownership entails the right to sell or to refuse to sell.

Three years after Yeardley officially recognized the Powhatan’s legal title to their lands in Virginia, authorities in England scrutinized the results of this treaty to determine

\textsuperscript{20} Commissioner of Indian Affairs, Treaties Between the United States of America, and the several Indian Tribes, from 1778 to 1837, (New York: Kraus Reprint Co., 1975), 24.
\textsuperscript{21} Prucha, Documents of United States Indian Policy, 35.
\textsuperscript{22} Williams, Jr., 214.
the legality of Yeardley’s actions. Granted legal jurisdiction over this colony by the King of England, “the Virginia Court in London” concluded in the 1622 *Barkham’s Case*\(^{23}\) that based on the right of discovery, Native Americans did not legally own the land that they had inhabited for thousands of years. Rather, the English government alone, through its representatives and laws, controlled all the land in Virginia and had the authority to distribute it.\(^{24}\) This decision clearly displays the stance taken by the Supreme Court in *Tee-Hit-Ton v. United States*. More specifically, *Barkham’s Case*, like this Supreme Court decision, reduced Native Americans from rightful land owners to mere tenets occupying lands controlled by Europeans.

Although scholars like Robert A. Williams, Jr. have meticulously examined the historical precursors to United States’ doctrines in regards to the Discovery doctrine, they have not as thoroughly identified seventeenth-century antecedents to the three other key concepts:

three core, fundamental principles … from which all … Indian law jurisprudence extends: the Congressional Plenary Power doctrine, which holds that Congress exercises a plenary authority in Indian affairs, the Diminished Tribal Sovereignty doctrine, which holds that Indian tribes still retain those aspects of their inherent sovereignty not expressly divested by treaty or statute, or implicitly divested by virtue of their dependent status; and the Trust doctrine, which holds that in exercising its broad discretionary authority in Indian affairs, Congress and the Executive are charged with the responsibilities of a guardian acting on behalf of its dependent Indian wards.\(^{25}\)

Just as *Barkham’s case* and the 1619 Anglo-Powhatan treaty represent antecedents of the Discovery doctrine, this thesis will demonstrate antecedents to the Congressional Plenary Power, Diminished Tribal Sovereignty, and Trust doctrines in

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\(^{24}\) Williams, Jr., 214-216. Vaughan, 27.

\(^{25}\) Getches, 36.
seventeenth-century legal and social sources, and show the extent to which seventeenth-century, English-Native American legal relations in British North America, as expressed through treaties and laws, resemble the legal materials that make up the three core principles of United States-Indian relations.

In 1984, Stanley N. Katz in “The Problem of a Colonial Legal History” issued a call for greater attention to colonial legal history. Similarly, in 1993, Daniel K. Richter called for more comprehensive examination of Indian and white social relations during the early contact period. Among recent research that addresses these calls is Williams’ examination of the legal discourse concerning British legal theories of sovereignty in regards to Indians during the early colonization of Virginia. This work presented a compelling interpretation of British colonial discourse. In particular, his assertion that English legal theories dictated that sovereignty could not be divided between the government and other groups highlights the consistency of British legal theory dealing with the issue of sovereignty from the 1620s through the American Revolution.

Dorothy V. Jones in “British Colonial Indian Treaties” also presented an insightful examination of seventeenth-century legal materials. In this article, Jones described how Native American and English diplomatic systems combined during the early encounter period to form a unique system. Correspondingly, Karen Kupperman

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29 Jones, 190. One of the major contributions made by Jones’ article is an incomplete list of treaties from 1607 to 1775 that was created by George Chalou and contains not only the date of each treaty but also the primary source where each one can be found.
also mentioned that early English colonists and Indians “incorporated” aspects of the others’ culture to create new forms of interaction that were unique to British North America. Helen Rountree also studied seventeenth-century laws and treaties from the Chesapeake Bay region in her examinations of Virginia and Maryland Indians. Her approach, like those of Jones and Kupperman, consisted of looking at legal artifacts to determine how colonists viewed and treated neighboring Indian groups. All three scholars utilized interpretations of seventeenth-century legal material to describe social relations rather than drawing connections to legal materials generated by the United States.

In regards to United States’ Indian policy, Francis Prucha’s *Documents in United States Indian Policy* is a highly detailed account of the evolving nature of United States-Indian relations from the late eighteenth-century through the twentieth-century. In the course of his research, Prucha clearly described the myriad of treaties, laws, and court cases that have combined to form the three core principles that dictate United States Indian policies. Along with Prucha, the late Vine Deloria, Jr. emerged as one of the most prominent researchers and commentators on the development of modern United States strategies to deal with the unique position of the Indian in United States society.

Deloria’s works include thorough compilations of primary sources such as *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979* as well as critical assessments of the United States’ treatment of Indians like *Custer Died for Your Sins: An Indian Manifesto*.

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This thesis will contribute to colonial history by providing clear evidence of legal theories and practices from the colonial period representing antecedents to modern United States policies. Unlike earlier authors, this thesis will more thoroughly explore the legal antecedents to the three core doctrines than has been previously attempted. However, the limitations facing this thesis are not uncommon in the field of colonial history. These include the lack of complete sources for seventeenth-century Virginia due to physical damage and the lack of formal record-keeping procedures. For example, colonists did not formally record many of the treaties made between Indians. Records of these treaties, such as the details of the 1614 treaty between English colonists in Virginia and the Chickahominy Indians, \(^{32}\) remain limited to descriptions in journals and manuscript collections often recorded by individuals present at the treaty-making conference. In addition, there is a paucity of local primary sources from southern colonies due to many county courthouses being burned during the Civil War, destroying important records.

This thesis is structured into three chapters—one for each of the three modern doctrines at which it will look. These modern policies define the obligations of the United States toward the Indians living within its borders, and also the extent of the powers that Congress wields over the Indians. In turn, these polices dictate what powers of self-government the tribes retain. However, rather than simple statements of policy, these doctrines represent interpretations based on a variety of sources such as ratified treaties between various Indian nations and the United States, Congressional statutes, and Supreme Court rulings. Chapter 1 examines the legal evidence used to support the

modern vision of the Congressional Plenary Power doctrine, or simply the plenary principle, and then focuses on their seventeenth-century antecedents. The modern interpretation of this doctrine holds that the United States Congress can change treaty stipulations, regulate land sales, and control liquor sales on reservations. This viewpoint further maintains that Congress is authorized to exercise this power without the consent or notification of the affected Indians. Similarly, colonial leaders changed treaty provisions, dictated the details of Indian-to-English land transfers, and directed what products could or could not be sold to Native Americans. Seventeenth-century authorities also exercised such powers without consulting affected Indians.

Chapter 2 looks at the Diminished Tribal Sovereignty doctrine along with its colonial antecedents. Just as Johnson v. McIntosh has been used to support an ultra-conservative vision of the doctrine of Discovery, one interpretation of the Diminished Tribal Sovereignty principle contends that members of federally recognized tribes “only exercise rights expressly granted to them by Congress.”\textsuperscript{33} Cherokee Nation v. Georgia (1831) also represents a cornerstone of modern notions concerning diminished Indian sovereignty. More specifically, this case allows policy makers to interpret this doctrine as “diminished sovereignty” because of Chief Justice John Marshall’s description of tribal governments, not as nations, but rather as “domestic dependant nations” in regards to tribes’ relationship with the federal government. Conversely, other scholars argue that “all rights [of the Indians] are reserved [to the Native Americans] except those

\textsuperscript{33} Wilkins, 120.
specifically given up in a treaty or similar agreement.” However, each interpretation results in a diminished form of Indian sovereignty.

Chapter 3 focuses on the Trust doctrine. One recent version of this doctrine stressed that the United States is engaged in a “guardian-ward” relationship. This argument, like the Diminished Tribal Sovereignty doctrine utilizes the phrase first coined in Cherokee Nation v. Georgia (1831) and later reiterated in Lone Wolf v. Hitchcock (1903) to describe the Indians as “domestic dependants” of the United States. However, United States v. Kagama (1883) represents the first instance where the courts clearly applied the notion of wardship toward Indians. Suggesting that the Native Americans are in a perpetual state of legal “childhood” and therefore too incompetent to survive without ‘special help’ beyond what social services that non-native United States citizens receive. However, a more moderate reading of the Trust doctrine asserts that because of stipulations in treaties and other legal documents where both sides agreed to provide aid to the other, the United States government has a legal obligation to aid Indians.

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34 Ibid.
35 Ibid., 65.
38 Prucha, Documents of United States Indian Policy, 266-267.
Chapter 1
The Plenary Power doctrine

The Congressional Plenary power doctrine refers to the authority of the United States Congress to “enact limits on Native American sovereignty without the consent of the involved Native American Nations.” More specifically, Congress dictates “how [tribal] land may be bought and sold, how crimes are punished,” how trade goods such as alcohol are regulated, and how Indians may practice their traditional religions. This authority stems from Article 1 of the United States Constitution, more generally known as the commerce clause, which states that only Congress can “regulate … the Indian Tribes.” Unlike the Articles of Confederation, which encouraged individual states to deal directly with Indian Nations, the Constitution makes clear the federal government’s exclusive right to regulate relations with Indians. To further clarify its exclusive right to regulate Native Americans, Congress passed a series of trade and intercourse acts between 1790 and 1834. Like the commerce clause, these acts asserted exclusive federal provenance over Indian affairs.

While most scholars in the fields of Indian history and law accept this explanation of the origins of the plenary power doctrine, they often disagree over what limits, if any, restrain Congressional powers and just how far this authority can extend over Indian tribes. David Wilkins, professor and chair of American Indian studies at the University of Minnesota, pointed out that “the United States sometimes … [exerted] absolute and unlimited power—over tribes, their resources, and Indian affairs.” He further

39 Johansen, 245.
40 Ibid., 245, 323-4.
42 Prucha, The Great Father, 31-5
43 Wilkins, 13.
highlighted four cases heard in the Supreme Court and the 10th Federal Circuit Court of Appeals during the 1990s that supported Congress’s use of unlimited plenary powers.\textsuperscript{44} In contrast to this view of unlimited plenary power, Stephen Pevar, author of the \textit{ACLU Guide to Indian and Tribal Rights}, pointed out that the Fifth Amendment and the Trust doctrine, which states that Congress must act in the best interest of the affected tribes, limit Congressional plenary power over tribes and individual Indians.\textsuperscript{45} However, these restrictions have “not [always] been effective in limiting Congress” from acting in an arbitrary manner toward tribal rights.\textsuperscript{46} Therefore, depending on the inclinations of Congress and the partiality of federal judges, the United States government displayed both limited and unlimited interpretations.

\textbf{Land Transfers}

The exclusive power of Congress to control land transfers has been repeatedly upheld by the United States judiciary. \textit{Johnson v. McIntosh} (1823), one of the most important Supreme Court decisions affecting legal doctrines toward Indians, concerned the power of Congress to void unauthorized land transfers. In \textit{Johnson v. McIntosh}, the plaintiff had bought a 43,000 square mile section of land directly from Indians in the present-day states of Illinois and Indiana during the Revolutionary War,\textsuperscript{47} while the defendant had received a congressionally approved title to the same land following the ratification of the Constitution and the early trade and intercourse acts.\textsuperscript{48} In its decision, the Supreme Court, led by Chief Justice John Marshall, upheld the federal government’s exclusive power to control land transfers and invalidate transfers made without its

\textsuperscript{44} Wilkins, 107.
\textsuperscript{46} \textit{Ibid.}, 49.
\textsuperscript{47} Robertson, 4.
\textsuperscript{48} Johansen, 172.
consent. This 1823 case has not only been used to define the United States’ position in regard to Native American land titles, but it has also been used “in other former British colonies … [as] the legal rule justifying claims to indigenous lands.” In addition to contributing to the official definition of land titles, this case is also cited to support the Congressional plenary powers dealing with land transfers. Nine years later, the Court in *Worcester v. Georgia* (1832) reaffirmed that the Federal government alone had the authority to accept lands from Indian Nations.

More recently, the 1980 Maine Indian Claims Settlement Act revealed the continued relevance of the commerce clause and the trade and intercourse acts. This legislation originated in a lawsuit filed on behalf of the Passamaquoddy, Penobscot, and Maliseet Indians of Maine. These Native Americans “laid claim to a large part of the state on the grounds that land cessions made after 1790 were invalid” because the transfers did not conform to stipulations in the Trade and Intercourse act passed in 1790. Recognizing the legal strength of the tribes’ lawsuit as well as the economic hardship that would occur to the people of Maine living on or off the land in question, Congress and the three tribes agreed to an out-of-court settlement in which the tribes relinquished their claim to the land in return for compensation from the federal government. By acknowledging the legitimacy of the Indians’ claim, Congress acknowledged that the trade and intercourse acts have continued their relevance in Indian affairs.

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49 Robertson, ix.
51 Prucha, *Documents of United States Indian Policy*, 296.
In searching for seventeenth-century antecedents of modern plenary powers regarding land transfers, several examples stand out from the colonial governments. More specifically, these colonies created legislation that required governmental approval for land transfers between Native American nations and English colonists. Looking first to Virginia, during the first few years following settlement, English colonists were allowed to purchase land directly from Indian tribes. However, by 1623, governments like those of Virginia had begun to regulate land sales by requiring titles to be confirmed by “the General Court.”

Therefore, within less than two decades of settlement, lawmakers in Virginia began using plenary-like power to regulate land transfers.

Helen Rountree pointed out that in 1652 the General Assembly passed an act that required all land purchases from Indians to be submitted to the legislature and the governor for approval “unless they [the government] shall see cause to the contrary.”

Again in 1654 and 1658, the Virginia Assembly, in response to petitions from Indians, proclaimed that all land transfers involving Indians remained invalid “until [granted] full leave from the governor and council.” Therefore, by claiming that it—not private individuals—had authority to regulate land sales, the Virginia Assembly displayed an assumption that it had plenary power over Indians.

Scholars have pointed out that in spite of laws against non-sanctioned land sales, some colonists in Virginia continued to buy and take tribal lands without government approval.

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53 Susie M. Ames, ed., *County Court Records of Accomack-Northampton, Virginia, 1640-1645*, (Charlottesville: University Press of Virginia, 1973), 34 n.10. In 1752, the English adopted the Gregorian calendar in favor of the Julian. Because this thesis is not focused on measuring specific lapses of time, it will not convert dates from the Julian to the Gregorian calendar. Therefore, all dates in this thesis prior to 1752 will be in accordance with the Julian calendar, and dates post-1752 will be in accordance with the Gregorian calendar.


approval. However, actions taken by the General Assembly in 1661 reveal that lawmakers continued to enact legislation aimed at reinforcing regulations passed in the 1650s. In order to ensure that colonists complied with these earlier statutes, legislators created an Indian land commission, which investigated all Indian land sales. Despite some unsanctioned land sales, colonists recognized the plenary—like authority of the government, and bought Indian lands through legally authorized channels.

In Maryland, the colonial government in the late seventeenth-century also claimed plenary power over Indian lands. In 1698, the legislature passed a statute asserting its authority to control all land sales within the surveyed boundaries. In 1768, the Maryland colonial authorities encountered a situation reminiscent of the Maine Indian Claims Settlement Acts. When the government looked into complaints from the Nanticoke Indians, it found that portions of their lands, which had been surveyed 1695, had been taken without official approval. Although the Maryland government recognized that these land transfers were invalid under the law, the legislature choose to enact legislation to compensate the Nanticokes for their lands illegally taken from them. The Maryland legislature offered compensation to the Nanticokes rather than return their land presumably because, like the United States in the Maine Indian Claims Settlement Act, this colony believed that returning the land would cause economic distress to Maryland’s white citizens.

Several other colonial governments, whether elected or appointed, also asserted plenary-like authority over Native Americans by regulating land transfers involving

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56 Rountree Eastern Shore Indians of Virginia and Maryland, 65.
57 Hening vol. 2, 155.
59 Ibid., 175.
60 Prucha, Documents of United States Indian Policy, 296.
Indian Nations. The Carolina colony in 1670 instituted statutes that stated along with other political contact with Indians, all land transfers required governmental approval to become valid.\textsuperscript{61} Charles Royce, author of \textit{The First American Frontier: Indian Land Cessions in the United States}, further pointed out that between 1675 and 1684 land purchases from Indians remained subject to the consent of colonial authorities. However, during this portion of the seventeenth-century, these authorities were the “Lords Proprietors” rather than an elected legislature as in Virginia.\textsuperscript{62} Turning next to New York, in 1675 and again in 1684 records reveal that land sales needed the approval of the government. However, in these instances, the colonial Governor represented the government.\textsuperscript{63}

Looking next to the colony of East New Jersey, beginning shortly after the English seized control of this area from the Dutch in 1664, the colonial government began regulating land transfers from Indians to non-Indians, and thus, began to informally extend its authority to include control of Indian land sales. For instance, from 1664\textsuperscript{64} to 1684 the Proprietors represented by the Governor reviewed and validated land transfers involving Indian nations.\textsuperscript{65} Even though the colonial government exercised plenary-like authority over land sales, it was not until 1699 that authorities formally declared their right to this power. In particular, the colonial authorities announced that

\begin{footnotesize}
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  \item \textsuperscript{61} Vaughan, vol. 13, 12.
  \item \textsuperscript{65} \textit{Ibid.}, 459.
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the proprietary government, alone, “shall have the sole privilege -- as always hath been practiced—of” controlling land purchases. Therefore, this colony’s leaders claimed plenary power over Indian lands despite a lack of official appointment of powers.

Along with the Southern and mid-Atlantic colonies, several of the New England colonies enacted legislation that granted the colonial government plenary-like powers over Indian land transfers. Massachusetts, for example, extended its authority over Indians living within its borders in the early 1630s. More specifically, in 1633, this colony passed an act stating that “no person [was] allowed to buy lands from [the Indian Nations] without leave” from the colonial government. The Massachusetts legislature continued to assert its exclusive control over Indian land transfers throughout the seventeenth-century. For instance, by 1686, the colonial government passed two more statutes restating its command over Indian lands. Connecticut’s legislature exercised plenary-like authority over Indian lands as early as the 1660s. In particular, a 1664 statute declared all land transfers void without government assent.

Similarly, the colony of Plymouth, founded in 1620 by religious dissenters from England, also enacted laws that granted plenary-like powers to its lawmakers. In a 1643 act, the colonial legislature formally granted itself the power to control Indian land transfers. In addition, like New Jersey, Plymouth colonial leaders stated that prior to the 1643 act “it hath been the constant custom from our first beginning that no person or

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66 Royce, 588.
71 Royce, 618.
persons have or ever did purchase, rent, or hire any lands … of the Natives but by the
magistrates consent.” Following this legislation, the colonial government continued to
assert its exclusive authority over land sales involving Indians by passing statutes in
1658, 1664, and 1691 that reaffirmed this plenary—like power.

In the 1630s, Roger Williams purchased land from the Narragansett Indians to
create the colony of Rhode Island. Roughly twenty years later this colony also extended
its authority over Indian land transfers. Felix Cohen in the *Handbook of Federal Indian
Law* mentioned that by 1651 the Rhode Island colonial government proscribed
“[u]nauthorized treating for the purchase of Indian land.” Because Rhode Island’s
government exercised plenary—like powers over Indian land transfers, this colony’s laws
along with the laws of the Southern, mid-Atlantic, and other New England colonies
represent antecedents to modern United States policy.

At various times throughout the seventeenth-century Native Americans petitioned
the English monarch in order to appeal legal actions taken by the colonial legislatures.
For instance, in 1644, Narragansett leaders directly petitioned the English king in order to
get permission (denied by the United Colonies of Massachusetts, Connecticut, New
Haven, and Plymouth) to go to war with another tribe. This request received no reply
due to the English Civil War. Despite the occasional Indian legal victory obtained
through direct appeal to the king, the British North American “colonies had been left

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74 Cohen, 47.
76 Pulsipher, 29.
largely free [in the seventeenth-century] to develop their own systems for regulating the … Indian tribes encountered within their chartered limits.”

Trade Goods

Just as Congress continues to regulate Indian lands under the commerce clause, it also controls trade in commodities other than land between Indian tribes and non-Indians. In order to regulate the types of goods available to Indians, Congress began allowing only certain individuals to trade with the Indians. For instance, Section 2 of the 1834 Intercourse and Trade act stipulated, “no persons shall be permitted to trade with any of the Indians … without a license.” Although trade regulations involving Indians once applied to Indians living on or off reservations, the 1871 case of the United States v. Certain Property “held that no license is required to trade with Indians outside of Indian country.” Congress also continues to require trading licenses for non-Indians supplying goods on Indian reservations as well as reserving its right to appoint the traders. As recently as 1983, the government required a particular non-Indian selling alcohol on a reservation to be licensed.

Among trade goods offered to Indians, alcohol and firearms have been specifically targeted for federal regulation. For example, Felix Cohen pointed that guns have historically been singled out by the government for close regulation. In addition to guns and ammunition, the late Francis Prucha, author of several scholarly works concerning Native Americans’ modern legal status, mentioned that early American

77 Getches, 57
78 Prucha, Documents of United States Indian Policy, 64.
79 Cohen, 349, n13.
80 Ibid., 349.
82 Cohen, 350.
leaders specifically identified alcohol as a trade good that had to be carefully controlled,\textsuperscript{83} and the fact that the federal government continues to license traders reveals that it exercises plenary authority over what items Indians are allowed access to on their reservations.

Several seventeenth-century policies appear to be antecedents of this modern plenary power over trade. Colonial Virginia restricted colonists from selling or bartering their guns to Native Americans. Governor Samuel Argall in 1617 observed that colonists were trading away their guns and, therefore, reducing the English settlers’ ability to successfully defend against Indian aggression.\textsuperscript{84} In 1621 and again in 1632, the Virginia House of Burgesses passed legislation that expanded earlier trade restrictions to include trade goods such as corn in addition to guns.\textsuperscript{85} In 1633, the Assembly granted the governor the authority to “give [certain individuals] leave and license to trade” with the Native Americans.\textsuperscript{86} Again in 1641, colonial authorities decreed that “trade with the savages [was] forbidden without special license” granted by the governor.\textsuperscript{87} That these regulations were enforced to some degree is evident from court records. For example, Virginia legislators in 1644 launched an investigation to determine whether rumors of unlicensed trading were true or not.\textsuperscript{88} In 1660, 1675, 1677 and 1678, the Assembly passed acts that reiterated earlier bans on unlicensed trading.\textsuperscript{89} However, from 1680 to the early eighteenth-century, Virginia lawmakers, responding to a decree “enacted by the

\textsuperscript{83} Prucha, \textit{Documents of United States Indian Policy}, 67.
\textsuperscript{85} Hening, vol. 1, 126, 173.
\textsuperscript{86} \textit{Ibid.}, 219.
\textsuperscript{88} Ames, 386.
kings most excellent majesty,” repealed certain trade restrictions. Specifically, this act allowed colonists to sell liquor to Native Americans without a license from 1680 to 1705, when a statute once again regulated it. The House of Burgesses allowed Indians access to weapons during this interval because colonists did not view the tribes as powerful enough to threaten the colony, even if they possessed guns.

In addition to exercising plenary-like power over trade in general, Virginia legislators singled out guns and ammunition for specific regulations. In 1642 and again in 1657, the Assembly enacted legislation for the sole purpose of controlling the sale of guns and ammunition to Indians. When legislators learned of arms sales to Indians from Dutch settlers, lawmakers in 1658 and 1659 allowed English colonists to trade guns to Virginia’s Native American allies. These legislators lifted the ban on gun sales to Indians in order to compete with the Dutch. Six years later, the Dutch trade in weapons to Indians had disappeared when England took control of Dutch colonies in North America, and Virginia’s Assembly reinstituted the ban on trading guns to Indians--until lifting all trade restrictions in 1680. By requiring trading licenses and dictating which items could be legally sold to Native Americans, the actions of the Virginia colonial government acted in ways that foreshadowed modern United States plenary powers concerning trade with the Indians.

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90 Hening vol. 2, 480.
91 Ibid., vol. 3, 468.
92 While this assertion is not supported by evidence it is very plausible based on earlier actions by legislators. In 1660, the Virginia Assembly allowed gun sales to the Chesskoack Indians because colonists believed that due to the Indians’ small numbers, this tribe represented no threat to the English. Hening, vol. 2, 39.
93 Hening vol. 1, 255, 441.
95 Ibid., vol. 2, 215.
96 Ibid.
Several other colonies regulated Indian trade in ways that resemble modern policy. Maryland passed legislation in 1652 that required all trade with Indians be conducted at specific locations by licensed individuals.\textsuperscript{97} New York, Pennsylvania, and New Jersey all regulated trade between Indians and colonists during the seventeenth-century. For instance, in 1698 New York authorities outlawed the sale of alcohol to the Mohawk Indians at the urging of the Mohawks.\textsuperscript{98} Pennsylvania authorities also targeted trade between Indians and non-Indians for special regulation and passed several acts asserting their authority. Colonial legislators enacted at least three statutes regulating trade in general, and passed at least six bills in the seventeenth-century that dealt with alcohol or firearms.\textsuperscript{99} This colony, along with those already mentioned, demanded that only licensed individuals could trade with Indians.\textsuperscript{100} East New Jersey also addressed trade between whites and Indians. Although Governor Dongan recognized that unlicensed trading took place, East New Jersey’s colonial government issued orders in 1685 intended to control trade with the Indians.\textsuperscript{101}

Like Dongan, Massachusetts officials realized that unregulated trade between colonists and Native Americans occurred within their boundaries. Moreover, leaders of this colony recognized that “the irregularities and improper conduct of [unlicensed English] traders” threatened to incite violence between colonists and Indians.\textsuperscript{102} In order to avoid violence, the Massachusetts lawmakers attempted to standardize and control

\begin{footnotes}
\footnote{Bozman, 451.}
\footnote{Wraxall, 31.}
\footnote{Ibid., i, 21, 98, 105, 116, 157-8. William Penn first promised Indian leaders that his proprietary government would regulate trade involving alcohol in 1682. Also mentioned in Vaughan, vol. 5, 56.}
\footnote{Hazard, \textit{Colonial Records of Pennsylvania}, 21, 404.}
\footnote{\textit{Documents Relating to the Colonial History of the State of New Jersey}, 485.}
\footnote{Cohen, 348.}
\end{footnotes}
trading between colonists and Indians by creating a licensing system in 1632. This colony’s legislature continued to pass acts that controlled trade in general with Indians throughout the seventeenth-century. Furthermore, Massachusetts also specifically regulated trade involving guns and alcohol, passing at least eight acts specifically targeting alcohol sales to Native Americans during the seventeenth-century as well as at least six laws regulating guns and ammunition. For instance, in 1633, the legislature enacted regulations concerning firearms, and in 1657 colonial authorities renewed an earlier act regulating the trade in alcohol “whether known by the name of Rum, strong waters, wine, strong-beer, brandy, cider, perry, or any other strong liquors.”

Plymouth colony, like others, not only regulated trade in general, but also specifically attempted to control trade in guns and alcohol. For instance, in the 1640s, 1660s, and 1670s, legislators passed acts regulating gun trades to Indians. In addition, Plymouth controlled alcohol sales to Indians in the 1660s and 1670s. Therefore, this colony's laws, like the others, represent clear antecedents to modern United States policy concerning trade with Indians.

Legal Jurisdiction

Along with land transfers, Congress also has the power to determine how crimes that take place on Indian reservations are prosecuted. More specifically, Congress

103 Shurtleff, volume 1, 96.
105 Shurtleff, volume 3, 139, 369, 425-6. Ibid., volume 4 part 1, 255, 277, 334. Ibid., volume 4 part 2, 512, 564.
107 Whitmore, 161.
108 Ibid.
110 Ibid., 169, 290
determines which crimes committed on reservations fall under the jurisdiction of tribal
courts and which fall under state or federal jurisdiction. For instance, the General Crimes
Act of 1817 stated that non-Indian criminals on tribal lands were to be turned over to the
United States, but conspicuously omitted to turn over Indian criminals in the jurisdiction
of the United States to tribal authorities for judgment. Following an 1883 Supreme Court
ruling that allowed a tribal court, operating on a reservation, jurisdiction over a murder
committed by one Indian against a member of the same tribe, Congress passed the Major
Crimes Act of 1885.\textsuperscript{111} This bill extended federal jurisdiction over seven crimes
involving Indian against Indian; “namely, murder, manslaughter, rape, assault with intent
to kill, arson, burglary, and larceny.”\textsuperscript{112} Passage of the 1968 Indian Civil Rights Act
“resulted in a … [further] limitation of tribal criminal jurisdiction to minor offenses
punishable by a maximum $500 fine or six months’ imprisonment.”\textsuperscript{113} In 1976, Congress
passed the Indian Crimes Act, which “extended the number of crimes [covered by the
Major Crimes Act of 1885 from seven] to fourteen.”\textsuperscript{114} Also passed in the late twentieth-
century, Public Law 280, which was later nullified, allowed certain states the option of to
assume the jurisdiction over all criminal and civil matters from tribes targeted for
termination.

Since the creation of the Indian Crimes Act, the Supreme Court has consistently
upheld the plenary authority of Congress to determine what jurisdictional authority tribal
courts can wield on their own reservations. For instance, in \textit{Oliphant v. Suquamish}
(1978), the Supreme Court held that based on the Indian Civil Rights Act and the Major

\begin{footnotes}
\textsuperscript{111} Prucha, \textit{Documents of United States Indian Policy} 167-8. Holt, 73.
\textsuperscript{112} Prucha, \textit{Documents of United States Indian Policy} 168.
\textsuperscript{113} Holt, 73.
\textsuperscript{114} Prucha, \textit{Documents of United States Indian Policy} 278.
\end{footnotes}
Crimes Act tribal courts could not try any non-Indians.\textsuperscript{115} Also based on these two statutes, the Court decreed in \textit{Duro v. Reina} (1990) that tribal courts could only have jurisdiction over members of their own tribe and that Indians caught committing a crime on a reservation belonging to a different tribe fall under state or federal jurisdiction.\textsuperscript{116} Therefore, modern legislation extending plenary control over crimes on tribal lands is currently supported by the Supreme Court.

Colonial assertions of legal jurisdiction over crimes that took place in areas controlled by Indians represent precursors to United States policies. Virginia attempted very early to establish the supremacy of English legal jurisdiction over tribal law. For instance, a 1614 treaty with the Chickahominy Indians stipulated that all English offenders who committed a crime against an Indian would be tried in colonial courts—not by tribal authorities.\textsuperscript{117} This treaty also stated all Indians who committed crimes against colonists would also face punishment in English courts rather than by tribal authorities.\textsuperscript{118} In a 1677 treaty, Virginia authorities not only restated their jurisdiction over cases involving non-Indians and Indians but also claimed jurisdiction over cases involving Indian against Indian. Section five of this treaty restated the 1614 stipulation that all English criminals caught by the Indians were to be tried in colonial courts.\textsuperscript{119}

As for the New England colonies, Jenny Hale Pulsipher, author of \textit{Subjects unto the Same King: Indians, English, and the Contest for Authority in Colonial New England,}

\begin{footnotes}
\textsuperscript{115} Ibid., 75.
\textsuperscript{116} Ibid., 77-8. However, this court ruling was reversed through a 1991 Act of Congress because it created a jurisdictional no-man’s land in Indian Country.
\textsuperscript{117} Hamor, 13
\textsuperscript{118} Ibid., 14.
\end{footnotes}
recently pointed out that authorities in colonial Plymouth attempted to exert plenary-like control over the legal jurisdictions of the Native American nations since the beginning of their colony. For instance, in 1621, English colonists and the Wampanoag Indians signed their first treaty. In this treaty, the Wampanoag chief agreed to English demands “that Indians send any [Indian] offender to the English ‘that we might punish him’ but [the colonists] failed to send [English] offenders to the Indians in return.” By dictating that tribal jurisdiction did not extend over non-Indians, the Plymouth legislators’ actions closely mirror modern United States policy.

Leaders of colonial Massachusetts also extended plenary-like authority over the legal jurisdiction of Indian nations. In particular, “in 1644, five Massachusetts Indian sachems … agreed to ‘put ourselves [and] our subjects … under the … jurisdiction of the Massachusetts’” government. Three years later, colonial authorities declared that Indians under Massachusetts’ jurisdiction could “keep a court themselves … to determine small causes of a civil nature and …small criminal cases.” However, this act also stated that for serious crimes, presumably such as murder, jurisdiction would revert to colonial authorities. In 1668, Indian tribes entering into a peace treaty with the English acceded to colonists’ demands that the Indians acknowledge that they were under the legal jurisdiction of the Massachusetts government. Although the crown objected when Massachusetts leaders claimed that Massachusetts—not the king, had ultimate authority over Indians, because no royal objections appeared to other colonies’ claims of legal jurisdiction over Native Americans, it is probable that the king took offence at

120 Pulsipher, 18. Bringham, 304.
121 Pulsipher, 27. Shurtleff, volume 2, 55.
122 Shurtleff, volume 3, 106.
123 Ibid.
124 Pulsipher, 27-8
125 Ibid., 28-9.
the omission of his ultimate authority in some colonial Massachusetts statutes made in the 1600s rather than the intent of those statutes. Aside from issues concerning the omission of acknowledgement of royal authority, the actions of colonial lawmakers clearly show that Massachusetts exerted plenary-like power over tribal legal jurisdiction, and thus represent antecedents to modern United States policy.

_Treaty Abrogation_

In addition to issues surrounding legal jurisdiction, the Supreme Court also upholds Congress’ plenary power to abrogate or alter the stipulations of treaties with Indians without the consent or even knowledge of the effect on Indian nations. Although, according to Congress and the Supreme Court, the federal government has always possessed this particular power, scholars point to _Lone Wolf v. Hitchcock_ (1903) as the foundation for the legal justification of Congressional authority to abrogate Indian treaties. This case arose when Congress attempted to purchase lands guaranteed to several tribes, including the Comanche, under the Treaty of Medicine Lodge (1867). When Congressional representatives proved “unable to obtain the consent of three-quarters of the adult males as required in this treaty,” Congress enacted legislation that approved the land sale without the consent or notification of the affected tribes. In the trial that followed this legislation, the Supreme Court upheld the actions of Congress. In 1964, this decision was used to justify Congress’ abrogation of a treaty with the Seneca Indians. In _Seneca Nation of Indians v. United States_ (1964), the Supreme Court supported Congressional plans to create a dam that eventually flooded “more than 10,000

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126 Wilkins, 145-7.
127 Johansen, 180.
128 Ibid.
129 Ibid.
acres … leaving fewer than 2,300 acres of habitable land” on the Seneca’s reservation.\textsuperscript{130} Even more recently, in \textit{South Dakota v. Yanton Sioux} (1998), the Court stated that “Congress possesses plenary power over Indian affairs, including the power to modify or eliminate … rights” that have been established by treaties.\textsuperscript{131} Therefore, the Court has continued to support the Congressional authority to exercise an ‘absolutist’ type of power over Indian treaties.

Using the modern United States policy of treaty abrogation as an interpretive framework, examples from Virginia, in particular, stand out. For instance, on April 3, 1623, the English and Powhatan Indians concluded a peace treaty ending roughly a year of violent hostilities between the two groups.\textsuperscript{132} Almost immediately after the peace treaty was signed, though, colonial authorities began planning on altering important details of the treaty. Eight months after the signing of this treaty, the English decided to eliminate the tribal rights of the Otiotan and Pamunkey Indians of the Powhatan Confederacy. More specifically, the colonial government decided to ignore the treaty’s stipulations and ordered that colonists attack these two tribes without the Indians’ knowledge.\textsuperscript{133} Again, in 1640, the Gingaskins of Virginia’s Eastern Shore were guaranteed a reservation of 1,500 acres.\textsuperscript{134} Thirty-three years later legislators reconfirmed the lands to Gingaskins, however, they decided to reduce the tribe’s land holding to 650 acres without the consent of the Gingaskins.\textsuperscript{135} These decisions to ignore

\begin{itemize}
\item \textsuperscript{130} Getches, 337.
\item \textsuperscript{131} Wilkins, 107.
\item \textsuperscript{132} Jones, 190.
\item \textsuperscript{133} Sainsbury, 1574-1660, 70-1.
\item \textsuperscript{134} Rountree, \textit{Eastern Shore Indians of Virginia and Maryland}, 54.
\item \textsuperscript{135} \textit{Ibid.}, 64. This reservation along with the Nottoway reservation, which was also created in the mid-seventeenth-century, was eventually dissolved within the first two decades of the nineteenth-century.
\end{itemize}
treaty terms without the consent of the affected tribes clearly represent antecedents to modern Congressional expressions of plenary powers in regards to treaty abrogation.

**Religion**

Along with land transfers and trade regulations, Francis Prucha, in *The Great Father*, stated that United States government extended its plenary authority to include the religious lives of Indians. Shortly after the conclusion of the Civil War, the federal government allowed “religious groups … [to play an important role in the] formation and administration of Indian policy.” The late, Vine Deloria, Jr. further explained this situation by pointing out that Christian “churches began [successfully] lobbying [politicians] early in the 1860’s … for franchise over the respective reservations.” This lobbying succeeded to the point that “one reservation would be assigned to the Roman Catholics, one to the Lutherans, one the Methodists, and one to the Episcopalians.” Furthermore, the federal government not only assigned an official church to each reservation, but also made certain, aspects of Native Americans’ traditional religious practices illegal. One example of this phenomenon concerns the Ghost Dance movement of the late nineteenth-century. Indian practitioners of the Ghost Dance attempted to invoke spiritual powers to return Indian culture to a pre-contact state. Threatened by this movement, the federal government outlawed its practice and used physical force in an effort to stamp it out. In 1978, Congress addressed this repressive action when it

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137 Vine Deloria, Jr., *Custer Died For Your Sins*, 106.
acknowledged that “Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians.”¹⁴¹

In 1959, the United States Tenth Circuit Court of Appeals ruled that First Amendment protections did not apply to Indians living on reservations when tribal governments pass laws that affect religious freedoms.¹⁴² The Civil Rights Act of 1968 nullified this ruling, and the federal government further pledged to protect Indian religious rights in the 1978 American Indian Religious Freedom Act.¹⁴³ In 1979, Congress promoted Indians’ traditional religious practices with the Archaeological Resources Protection Act. This act required all persons interested in excavating sites containing Indian religious artifacts or human remains to gain the permission of the affected tribe.¹⁴⁴

However, the Supreme Court decision in Lying v. Northwest Indian Cemetery (1998) negated these earlier gains for Indian freedom of religion, and supported Congress’ power to restrict the ability of Native Americans to practice their traditional beliefs. This case arose from concerns of how congressionally sanctioned timber harvests and the roads built to bring in the harvesting equipment would impact the traditional religions of California’s “Yurok, Karok, and Tolowa” tribes.¹⁴⁵ In its decision, the Court allowed the timber harvest to take place even though the justices clearly recognized that the logging operation would “virtually destroy the Indians’ ability to practice their religion.”¹⁴⁶ Prior to Lying v. Northwest Indian Cemetery, the Supreme Court ruled in Employment Division v. Smith (1990) “that [under certain circumstances

¹⁴¹ Prucha, Documents of United States Indian Policy 288.
¹⁴² Ibid., 150.
¹⁴³ Ibid., 250, 288-9.
¹⁴⁴ Ibid., 294-5.
¹⁴⁵ Ibid., 312-4.
¹⁴⁶ Ibid., 313.
the] states can incidentally prohibit … Indian religious practices."\footnote{147} Through these cases, the Supreme Court upheld the power of individual states and Congress to control Indian religions, and thus represents a continuation of nineteenth-century policy.

Looking at the seventeenth-century, converting Indians from their traditional beliefs to Christianity represented a fundamental goal for the English North American colonies since the failed Roanoke colonies of the 1580s.\footnote{148} English treatment of Indians’ religious beliefs reveals that the colonists, at best, saw Indian religions as primitive and not worth notice; at worst, colonists regarded Native American religious convictions as an evil threat to the colonists’ well-being. One of the most negative of the colonists’ perceptions of Indian religions contended that, as opposed to the English who were children of God, the Indians were “children of the Devil.”\footnote{149} English religious leaders further exacerbated this negative stereotype. In “Jonathan Edwards and American Indians: The Devil Sucks Their Blood,” Gerald R. McDermott pointed out that although written in the early half of the eighteenth-century, Jonathan Edwards’ sentiments concerning Indian religious practices accurately reflect convictions widely held by seventeenth-century colonists.\footnote{150} More specifically, Edwards, a well-respected religious leader, continuously described “Indian religion as peculiarly satanic,”\footnote{151} and went so far as to declare that “the devil sucks their [Indians’] blood.”\footnote{152} Like Edwards, the early colonists of New England spent considerable amounts of time striving for the “eternal

\footnote{147} Holt, 18.  
\footnote{151} *Ibid.*, 539.  
\footnote{152} *Ibid.*, 540.
salvation [they believed was] granted by God to His chosen few.”¹⁵³ As such, colonists from this region, in particular, attempted to mitigate this perceived “harmful influence of the unconverted Indian.”¹⁵⁴

Due to their clear intentions, the colonies of Plymouth and Massachusetts stand out from the other colonies in this study as closely corresponding to the actions of the United States in the nineteenth-century.¹⁵⁵ For instance, in 1646, a statute stated that Indians who violated Christian mores, like white colonists found guilty of blasphemy, would be put to death.¹⁵⁶ Furthermore, that same year in Massachusetts, Indians were “forbidden to perform outward acts of worship to false gods.”¹⁵⁷ In Plymouth colony during the seventeenth-century, lawmakers also extended their authority over Indians. For instance, this colony demanded that Indians not work on Sundays, not fire a weapon on Sundays, and “not [be] permitted to powwow or visit the houses of the English on” Sundays.¹⁵⁸ By imposing these religious laws on the Native Americans living within the boundaries claimed by these colonies, both Massachusetts and Plymouth laws represent antecedents to United States federal polices.

Although the English, like Congress, enacted legislation without the consent of the affected Indians, not all of the targeted Indian population acted in accordance with those laws. While some tribes such as the Powhatan in Virginia and the Pequot in Massachusetts, were almost wiped out in the seventeenth-century, other tribes in British North America remained powerful enough to resist pressures from English colonists to

¹⁵³ Leach, 7.
¹⁵⁴ Ibid., 6.
¹⁵⁵ The federal government no longer attempts to convert Native Americans to Christianity.
¹⁵⁷ Ibid., 178.
¹⁵⁸ Bringham, 96, 288-9, 100.
conform to colonial laws.\textsuperscript{159} Therefore, it is important to remember that during the seventeenth-century even though the various colonial governments acted at times as if they controlled the Indians living in their ‘claimed’ borders, the Indians exercised great agency in their decisions to act in accordance with English demands or to refuse such demands for their own purposes.

Seventeenth-century laws created for England’s North American colonies and directed toward Native Americans closely correspond to the legal devices that have been used to establish the modern United States’ Congressional Plenary Powers doctrine. These modern policies, expressed through treaties, statutes, and court rulings, rarely cite or mention legal artifacts from the seventeenth-century. Despite this lack of a concrete connection, though, the close similarities in purpose and language between modern and seventeenth-century legal devices reveal that these colonial laws represent antecedents.

\textsuperscript{159} Pulsipher, 35.
Chapter 2  
The Trust Doctrine

A trust relationship refers to an arrangement whereby one person or group of people control financial matters, hold title to land and natural resources, or even the actions of a second person or group of people. Furthermore, the first party, or the trustee, is legally assigned such expansive powers over the resources or actions of the second party, the beneficiary, in order to act in the best interests of the beneficiary. In regards to the modern Trust Doctrine, this policy refers to the “legal obligation of the United States [, like any trustee,] to act in the best interests of Indians”¹ This legal obligation requires federal protection and management of “Native American[s, their] lands, and resources.”²

As part of its relationship with Native Americans, the federal government holds title to reservation lands in trust for the Indian tribes,³ provides financial assistance for social programs such as schools and medical facilities, and manages revenues resulting from the extraction of natural resources from tribal lands.⁴ Like the Discovery and Plenary Powers doctrine, the Trust doctrine was created through provisions in treaties, statutes, and Court rulings and its origins date to the early formation of the United States. For instance, until it stopped negotiating with Indians by treaty, in 1871, “the United States entered into hundreds of treaties with Indian tribes. In almost all of the treaties, the Indians gave up land in exchange for … a guarantee that the United States would create a permanent reservation for the tribe and would protect the safety and well-being of tribal members.”⁵

For example, an 1864 treaty between the Hupa, South Fork, Redwood, and Grouse Creek

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¹ Johansen, 345.  
² Ibid.  
⁴ Wilkins, 65. Prucha, The Great Father, 130, closely echoed this statement.  
Indians and the federal government guaranteed the Indians a reservation, an annual
allotment of clothing, and free access to a doctor “appointed to reside upon the
reservation.” Because of the clear intent to promote Native American interests, these
treaty-guarantees are an important feature of the Trust doctrine.

The Trust doctrine creates a relationship between the federal government and
Native American nations that has been variously described by the federal government as
a “ward-guardian” and a “trustee-beneficiary” relationship. In the mid twentieth-
century, critics of the federal government’s approach to Indian affairs attempted to clarify
the Trust relationship between the United States and Native Americans. In particular,
scholars critical of federal Indian policy asserted that “wardship [is] defined as [a]
restriction on [Indians’] personal freedom of action, a remnant of paternalism; trusteeship
on the other hand, did not touch the person of the Indian or his personal freedom as a
citizen, but was a necessary means of protecting Indian property.” Dillon S. Myer,
speaking for the federal government, brushed aside arguments concerning “the distinction
between ‘trustee-beneficiary’ and ‘guardian-ward,’ … [and stated that] you cannot have
trusteeship without paternalism and practically all the paternalism … in [governmental
relations with Indians] stems directly from our trustee responsibilities.” Therefore,
according to the United States government both “wardship” and “trusteeship” represent a
loss of Indian agency and paternalistic attitudes and actions on the part of the federal

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6 Vine Deloria, Jr. and Raymond J. DeMallie, Documents of American Indian Diplomacy:
7 Ibid.
8 Wilkins, 12.
9 Prucha, The Great White Father, 345. Prucha also mentioned that Myer emphasized the
paternalism in federal actions toward Native Americans in order to justify government policies aimed at
ending social programs and land trusteeship by eliminating the Trust doctrine and the federal obligations to
Indians that make up this policy.
government, and further, that paternal actions are a defining characteristic of the modern Trust doctrine.

As early as the 1780s, Congress passed legislation that expressed paternalism in regards to its Trust obligations to Native Americans. Provisions within the Northwest Ordinance of 1787 state that the federal government pledged to protect Indian lands and possessions,\(^\text{10}\) as well as, to prevent “wrongs being done to” their persons by white Americans.\(^\text{11}\) Even though the United States extended this protection to all individuals within its boarders, white Americans’ racist beliefs resulted in whites ignoring the right to life, liberty, and property when it came to Indians. Presumably, the United States created the provisions within the 1787 Northwest Ordinance to halt this illegal violence directed at Native Americans by specifically demanding that law enforcement officials were required to protect Indians from harm just as they protected whites from injury. By passing legislation aimed at restating the Indians’ right to be free from hurt, which they should have already enjoyed, Congress made protection of Indians an important feature of the Trust doctrine. Congress expanded its paternal responsibility toward Indian nations in the 1790 Trade and Intercourse Act. In this act, Congress claimed sole right to regulate trade goods and land transfers involving Native Americans in order to protect the Indians and their interests from predatory whites.\(^\text{12}\) Roughly forty years later in *Cherokee Nation v. Georgia* (1831), Chief Justice Marshal first coined the phrase “domestic dependent nations” to describe the paternalistic relationship between the federal government and Native Americans.\(^\text{13}\)

\(^{10}\) Wilkins, 72.
\(^{11}\) Prucha, 10.
\(^{13}\) Johansen, 42.
From these origins, the United States has continued to assert and refine its Trust responsibility through statutes and Court rulings. For instance, the 1988 Tribally Controlled Schools Act reasserted the federal government’s “continuing trust responsibility with and responsibility to the Indian people.”\(^\text{14}\) Again, in 1994, the American Indian Trust Fund Management Reform Act restated this obligation to manage tribal funds and natural resources for the benefit of Indian tribes.\(^\text{15}\) Closely echoing the language of these statutes, recent Supreme Court decisions also reaffirmed the government’s Trust obligation to Indian nations. In 1980, the Court referred to the federal government as a “trustee,” which ideally administers the resources of their Native American “wards” for the benefit those tribes.\(^\text{16}\) In *Navajo Tribe of Indians v. United States* (1986), the Court again asserted that the federal government had a legal obligation to manage Indian resources for the betterment of the affected Native Americans.\(^\text{17}\) Therefore, Court rulings, along with treaties and statutes have shaped the modern Trust policy which by its very nature limits the Congressional exercise of absolute plenary power over Native Americans. Because the Trust doctrine obligates the federal government to act in the best interests of its Indian beneficiaries, this doctrine clearly intends to restrict Congressional actions when Indian interests are involved.

Despite the clear intent of the Trust doctrine to promote Indian interests, in several cases, the federal government not only failed to uphold its responsibility to act in the best interests of Indian tribes, but also used the Trust doctrine as “a political and legal

\(^{14}\) Prucha, *Documents of United States Indian Policy*, 315.

\(^{15}\) Wilkins, 74.


\(^{17}\) *Ibid.*, 46.
‘cover’ for exploitation.”\textsuperscript{18} For instance, in \textit{Lone Wolf v. Hitchcock} (1903) the Supreme Court upheld Congressional authority to take and sell Indian lands without the consent of and to the detriment of the affected tribes.\textsuperscript{19} In the mid twentieth-century, the government launched a program intended to terminate the legal relationship between the United States and Indian tribes along with all federally sponsored social programs that the Indians once received.\textsuperscript{20} Although the federal government ultimately abandoned this program, tribes such as Menominee Indians of Wisconsin “felt [the negative] effects of the termination policy” and lost all benefits provided by the trustee-beneficiary relationship.\textsuperscript{21} More recently, in 1988, the Court allowed Congress to harvest timber at sites, within national forests, integral to three Native American religions and thus destroy those religions.\textsuperscript{22} Because Congress, in this case, acknowledged that it was acting to the detriment of the affected Indian tribes, the federal government failed in its trust obligations to these Indians.

Just as the United States government has created a trustee-beneficiary relationship marked by a paternalistic approach, and at times, failed to meet this obligation; colonial governments developed paternalistic obligations to protect Indians and manage their resources, and were also unwilling or incapable at times of upholding their obligations to Native Americans. Helen Rountree pointed out that despite the creation of laws that demanded colonists respect Indian lands and the Indians’ physical well-being, colonial “governments, whether royal [or] colonial … were unable to protect Indians … from the

\textsuperscript{18} Pevar, 32. Wilkins, 69-70. Johansen, 345.
\textsuperscript{19} Johansen, 180-1.
\textsuperscript{20} Prucha, \textit{The Great Father}, 344-5.
\textsuperscript{21} Prucha, \textit{Documents of United States Indian Policy}, 234.
\textsuperscript{22} \textit{Ibid.}, 312-4.
encroachments and abuses of the frontiersmen.”

Furthermore, “white men who took Indian land and beat or killed the Indians were seldom brought to trial, and when they were tried they were usually freed by juries of their peers.” Just as the United States failed to meet its legal obligations to Native Americans, the North American British colonies failed to meet their commitments to the tribes under their jurisdiction.

This harsh treatment from white colonists was directed in many cases at Indians considered by the English to be fellow subjects of the British monarch. Even though Indian subjects were specifically granted equal access to courts of law for redress of injuries, scholars such as Rountree and Jenny Hale Pulsipher have pointed out that many white colonists viewed “the king’s Indian subjects” as inferior to his white subjects, and therefore, possessing fewer rights than whites. The pervasiveness of this prejudice meant that “white men who took Indian land and beat or killed the Indians were seldom brought to trial, and when they were tried they were usually freed by juries of their peers.”

In order to protect the Indians from such illegal actions by whites, colonial authorities, like the federal government, passed laws that clearly demanded that law enforcement officials punish white colonists who did not respect the rights of Indian subjects to be free from illegal physical and economic harm. By protecting Indians and their lands, colonial authorities created a relationship marked by paternalism that closely resembled federal Trust obligations. Aside from these failures to protect Indian interests, keeping in mind this description of the modern Trust doctrine with its paternalistic

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24 Ibid., 76.
25 Pulsipher, 15.
26 Pulsipher, 15.
28 Pulsipher, 17, 103.
attributes and looking at the seventeenth-English-Indian affairs, several clear antecedents stand out.

Like the United States, colonial governments inserted provisions into treaties, passed legislation, and handed down court rulings that created a Trust-like or paternalistic relationship between certain Indian tribes and the colonies. For instance, Virginia’s Governor, Thomas Dale promised to protect the Chickahominy Indians from hostile neighboring tribes in a 1614 treaty in return for acknowledgement of English superiority in the form of a tribute.29 A 1646 treaty between the English and the Powhatan also included provisions offering the Indians protection from hostile Indians or other European countries in return for Indian acknowledgement of the superiority of English authority.30 In addition to protecting the Powhatans from other Indians, Virginia’s government also pledged to protect tributary Indians and their lands from rapacious English colonists.31 Helen Rountree’s description of the treatment of Indians by English colonists revealed that even though tributary Indians were considered British subjects, white subjects of the English king, by and large, viewed the king’s Indians as possessing fewer rights than white English subjects.32 This belief that Indians were inferior eventually became codified in 1670 when the Virginia Assembly declared that Indians

29 Hamor, 14.
30 Hening, vol. 1, 323.
31 Ibid., 324-5. This tributary relationship closely resembled the paternalistic principles of English feudalism, wherein, a subject received protection from an aristocrat in return for tribute in the form of money or goods. In addition scholars suggest that early Spanish and Indian traditions also influenced the tributary approach used in the 1614 and 1646 treaties. W. Stitt Robinson pointed out that when deciding upon what relationship to develop with Native Americans English colonists cited Spanish models of tributary policy. Robinson further, mentioned that this paternalistic approach was “not … entirely new for Virginia Indians because Powhatan had imposed a tribute system upon his followers, [in return for protection he collected] … such products as corn, beans, deer, turkey, skins, beads, and copper (Robinson, 52-53). Pulsipher on page 17 also mentioned Spanish influence on the creation of English tributary systems.
could not employ white servants, and in 1705, lawmakers passed legislation that made it illegal for individuals with Native American ancestry to hold public office. Furthermore, in the colony of Plymouth, legislators only allowed Indians to give limited testimony in courts of law because the Indians were not Christians. Because Indians had fewer social and political rights than whites in addition to white racist beliefs, many colonists did not feel constrained to provide fair treatment in their dealings with Native Americans. In order to protect the Indians from such attitudes, colonial leaders passed laws that explicitly granted Native Americans the same protections from harm that colonists enjoyed under English law. Furthermore, at times during the seventeenth-century, Indians in Virginia successfully brought suit against whites who violated the protection granted by the colonial government. In 1661, leaders of the Rappohannock tribe successfully brought suit against Colonel Moore Fauntleroy for illegally detaining them. Fauntleroy’s punishment included being stripped of all civil and military offices in the colony for one year as well as having to provide a bond to the court to ensure “his good behavior and civil carriage … towards those [affected] Indians.” In certain instances, the government brought suit against colonists on behalf of the Indians. In 1670, Edmund Scarburgh, an English colonist and a militia colonel on the eastern shore of Virginia, enticed tribal leaders into a ditch and summarily killed them. After learning of these murders, Virginia’s governor, William Berkeley, sent word to law enforcement officials on the eastern shore that Scarburgh had:

34 Ibid., vol. 3, 251.
35 Bringham, 171.
36 Pulsipher also makes this point that colonists in the New England area also disregarded Indians’ rights to be free from abuse.
37 Hening, vol. 2, 152.
unjustly and most Tiranously oppressed them [the Eastern Shore Indians] by Muthering … them, … and many other waies to the apparent hazard of the said peace established as aforesd These are therefore in his Majesties Name to will and require you forthwith upon Sight hereof to Arrest the Body of the said … Edmund Scarburgh and him to cause personally to appeare before mee and the Councell and Assembly… and there to answere things as shall bee laid to his charge for having soe unjustly and contrary to Law and order abused the Authority committed to him.\(^{38}\)

Authorities latter found Scarburgh guilty as charged and punished him by stripping him of all public offices—namely his colonelship—and fining him.\(^{39}\) By bringing suit against Scarburgh on behalf of the eastern shore Indians, the colonial government acted as a guardian or trustee and displayed a paternalistic relationship with these Indians that closely resembled the modern Trust doctrine. In addition to this case, colonial Virginia leaders passed a statute that further reinforced the existence of a paternally-based, Trust-like relationship between the English and Native Americans. In 1629, colonial officials passed a tax on colonists’ tobacco in order to financially support three individual Native Americans (for unknown reasons).\(^{40}\) By protecting these Indians, colonial Virginia authorities displayed a trustee-beneficiary relationship that closely resembled federal obligations made in the trade and intercourse acts, which also pledged to protect Indians’ well-being and lands.\(^{41}\)

The Treaty of Middle Plantation (1677) between Virginia and the Pamunkey, Roanoke, Nottaway, Monacan, Saponi, and Nansemond tribes further refined the Trust-like obligation owed by colonists to those Indians allied with the British. Specifically, the colonial government not only promised “that all Indians who are in amity with us, and have not land sufficient to plant up, be … provided for, and land laid out [for] them,” but


\(^{39}\) Whitelaw, 633-5.

\(^{40}\) Hening, vol. 1, 143.

\(^{41}\) Wilkins, 72. Prucha, 14-15, 277.
also, provided “that the said Indians be … defended in their persons, goods, and properties against all hurts and injuries” caused by colonists. Colonial authorities created legislation that placed the government in a trustee-beneficiary relationship in regards to the control of reservation lands. For example, as early as 1623 and throughout the seventeenth-century, the General Assembly sought to protect Indian lands from unscrupulous colonists, who knowingly violated Indian land rights, and passed legislation dictating that all Indian land sales, including reservation land sales, remained invalid without “full leave from the governor and council.” Like the federal government, the colonial government passed legislation that gave it title to these reservations to hold in trust for the benefit of the tribes. Through these actions, the colonial Virginia government displayed a paternal attitude when it promised to protect Indians, their lands, and resources as well as offering social services in the form of free land to qualifying Native Americans. Consequently, this paternalistic relationship between the English and Indians created by the 1677 treaty closely resembles the modern Trust relationship between the United States and Indians.

In addition, the Virginia Assembly passed a bill in 1640 that created a reservation for the Gingaskin Indians of the Eastern Shore. The legislature created this reservation, which existed until 1813, in order to protect the Gingaskins, who by the late 1630s had sold all their land. Similarly, the Virginia government granted a 5,000 acre reservation to the Pamunkey and Chickahominy tribes in 1649. Colonial authorities later reconfirmed these tribes’ right to a reservation in 1653, and also called for the removal of

42 Colony of Virginia. “Treaty of Middle Plantation,” Article IV, V.
44 Rountree, Eastern Shore Indians of Virginia and Maryland, 54.
45 Rountree, Pocahontas’s People, 110-112.
English squatters on reservation lands. Authorities later enacted legislation in 1664, 1665, and 1668 calling for the removal English squatters on this reservation. Just as the colonial government acted as trustee for the tribes granted reservations in the 1677 treaty, Virginia authorities also held title to these reservations for the benefit of these tribes. Consequently, by creating reservations for these Indians and controlling to whom the Indians could sell their land, the Grand Assembly acted as a trustee for the Gingaskins, Chickahominies, and Pamunkies. This trusteeship assumed by the colonial government clearly displayed paternalistic obligation to these Indians that closely resembles the modern Trust doctrine.

Like Virginia, colonial Maryland also created a paternalistic relationship with Native Americans in which colonial authorities controlled Indian land sales for the benefit of Indians, created reservations, and passed statutes aimed at protecting Native Americans from physical harm. In 1678, Maryland colonial government established reservations for members of the Nanticoke, Pocomoke, and Assategue tribes. When creating these reservations, Helen Rountree pointed out that these tribes “were not given legal title to the … lands” rather colonial authorities held the title in trust to ensure that the Indians continued to maintain a land base. Aside from the creation of this reservation, lawmakers in Maryland signed treaties in 1687, 1692, and 1693 that stated and restated that law enforcement official were to provide Indians “protection against

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46 Hening, vol. 1, 380.
47 Rountree, Pocahontas’s People, 110-112.
48 In the early eighteenth-century, the colonial government began appointing white individuals to act as the governments representatives in matters regarding its trustee obligations to these tribes. These trustees controlled land sales, rented out unused areas to other whites, and collected that rent on behalf of the tribes.
personal violence from English” colonists. Furthermore, colonial lawmakers also enacted legislation to defend Indian lands from predatory colonists. A 1698 act declared “that the Indians, the ancient inhabitants of this province, [will be kept] free from the encroachments and oppressions of the English; especially the Nanticoke Indians” through intercession by colonial courts. Maryland authorities specifically proscribed white violence and oppression against Indians, presumably, because white colonists of Maryland, like those in Virginia, did not respect the Indians’ rights as fellow English subjects. Consequently, by assuming a paternalistic obligation to protect these Native Americans and their lands, colonial authorities in Maryland displayed a principal attribute of the modern Trust relationship.

Other colonial governments like Virginia and Maryland also used treaties, statutes and court rulings to establish with certain tribes Trust-like relationships that were marked by a paternal approach to Indian affairs. New York’s first colonial governor concluded treaty negotiations with the Esopus Indians in 1665. Provisions within this treaty “provided protection for personal and real property of … [the] Indians … and set the death penalty for any white who willfully killed an Indian” or another white person. New York authorities later passed several other laws providing for the protection of Indians and their lands throughout the seventeenth-century. This colonial government, furthermore, provided Indians living in Stockbridge, New York, with a superintendent to manage their lands by controlling land sales for the benefit of the tribe. Similarly,

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50 Ibid., 106-7.
51 Quoted in James McSherry, History of Maryland, (Baltimore: The Baltimore Book Company, 1904), 86.
52 Vaughan, vol. 7, 300.
54 State of New York, 162, 165.
Rhode Island’s government in 1696 passed an act that designated the Narragansett Indians as “wards of the legislature” and declared that the legislature—not the Narragansett leaders—would manage the tribes’ remaining land with the Indians’ best interests in mind.\(^5\) The Plymouth colony also created a trustee-beneficiary relationship with the Wampanoags during the last-half of the seventeenth-century. For instance, in the early 1670s the governor addressed the tribe’s leader, referred to by the English as King Philip, and attempted to explain that based on a 1643 act, the colonial government held the Wampanoags’ land in trust for the tribe’s benefit. In particular, the governor mentioned to King Philip that colonial authorities “‘kept his land not from him but for him.’”\(^6\) Because of the paternalistic provisions made by these three colonies on behalf of Native Americans, these actions clearly resemble important attributes of the modern Trust policy.

Also during the seventeenth-century, Connecticut, created a reservation and enacted legislation for the protection of certain Indian tribes. Although in 1637 colonists almost completely eradicated the Pequot Indians, Connecticut leaders in 1655, acting on a petition from the remnants of the Pequots, established a paternalistic, Trust-like relationship with this tribe. Specifically, “places of residence were appointed for them by the general court of Connecticut … and they were allowed to hunt on the lands” set aside for them.\(^7\) Colonial officials also appointed an “Indian governor” or rather a white trustee to hold title to the Pequots’ land in order to control land sales for the benefit of the tribe.\(^8\) At the end of the seventeenth-century, “colonists [in Connecticut], by repeated

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\(^5\) Royce, 623–4.
\(^6\) Bringham, 74. Pulsipher, 103.
\(^7\) Royce, 617.
\(^8\) Ibid.
purchases … had … obtained title to most of” the lands belonging to the Mohegan Indians.\textsuperscript{59} However, in order “to prevent trouble … [for] the Mohegans, … colonists … [created a reservation] for the Indians [consisting of] between 4,000 and 5,000 acres of land.”\textsuperscript{60} Furthermore, the colonial government claimed title to this land in order to control land sales for the benefit of the tribe, and thus, acted as trustee for the Mohegans.\textsuperscript{61} Because of these paternalistic obligations to protect Indians and their lands assumed by colonial leaders, Connecticut clearly created a Trust-like commitment to certain tribes.

Colonial Massachusetts also established a paternal trusteeship relationship with Indians throughout the seventeenth-century. In this colony, like others, colonists treated Indian subjects of the king harshly by illegally seizing their lands and committing acts of personal violence against them. In order to combat this behavior, colonial legislators, like the federal government passed a number of statutes specifically granting Indians the rights that they should have already enjoyed as subjects of the king. In 1628 and again in 1629, colonial authorities extended protection to the Indians and passed legislation demanding that English settlers “demean themselves justly and courteous towards the Indians” so “that no wrong or injury be offered … to the natives.”\textsuperscript{62} As the seventeenth-century progressed, Massachusetts’ leaders further expanded and clarified this colony’s legal obligation toward Native Americans. One 1639 statute not only restated that “care should be taken to prevent damage to the Indians,” but also declared that the court system would investigate claims by mistreated Indians and award accordingly.\textsuperscript{63} Colonial leaders reiterated this statute’s stance regarding the courts’ enforcement of laws.

\textsuperscript{59} Ibid. \\
\textsuperscript{60} Ibid. \\
\textsuperscript{61} Ibid., 618. \\
\textsuperscript{62} Shurtleff, vol. 1, 384, 399. \\
\textsuperscript{63} Ibid., 259
proscribing English-against-Indian crimes in a 1640 statute concerning English livestock
damaging Indian crops.\textsuperscript{64} Again, in 1652, legislators stated “that if any plantation or
person of the English shall offer injury … [to the Indians] they shall have relief in any of
the courts of justice amongst the English.”\textsuperscript{65} Later that same year, a Massachusetts court
ordered colonist Stephen Kent to pay for the medical treatment of an Indian who had
been injured while visiting Kent.\textsuperscript{66} Like the United States government, colonial leaders
in Massachusetts created a relationship marked by paternalism with that Native
Americans under this colony’s jurisdiction, and at times, enforced that relationship
through subsequent court proceedings.

In addition to enacting legislation to protect Native Americans from colonists,
Massachusetts authorities created reservations intended to benefit certain tribes. For
instance, colonial authorities granted the Putikookupegs Indians in 1664 a reservation “not
to exceed four thousand acres.”\textsuperscript{67} Colonial officials, furthermore, appointed three
Englishmen to act as trustees of the tribe’s land by controlling all land sales in the best
interest of the Putikookupegs.\textsuperscript{68} In 1675, Massachusetts created the “Deare Island”
reservation.\textsuperscript{69} Just as the United States made it a criminal offense for Indians in the late
nineteenth-century to leave reservations, these Indians were forbidden to leave the island
“for their … safety.”\textsuperscript{70} However, shortly after its establishment, this reservation
experienced shortages of food and other “absolute necessaries.”\textsuperscript{71} After the Indians’
plight was brought to the legislature’s attention, lawmakers acting as trustee for these

\textsuperscript{64} Ibid., 293-4.
\textsuperscript{65} Ibid., vol. 3, 281-2
\textsuperscript{66} Ibid., vol. 4 part 1, 117-8.
\textsuperscript{67} Ibid., vol. 4 part 2,109-110.
\textsuperscript{68} Ibid.,109-110.
\textsuperscript{69} Ibid., vol. 5, 64.
\textsuperscript{70} Ibid., vol. 5, 64.
\textsuperscript{71} Ibid.
Native Americans ordered supplies to be “sent down to Deare Island, so as to prevent their [the Indians] perishing.”72 The following year, authorities “considering [once again] the … distressed condition of the Indians at the island” not only provided more supplies, but also provided a boat to the Indians so that they could fish more productively.73 By providing a reservation as well as emergency social services, these paternalistic actions taken by colonial authorities closely resemble important aspects of the federal Trust relationship.

Like other colonies, Pennsylvania extended protection to the Indians under its jurisdiction from physical harm. As early as 1682, William Penn wrote to the Indians under Pennsylvania’s jurisdiction that even before he arrived in Pennsylvania he had “already taken care that none of my people wrong you by good laws.”74 He further pledged that if any of the English illegally harmed Indians, the Indians would receive compensation in the English court system.75 In 1693 and again in 1694, Pennsylvania’s governor displayed a paternalistic obligation when he extended protection from the French and hostile Indians to a tribe of Delaware Indians.76 The proprietary government of the Carolina colony also created a Trust-like obligation marked by paternalism to specific Native Americans. In 1680, colonial authorities discovered that several of their allies or “neighbor Indians” had been attacked and enslaved by the Westoe tribe. Soon after learning the plight of these Indians under the colony’s jurisdiction, authorities dispatched two Englishmen to “forthwith repair to the several and respective places and habitations where any of the said neighbor Indians do remain and are detained in bondage

72 Ibid.
73 Ibid., 84.
74 Vaughan, vol. 1, 56
75 Ibid.
76 Ibid., 88-90.
and … cause [those Indians] to be brought in safety before the Grand Council … where they shall be restored to their former liberty.” Because colonial authorities acted in a paternalistic fashion for the benefit of the affected tribes, these actions closely resemble attributes of the Trust doctrine and therefore represent antecedents to this federal policy.

Through the creation of laws and treaty stipulations aimed at protecting Indian lives and land, the United States formed a trustee-beneficiary or a guardian-ward relationship with the various Indian tribes. Taken together, these treaties and statutes, such as the trade and intercourse acts form what the federal government calls the Trust doctrine, which is characterized by paternalistic actions taken by the government intended to benefit Native Americans. Some of these paternalistic dealings include the creation of reservations held in trust by the government, protection from physical harm, and the provision of social services. Several colonial governments during the seventeenth-century also developed a trustee-beneficiary relationship with Native Americans under their jurisdiction marked by paternalistic obligations. These obligations also included creation of reservations held in trust by colonial authorities, protections from physical harm, control of Indian resources, and the provision of social services. Due to the pronounced similarities between the paternalism displayed by the United States and the colonial governments, actions taken for the benefit of Indian tribes by seventeenth-century colonial leaders represent antecedents to modern Trust policies.

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77 Ibid., vol. 13, 27.
Chapter 3
Diminished Tribal Sovereignty doctrine

Unlike the Plenary powers doctrine, which concerns the power Congress wields over Native Americans, the Diminished Tribal Sovereignty doctrine, also called the reserved rights principle, focuses on the sovereignty retained by Indian tribes. Two import aspects of sovereignty in this context refer to the ability of a nation or political body to practice self-governance and its authority to declare war upon another group. In the United States’ political system, sovereignty is split between federal, state, and local governments. The federal government creates laws that apply to all citizens, while states have the authority to take legislative action that does not contradict federal statutes and only applies to the inhabitants of that particular state. Local authorities, in turn, can enact legislation that pertains exclusively to residents within their political boundaries and does not conflict with either federal or state laws. Another attribute of self-governance concerns the ability of a group to enforce the legislation it creates. In the United States, local and state governments can create courts that have jurisdictional powers not reserved for the federal government and limited by their political boundaries. These courts must also abide by standards set by the federal judicial system with the Supreme Court at its head. Because they retain limited powers of self-governance and judicial control, state and local governments share sovereignty with the federal government, but are ultimately ruled by the federal legislation and courts. In addition to self-governance, another important attribute of sovereignty concerns the authority to declare war upon another nation or political body. The federal government exclusively reserves this power for
Therefore, because state and local authorities possess one important feature of sovereignty—the power to self-govern, but not the ability to declare war, state and local authorities have a diminished amount of sovereignty as compared to the federal government.

Just as state governments possess a diminished sovereignty that is superseded only by federal regulations, Indian tribes also enjoy a form of sovereignty that is limited only by the federal government. Prior to the arrival of Europeans, Indian tribes exercised unfettered sovereignty over their affairs in regards to their authority to declare war on other groups and their ability to self-govern or create and enforce legal codes. When tribes came under the authority of the United States government—whether voluntarily or through military conquest, those tribes surrendered certain aspects of their original sovereignty to federal authorities. Like state governments, tribal authorities also retain the ability to create legislation that does not contradict federal statutes. For instance, tribal governments have authority to control matters within their political boundaries such as the power to create “tribal courts and police forces, … to elect governing councils, or to tax on-reservation businesses or persons.” In addition, until the Civil Rights Act of 1968, the judicial system “held that the First Amendment [of the United States Constitution] did not” apply to Indians living on reservations when tribal governments passed laws that affected religious freedoms. Even though legislation in 1924 “conferred … citizenship … upon all Indians ‘born within the territorial limits of

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1 United States Constitution.
2 It is important to note that state governments are not allowed to enter into treaties with foreign nations or claim jurisdiction over another states’ political boundaries.
3 In a very few instances, states are granted legal jurisdiction over certain offenses committed within tribal boundaries. See legal jurisdiction in chapter 1.
4 Wilkins, 5-6.
5 Prucha, Documents of United States Indian Policy, 150.
the United States,‘’ certain Indians were not protected by the First Amendment until Congress nullified this power exercised by tribal leaders in 1968.\(^6\) Tribes also maintain courts of law with jurisdictional boundaries dictated by the federal government. More specifically, tribal courts have jurisdiction over all legal matters except those “offenses mentioned in the Major Crimes Acts of 1885 and the 1968 Indian Civil Rights Act.”\(^7\) In addition, also like restrictions on states’ sovereignty, tribal governments have given up the power to declare war. By surrendering a certain amount of their self-governing powers and the power to declare war, Native Americans now possess a diminished form of their pre-contact sovereignty.\(^8\)

Despite conservative interpretations of the Diminished Tribal Sovereignty doctrine contending that members of federally recognized tribes “only exercise rights expressly granted to them by Congress,” the prevailing approach to this portion of the diminished sovereignty principle affirms that “all rights [of the Indians] are reserved except those specifically given up in a treaty or similar agreement.”\(^9\) In support of this perspective, scholars point out that the reserved rights principle was “first enunciated by the ... Supreme Court in Untied States v. Winans.” (1905)\(^10\) In this decision, the Court stated that “a treaty is not a grant of rights to the Indians but [rather] a taking of rights from them.”\(^11\) As a result, when Native Americans and the United States entered into treaty agreements, the Indians gave up certain rights, often the right to use and/or occupy certain lands and resources. However, the Indians not only received any rights stated in the treaty, but also retained all privileges not expressly mentioned in a treaty or

\(^6\) Holt, 6.  
\(^7\) Ibid.  
\(^8\) Wilkins, 123.  
\(^9\) Ibid., 120.  
\(^10\) Johansen, 282.  
\(^11\) Pevar, 190.
Congressional legislation.\textsuperscript{12} Therefore, if a tribe signed a treaty agreeing to sell the United States land, and that treaty did not state that the Indians relinquished hunting rights to the particular area, that tribe may continue to hunt game on the land in question.\textsuperscript{13} Aside from concerns about religious freedoms, most contemporary issues regarding these privileges involve tribal access to natural resources, such as water and game animals like fish. For instance, language in treaties with several tribes from the northwestern and Great Lakes region of the United States allow certain tribes continued access in order to harvest more fish per-person than non-Indians and in the case of tribes such as the Chippewa, to use equipment that is illegal for non-Indians to use.\textsuperscript{14} In relation to water rights, the reserved rights principle states that “the water necessary for the purposes … [of] a reservation … were reserved for Indian use” and that Indian needs superseded any non-Indian water requirements.\textsuperscript{15}

Looking at English views of Indian sovereignty in the seventeenth-century, one important difference between England and the United States emerges. Whereas the United States acknowledges that it shares sovereignty with tribal governments, seventeenth-century English authorities rejected the legal notion of dividing sovereignty with Indians. In 1622, the Virginia Court in London ruled in \textit{Barkham’s Case} that based on the right of discovery, Native Americans who the British considered to be the king’s subjects no longer possessed any sovereignty.\textsuperscript{16} Rather, the English government alone exercised exclusive sovereignty over all subjects—both Indian and white.\textsuperscript{17} However, in

\begin{footnotesize}
\textsuperscript{13} Wilkins, 118.
\textsuperscript{14} \textit{Ibid}.
\textsuperscript{15} Prucha, \textit{The Great Father}, 388.
\textsuperscript{16} Vaughan, 27-8.
\textsuperscript{17} Williams, Jr., 214-216.
\end{footnotesize}
reality both English colonists and Indian subjects of the king exercised important attributes of sovereignty such as the authority to govern themselves. For instance, like modern state and local governments, colonists and many Indian groups throughout much of the seventeenth-century created new laws and judicial procedures to enforce those laws. Furthermore, England’s central government allowed colonists this freedom because of the need for flexibility in a legal code to cope with novel situations that arose during the colonizing process. In regards to Indians, colonial authorities recognized the right of many tribes to govern themselves through explicit or implied gestures. Like modern state and local governments, those Indians considered English subjects were ultimately subordinate to English authorities—whether royal or colonial, and yet the Indians continued to practice a limited forms self-governance and adjudication; thus, they had a diminished form of their pre-contact sovereignty. Despite the English government’s official stance that only the central government exercised sovereignty, according to modern standards of sovereignty, it is clear that both colonial and tribal governments enjoyed degrees of sovereignty.

By identifying the power to self-govern and declare war as integral characteristics of modern theories concerning sovereignty and looking to the seventeenth-century for antecedents to contemporary interpretations of the Diminished Tribal Sovereignty doctrine, several clear examples from Virginia appear throughout this period. Just as English colonists relied on legal devices developed by the Spanish in the formation of the doctrine of discovery, the English attempted to impose a form of rule used by the Spanish to govern Indian populations. More specifically, the Spanish would appoint an Indian

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from each tribe to act as a governor over their tribe. Furthermore, “these appointees derived their authority from the Spaniards and were responsible to them.”19 However, these Indian governors continued to enforce traditional laws, as long as those laws did not contradict Spanish edicts.

One close example of this system stems from the 1608 coronation of Powhatan, leader of the powerful Powhatan Confederacy. From the standpoint of the English, this coronation signified that Powhatan acknowledged that he and the Indians he ruled were subjects of the English Crown and entitled to equal legal rights—not civil or political—as white colonists.20 In addition, colonists expected that as the king’s Indian subject, Powhatan would continue to rule his people according to a legal foundation based upon a mixture of traditional Indian laws and new laws imposed by the English. For instance, colonial authorities asserted a superior legal jurisdiction over crimes concerning an Indian and a colonist. More specifically, all crimes involving an Indian and a non-Indian were to be tried in colonial courts even if the crime took place on tribal lands.21 However, Powhatan retained jurisdiction over Indian against Indian crimes. Scholars like Helen Rountree have convincingly argued that Powhatan’s conduct both during the coronation and after the ceremony revealed that he did not consider himself or his followers subject to the English King. Rather Powhatan considered his position as equal terms to the British monarch.22 Despite Indian perceptions of this early relationship between the Powhatan Indians and the colonists, the English persisted in viewing the Powhatan’s ceremony as a legally binding acknowledgement of the Indians’ subjugation.

21 Vaughan, 6-8.
to English authority. Even though the Indians of the Powhatan Confederacy had legally become English subjects, without the same political and civil rights as white English subjects, and no longer enjoyed total jurisdictional powers over crimes committed on their land, the Indians continued to practice self-governance and, therefore, retained a diminished form of their pre-contact sovereignty.

Fearing that a Powhatan-English alliance might lead to a disadvantaged position for the Chickahominy Indians, also of Virginia, leaders of this tribe entered into a peace treaty with the English in 1614. Among the treaty’s stipulations, Governor Thomas Dale required that the Chickahominies agree to become loyal subjects of the English monarch. In proof of their sincerity, the Chickahominies agreed to change their tribe’s name to “Taffantaffes or Englishmen, and be King James his subjects and be forever honest, faithful, and true.”23 As further proof of their subjugation to the English monarchy, the Chickahominies agreed to pay colonial authorities a tribute of food. In addition, the final article of the 1614 treaty, the English affirmed that the tribe would continue to be governed by its traditional ruling body, consisting of “eight chief men.”24 Furthermore, like jurisdictional stipulations placed upon Powhatan leaders, colonial authorities stated that all altercations involving Indians and non-Indians be adjudicated in English courts.25 By becoming English subjects and having their legal jurisdiction limited by colonial leaders, and yet retaining some self-governing powers, the Chickahominies, like the Powhatans, retained a diminished form of their sovereignty that closely resembles modern policies.

23 Hamor, 13.
24 Ibid., 13-4.
25 Ibid., 14.
In 1646, following English victory in the second Powhatan uprising, the leader of the Powhatan Confederacy, entered into new a treaty with the colonists. Along with ceding land to the English and any hunting or fishing rights to those lands,\textsuperscript{26} the Powhatan leader, Necotowance acquiesced to become a tributary, and thus, agreed “to hold his kingdom from the King … of England, and that his successors be appointed or confirmed by the … governor” of Virginia.\textsuperscript{27} In 1665, the Virginia Assembly passed an act that repeated this limitation of tribal sovereignty, stating that the Powhatan “Indians [were] not to appoint their own Werowance or chief commander but [rather] the governor [alone had the power] to appoint” their leader.\textsuperscript{28} This act included the assertion that the Powhatan Indians were English subjects and that any Indians “refusing to obey [were] … to be accounted … rebels … and to be proceeded against accordingly.”\textsuperscript{29} Along with the governor’s prerogative to appoint or confirm future Powhatan leaders, the English also claimed jurisdictional precedence in crimes involving Indians and colonists, but did not otherwise interfere in the intra-tribal governance of the Powhatans.\textsuperscript{30} Consequently, the 1646 treaty and subsequent statutes reaffirmed that the Powhatans were subordinate to the English government and that, like modern state and local governments, these Indians could not exercise governmental functions denied to them by the colonial governments—in this case, elect or appoint their own leader. However, because these Indians continued to practice limited self-governance, they retained a diminished form of sovereignty.

\textsuperscript{26} Hening, vol. 1, 324-325.
\textsuperscript{27} Ibid., 323.
\textsuperscript{28} Ibid., 219.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid., 322-327.
In the Treaty of Middle Plantation (1677), the English renewed with the remaining tribes of the Powhatan Confederacy—now under the control of “the Queen Pamunkey”\(^{31}\)—many of the stipulations of the 1646 treaty and the 1665 statute, and extended these provisions to a number of other tribes in Virginia, including the Monacans and Saponies. In particular, Article I of the treaty demanded that “the respective Indian kings and queens do from henceforth acknowledge to have their immediate dependency on, and own all subjection to the great King of England.”\(^{32}\) In proof of their subjugation to the English monarch, the Indians were required to deliver an annual tribute of wild game to Virginia’s governor.\(^{33}\) While this treaty, like the 1646 treaty, regulated social and business interactions between whites and Indians, it contained very little interference in regards to tribal self-government. For instance, the 1677 treaty stipulated that before any of the Indians under the jurisdiction of the English went to war with one another; they would seek colonial authorities’ permission.\(^{34}\) Article XII stated “that each Indian King and Queen … [retained the] power to govern their own people” according to traditional Indian practices.\(^{35}\) The 1677 treaty more clearly stated the Indians’ right to self-government in matters involving internal tribal affairs, and like the 1646 treaty, allowed the affected tribal governments to retain some sovereignty as represented by self-government. Because the tribal governments recognized the superior authority of the English government, they were denied unfettered authority to declare war, and yet still retained the power to practice a narrowed form of self-governance. This treaty and its

\(^{31}\) Colony of Virginia. “Treaty of Middle Plantation,” article XII.
\(^{32}\) Ibid., article I
\(^{33}\) Ibid., article XVI. This tradition is still carried out by descendants of the tribes involved in the treaty, such as the Pamunkey and Chickahominy tribes.
\(^{34}\) Ibid., article III.
\(^{35}\) Ibid., article XII.
repercussions represent a strong antecedent to the modern Diminished Tribal Sovereignty doctrine.

This pattern of Indian submission to English authority while retaining a diminished form of sovereignty represented by self-governance can also be identified in Indian affairs in the New England. In *Subjects unto the Same King: Indians, English, and the Contest for Authority in Colonial New England*, Jenny Hale Pulsipher highlighted several instances that clearly represent precursors to the retained sovereignty expressed through the self-governing powers exercised by modern tribal governments. For instance, in a 1621 meeting with leaders of the Plymouth colony, Massasoit, leader of the Wampanoag Indians, closely echoed language in the 1614 Chickahominy treaty when he “proclaimed himself ‘King James his man’ and said that his tribe’s land was henceforth ‘King James his country.’” However, Pulsipher argued that based on Massasoit’s actions following his declaration of submission as well as traditional Indian diplomatic practices that, like Powhatan, Massasoit most likely considered himself an ally to the English crown rather than a subject. Despite any confusion of the colonists’ intent, the English accepted Massasoit’s submission as legally binding, just as they did with Powhatan’s coronation. For instance, Pulsipher pointed out that following Massasoit’s declaration of subjection, colonial leaders came to the “understanding that [not only were the Indians subjects of the English king, but also] that Indians stood beneath them on the hierarchical ladder” of the king’s subjects. Although Plymouth leaders may have established English subjugation of the Wampanoags, this tribe continued to practice self-

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36 Pulsipher, 19.
37 Ibid., 18-19.
38 Ibid., 15.
39 Ibid., 18.
rule, and thus retained a diminished form of their original sovereignty until its defeat in King Philip’s in 1676.

Aside from Massasoit’s questionable submission to crown rule, New England’s colonial leaders did not begin insisting upon similar submissions from other Indian tribes until after the military defeat of the once powerful Pequots. In the course of this war, the English (and their Indian allies) were not only able to conquer the Pequots, but they also established themselves as an important military power in New England. Shortly after the conclusion of this war, in 1637, leaders of the Montauk tribe approached colonial Massachusetts authorities and “tendered themselves to be tributaries” to the English.\textsuperscript{40} A year later the Mohegan and Narragansett leaders entered into a treaty with Connecticut in which they acknowledged English authority and also “agreed to pay a yearly tribute.”\textsuperscript{41} Following a failed Indian uprising in 1643, the United Colonies of New England, consisting of Connecticut, New Haven, Plymouth, and Massachusetts, further reduced tribal sovereignty when they “demanded that the Indians … receive their [the colonists’] permission before going to war with any Indians ‘in friendship with or subject to’” any member of the” United Colonies.\textsuperscript{42} Also in 1643, “colony leaders made it clear to the Indians that submission to … [the English] government entailed subjection, not alliance.”\textsuperscript{43} One year later

five Massachusetts Indian sachems around Boston submitted to the English government. At the colony’s urging, the sachems agreed to ‘put ourselves, our subjects, lands, and estates under the government and jurisdiction of the Massachusetts’ and to ‘be true and faithful to the said government.’ Passaconaway, sachem of the Pennocoods, submitted later that year on terms the colony’s leaders later described as ‘friendship, amity, and subjection.’ In 1668, ten Nipmuck sachems from western Massachusetts likewise

\textsuperscript{40} Ibid., 22.
\textsuperscript{41} Ibid., 22-23.
\textsuperscript{42} Ibid., 27.
\textsuperscript{43} Ibid.,
submitted to Massachusetts’s authority, seeking protection and agreeing to be ‘ruled’ by colony leaders.\textsuperscript{44}

In 1644, Narragansett leaders also “submitted themselves, their land, and their possessions to the king”\textsuperscript{45} In a 1665 treaty with colonial authorities of Massachusetts, the Narragansett Indians reaffirmed the earlier “surrender of themselves, their subjects and their lands to the government and dispose of his Majesty.”\textsuperscript{46} As English settlement expanded during the seventeenth-century, more and more Indian groups came under the English orbit of influence. However, despite English subjugation of these Indians—as demonstrated by requiring Indian subjects of the English monarch to pay a tribute and by restricting the tribes’ ability to declare war, throughout the seventeenth-century these Indian tribes “maintained models of authority that preserved their independence.”\textsuperscript{47}

These models of authority included the tribes’ restricted but still very real power to govern themselves by traditional laws. Consequently, by retaining this power of self-governance, these tribes practiced a diminished form of sovereignty that in turn closely resembles important attributes of modern federal policy.

Through their legal treatment of Native Americans, officials throughout the British North American colonies, subjected the tribes within their spheres of influence to English laws, and consequently, reduced the self-governing powers exercised by tribes. However, because many tribes living within colonial boundaries remained able to resist some—if not all—colonial edicts, these seventeenth-century Native Americans, like modern tribes, retained a diminished form of their original sovereignty.

\textsuperscript{44} Ibid., 27-28.
\textsuperscript{45} Ibid., 30. Sainsbury, \textit{1574-1660}, 326.
\textsuperscript{47} Pulsipher, 35.
Conclusion

Scholars have identified several policies or doctrines developed by the federal government to establish its relationship with and obligations to those Indian tribes that the government chooses to recognize as legitimate. In particular, most legal authorities point to four different policies as most influential to the treatment of Native Americans. These include the Discovery doctrine, which is used to legitimize American claims to land ownership titles superior to Indian land ownership claims, as well as the “three core … principles.” The Congressional Plenary Power doctrine, or simply the plenary principle, holds that the United States Congress can change treaty stipulations, regulate land sales, and control liquor sales on reservations. The Trust doctrine asserts that a “trustee-beneficiary” or “guardian-ward” relationship exists between the United States and Native Americans and that the United States government has a legal obligation to aid Indians. Finally, the Diminished Tribal Sovereignty doctrine deals with the extent to which Indians have retained their sovereignty.

Although scholars attribute the origins of these four doctrines to legal artifacts from the early colonial era, aside from the Discovery doctrine, most evidence that has been published to provide specific details to such claims focuses on the period of time following the French and Indian War. One piece of scholarship that most closely falls within the parameters of this thesis is Helen Rountree’s dissertation Indian Land Loss in Virginia: A Prototype of U.S. Federal Indian Policy. In addition to this study of land issues, when contrasting the three core principles to seventeenth-century sources, other

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48 Ibid., 36.
49 Ibid., 65.
50 Prucha, Documents of United States Indian Policy, 266-267.
resemblances appear between early colonial and modern federal Indian policies. Focusing on seventeenth-century language used primarily in treaties and statutes, this thesis suggests that, while no direct evidence links seventeenth-century policies to modern federal practices, due to close similarities, early colonial laws represent antecedents to modern Indian doctrines. Consequently, this thesis has also suggested that precursors to modern United States Indian policies developed during the British colonizing experience in North America.
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