

ARTICLES

WE THE (NATIVE) PEOPLE?: HOW INDIGENOUS PEOPLES DEBATED THE U.S. CONSTITUTION

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The Constitution was written in the name of the “People of the United States.” And yet, many of the nation’s actual people were excluded from the document’s drafting and ratification based on race, gender, and class. But these groups were far from silent. A more inclusive constitutional history might capture marginalized communities’ roles as actors, not just subjects, in constitutional debates.

This Article uses the tools of legal and Native history to examine how one such group, Indigenous peoples, argued about and with the U.S. Constitution. It analogizes Native engagement to some of the foundational frames of the “Founding” to underscore the significance of such engagement for current constitutional discourse. Like their Anglo-American neighbors, Native peoples, too, had a prerevolutionary constitutional order—what we here dub the “diplomatic constitution”—that experienced a crisis during and after the Revolution. After the Constitution’s drafting, Native peoples engaged in their own version of the ratification debates. And then, in the Early Republic, Native peoples both invoked and critiqued the document as they faced Removal.

This Article’s most important contribution is proof of concept, illustrating what a more inclusive constitutional history might look like. Still, some of the payoffs are doctrinal: broadening the “public” in original public meaning, for instance. But the more significant stakes

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are theoretical. As this Article contends, by recognizing Indigenous law and constitutional interpretations as part of “our law”—in other words, the pre- and postconstitutional legal heritage of the United States—Native peoples can claim their role as co-creators of constitutional law.

INTRODUCTION	244
I. THE CRISIS OF THE DIPLOMATIC CONSTITUTION.....	253
A. The Diplomatic Constitution.....	256
B. Indian Country’s Critical Period	263
II. THE NATIVE RATIFICATION DEBATES.....	267
A. The U.S. Constitution and the Diplomatic Constitution	269
B. Native Nations Debate the Constitution	271
1. The Constitutional Debate in Indian Country: The Voyage of Hendrick Aupaumut.....	272
2. Native Nations Decide	279
C. The Outcome of the Native Ratification Debates.....	284
III. NATIVE DEPORTATION AND THE RENEWED RATIFICATION DEBATES.....	286
A. Winning the Interpretive Battle	289
1. Constitutional Claims for Tribal Sovereignty.....	289
2. The Cherokee Legal Campaign.....	294
B. Losing Constitutional Faith	296
C. The Constitutional Campaign of Forced Inclusion.....	300
IV. IMPLICATIONS: BEYOND TAINT TO “OUR LAW”	303
A. “Our Law”: Positivist Theories	305
B. “Our Law”: Doctrinal Implications.....	307
C. “Our Law”: Legitimacy	312
CONCLUSION	317

INTRODUCTION

Writing in the name of the “People of the United States,” white men drafted the U.S. Constitution in 1787.¹ The following year, white men, chosen by an almost exclusively white, male, property-holding electorate, voted to ratify the Constitution.²

1. U.S. Const. pmb.; see The Delegates, Digit. Hist., https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=2&psid=3233 [<https://perma.cc/HE33-KDAW>] (last visited Oct. 4, 2022).

2. See Jamal Greene, Originalism’s Race Problem, 88 Denv. U. L. Rev. 517, 518 (2011) [hereinafter Greene, Originalism’s Race Problem].

These historical facts have important implications for constitutional law. They have led many commentators to question or reject the authority of the Constitution because it rests on such an undemocratic conception of the people.³ They also mean that present efforts to discern the Constitution's historical meaning have focused almost exclusively on the views of the document's drafters and elite interpreters.⁴

Yet the actual "People of the United States" were far less homogenous than the circumscribed group who claimed to represent them. Like the nation today, the United States in 1787 was strikingly diverse, polyglot, and pluralistic. The nation's more than three million residents of European descent⁵—who had only recently begun to conceive of themselves as a cohesive "white people"—encompassed a startling array of nationalities, faiths, and languages.⁶ Even those white people excluded from the franchise—most women, poor men, and laborers⁷—could, and did, actively

3. Many of these works have focused on the implications of the Constitution's subordination and exclusion of Black people. See, e.g., Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 *Duke L.J.* 39, 67–77; Greene, *Originalism's Race Problem*, *supra* note 2, at 517–22; Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 *Harv. L. Rev.* 1, 2–4 (1987); Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 *Fordham L. Rev.* 1761, 1762–67 (1997). Some works have also considered the theoretical consequences of the exclusion of women. See, e.g., Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 *Const. Comment.* 431, 431–33 (2014). Other works have considered the implications of Native peoples' forcible and nonconsensual inclusion within the United States. See, e.g., Vine Deloria, Jr. & David E. Wilkins, *The Legal Universe: Observations on the Foundations of American Law* 8 (2011); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 *Harv. L. Rev.* 1787, 1800–03 (2019); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 *Ariz. St. L.J.* 113, 159–62 (2002); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 *Calif. L. Rev.* 1751, 1765–67 (2017); Robert B. Porter, *The Demise of the *Ongwehoweh* and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 *Harv. BlackLetter L.J.* 107, 110–12 (1999).

4. Cf. *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022) (suggesting that the Court's approach to constitutional history privileges "what white, wealthy, and male property owners thought about" the Constitution).

5. These numbers are based on the 1790 census. See 1 *Historical Statistics of the United States: Earliest Times to the Present* I-48 tbl.Aa146 (Susan B. Carter, Scott Sigmund Gartner, Michael R. Haines, Alan L. Olmstead, Richard Sutch & Gavin Wright eds., millennial ed. 2006) [hereinafter 1 *Historical Statistics*].

6. See Peter Rhoads Silver, *Our Savage Neighbors: How Indian War Transformed Early America*, at xix–xxiii (2008) (describing the rise of the category of "white people" in the mid-eighteenth-century American colonies to encompass a strikingly diverse array of ethnicities and communities). For an overview and critique of the scholarship exploring the construction of whiteness, see Peter Kolchin, *Whiteness Studies: The New History of Race in America*, 89 *J. Am. Hist.* 154, 154–55 (2002).

7. See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 5–21 (2000) (noting that the "lynchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property" and observing that states largely retained, although sometimes loosened, these requirements after the Revolution).

participate in what was known as politics “out of doors.”⁸ Roughly 750,000 people whom Anglo-Americans labeled “Black” also lived within the United States.⁹ This number included nearly 700,000 enslaved peoples from throughout Africa—some recently arrived, others descended from long-standing enslaved communities—alongside a small, though growing, free Black population of 50,000 people.¹⁰ Meanwhile, roughly half the purported territory of the new nation was legally “Indian country,” the homelands of at least 150,000 Indigenous people organized into powerful, loosely centralized confederacies like the Haudenosaunee and Muskogee.¹¹

At the core of the new Constitution, then, was a contradiction: a narrow political elite attempting to govern, in the name of the people and popular sovereignty, a much more diverse nation. That elite sought to resolve this hypocrisy through exclusion. As scholars have amply shown, the Constitution placed most of the actual people of the United States outside the bounds of the body politic and sought to limit their access to political power.¹² Moreover, the increasing democratic *inclusion* of white men further entrenched whiteness and maleness as the defining boundaries of political participation.¹³

8. On politics out of doors, see Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 319–28 (2d ed. 1998). On the active political role of women, see Rosemarie Zagari, *Revolutionary Backlash: Women and Politics in the Early American Republic 2–9* (2007).

9. 1 Historical Statistics, *supra* note 5, at 1-48 tbl.Aa147–Aa149.

10. *Id.* For a synthesis exploring the enslaved and free Black communities in the early United States, see Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America 109–91* (1998).

11. On the Native population of the new United States, see James H. Merrell, *Declarations of Independence: Indian–White Relations in the New Nation*, in *The American Revolution: Its Character and Limits 197*, 201 (Jack P. Greene ed., 1987). On Native confederacies in the early United States, see, e.g., Robbie Franklyn Ethridge, *Creek Country: The Creek Indians and Their World 26–31* (2003) (describing the Muscogee Confederacy); Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution 119–28* (2006) [hereinafter Taylor, *Divided Ground*] (describing the Mohawk Nation, which was part of the Haudenosaunee Confederacy). On “Indian country,” see Act of July 22, 1790, ch. 23, § 3, 1 Stat. 137, 137–38.

12. For works exploring the antidemocratic implications of the Constitution, see generally Terry Bouton, *Taming Democracy: “The People,” the Founders, and the Troubled Ending of the American Revolution 4* (2007) (“[M]uch of the revolutionary generation was convinced that, during the postwar decade, the elite founding fathers had waged—and won—a counter-revolution against popular democratic ideals.”); Woody Holton, *Unruly Americans and the Origins of the Constitution* (2007) (arguing that the Framers sought to curtail the embrace of democracy in the aftermath of the Revolution); Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* (2016) (arguing that the Constitution was the result of interest group politics and overwhelmingly reflected elite interests).

13. See Gerald Leonard & Saul Cornell, *The Partisan Republic: Democracy, Exclusion, and the Fall of the Founders’ Constitution, 1780s–1830s*, at 212 (2019) (“[T]he rise of democracy rested openly on the declaration that America belonged to the white, male

Recent literature captures how thoroughly such exclusionary efforts succeeded. Racialized and gendered exclusion entrenched itself throughout much of antebellum constitutional law, which vindicated chattel slavery, Native dispossession, and women's supposed subservience.¹⁴ The protests of those deemed political outsiders could be, and were, brutally suppressed through state-sanctioned and state-sponsored violence.¹⁵

But these exclusionary efforts also failed. The United States never was, nor could be, a solely white or male nation. Despite efforts to suppress their voices, those excluded from whiteness and maleness nonetheless engaged with the law, including constitutional law. Historians have recently and effectively reconstructed the legal consciousness of many marginalized groups and their impact on Anglo-American law, including constitutional law.¹⁶

Yet little of this work has focused on the so-called "Founding," the period surrounding the drafting, ratification, and early interpretation of

democracy and no one else."); cf. Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848*, at 5 (2007) ("The *consequences* of white male democracy, rather than its *achievement*, shaped the political life of this period.").

14. The literature on these topics is large and rapidly growing. For important recent explorations, see generally Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (2006); Alan Taylor, *American Republics: A Continental History of the United States, 1783–1850* (2021); George Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (2010); David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (2009); Zagari, *supra* note 8; Blackhawk, *supra* note 3; K-Sue Park, *Self-Deportation Nation*, 132 *Harv. L. Rev.* 1878 (2019).

15. For some prominent examples, see generally Walter Johnson, *The Broken Heart of America: St. Louis and the Violent History of the United States* 58–65 (2020); Christopher Tomlins, *In the Matter of Nat Turner: A Speculative History* 120–24 (2020).

16. Key recent works in this vein include Laura F. Edwards, *Only the Clothes on Her Back: Clothing and the Hidden History of Power in the Nineteenth-Century United States* (2022) (studying how marginalized peoples used textiles and the property rights attached to them as an entrée into the U.S. legal system); Sam Erman, *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire* (2019) (recounting Puerto Rican activists' efforts to secure U.S. citizenship in the early twentieth century); Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (2018) (arguing that free Black Americans articulated and advocated for a concept of birthright citizenship that was eventually affirmed in the Fourteenth Amendment); Kelly Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (2017) (examining enslaved Black Americans' suits for freedom); Kate Masur, *Until Justice Be Done: America's First Civil Rights Movement, From the Revolution to Reconstruction* (2021) (contending that free Black Americans' civil rights activism in the early nineteenth century influenced the Fourteenth Amendment and Reconstruction legislation); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857* (2016) (arguing that enslaved Black Americans used their understanding of formal law to pursue freedom suits); Kimberly M. Welch, *Black Litigants in the Antebellum American South* (2018) (studying Black Americans' use of courts and property law to protect their interests against whites); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 *Harv. L. Rev.* 1, 56–71 (2019) (examining how Black abolitionists and antislavery activists interpreted the Reconstruction Amendments).

the Constitution.¹⁷ This omission is surprising, partly because this era has become ever more legally important in constitutional interpretation with originalism's ascendance¹⁸ and partly because constitutional history itself has already shifted to encompass popular constitutionalism.¹⁹ Nonetheless, though we know quite a bit about how marginalized groups were talked *about* in the period's constitutional discourse, we know little about what they said; they are presented as objects, not creators, of constitutional ideas.²⁰ This absence has come to be interpreted as evidence of silence rather than, more accurately, of silencing.²¹

This Article seeks to counter this absence by recovering just one of many such suppressed constitutional discourses: the debates and engagement by some Native peoples over the U.S. Constitution during the Founding.²² Its goal is less to offer a definitive account than to provide proof of concept: to show that we can, in fact, incorporate these voices into our constitutional histories. We should not, in other words, use past exclusion to justify continued exclusion from constitutional history today.

What do we discover when we do this work? In one sense, this history shows the challenge in expanding our conventional narratives using current frames. Even the idea of a "Native" perspective on the

17. One important potential exception is Leonard & Cornell, *supra* note 13. Professors Gerald Leonard and Saul Cornell acknowledge that a "full understanding of early American constitutional development" requires an expansive "narrative" that integrates diverse voices and perspectives into the "same cast of characters." *Id.* at 4. But their initial and broad synthesis addresses these perspectives only briefly, as they themselves have acknowledged. Gerry Leonard, *An Elusive Constitution, Balkinization* (May 11, 2020), <https://balkin.blogspot.com/2020/05/an-elusive-constitution.html> [<https://perma.cc/7BKR-VCTV>]. Another very recent exception is Mary Sarah Bilder, *Female Genius: Eliza Harriot and George Washington at the Dawn of the Constitution* (2022) (discussing women's inclusion in constitutional history through the story of educator and advocate Eliza Harriot).

18. See Jamal Greene, *On the Origins of Originalism*, 88 *Tex. L. Rev.* 1, 63–66 (2009) (describing the lionization of "the ideas and historical figures of the Founding Era" with the passage of time).

19. See generally Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) (examining the interpretive authority of ordinary citizens in implementing the Constitution); Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 *Yale J.L. & Humans* 295 (2011) [hereinafter Cornell, *People's vs. Lawyer's Constitution*] (describing how expanding the range of sources construing constitutional meaning exposes a conflict between elite and popular approaches to constitutional interpretation).

20. See *supra* note 14 and accompanying text.

21. See, e.g., Akhil Reed Amar, *The Words that Made Us: America's Constitutional Conversation, 1760–1840*, at 634 (2021) [hereinafter Amar, *The Words that Made Us*] ("American Indians largely remained, and in future decades would continue to remain, outside the conversational circle.").

22. The terms "Native" and "Indigenous" are favored in this Article to describe the Indigenous peoples of the United States. The term "Indian" is used in its historical context and as part of key historical terms of art like "Indian affairs" and "Indian country." See Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, *Am. Indian Q.*, Spring 1999, at 1, 7–11.

Constitution posits something that never existed: The many Native peoples within the United States have had all their own distinct histories with, and views on, the document. This Article focuses on the debates of some particularly prominent Native nations in what became the U.S. Northeast, Midwest, and South during the Founding Era without claiming to universalize their experiences. In doing so, it recognizes that Indigenous peoples have always had their own, separate legal systems that rested on fundamentally different principles, worldviews, authorities, and forms of recordation than Anglo-American law.²³ Scholars in Native American and Indigenous Studies (NAIS) have emphasized the significance of Indigenous ways of knowing, including in law, and have done important work on Indigenous constitutional law—with much more work still to be done.²⁴

This Article, however, opts for a different path. It narrates this history using the conventional categories and periodizations of U.S. constitutional history. This version of the story runs like this: Like their Anglo-American neighbors with the British constitution, Indigenous peoples harkened back to a prerevolutionary ancient constitution—what we here dub the “diplomatic constitution,” the set of practices, norms, and expectations that governed interactions between Native nations and European empires.²⁵ Also like their neighbors, Natives resisted when the principles of that diplomatic constitution were challenged—although the constitutional threats here came mostly from the new United States—and they, too, experienced a postrevolutionary era of turmoil and contention,

23. See *infra* Part II.

24. For examples of such works, see generally Noelani Arista, *The Kingdom and the Republic: Sovereign Hawai'i and the Early United States* (2019) (examining the transformation of Hawaiian law from oral pronouncements to published form); Duane Champagne, *Social Order and Political Change: Constitutional Governments Among the Cherokee, the Choctaw, the Chickasaw, and the Creek* (1992) (analyzing the rise of stable constitutional governments among Native nations across the nineteenth century); Keith Richotte Jr., *Claiming Turtle Mountain's Constitution: The History, Legacy, and Future of a Tribal Nation's Founding Documents* (2017) (studying the process by which the Turtle Mountain Band of Chippewa Indians adopted their constitution in the early twentieth century); Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800*, at 3 (1997) [hereinafter Williams, *Linking Arms Together*] (exploring the influence of Indigenous legal traditions on “relations with the West during the North American Encounter era”). There is a very large literature on NAIS approaches. For an overview, see generally Alyssa Mt. Pleasant, Caroline Wigginton & Kelly Wisecup, *Materials and Methods in Native American and Indigenous Studies: Completing the Turn*, 75 *Wm. & Mary Q.* 207 (2018) (focusing on materials and methods rather than traditional sources); Robert Warrior, *2010 NAISA Presidential Address: Practicing Native American and Indigenous Studies*, *Native Am. & Indigenous Stud.*, Spring 2014, at 3, 9 (discussing how “Native and Indigenous studies needs to see itself in dialectical relationships to the Indigenous communities, educational institutions, and scholarly constituencies we seek to serve or participate in through our work, and that in that relationship we exist as a key alternative space within the Indigenous world”).

25. See *infra* section I.A.

an Indigenous “critical period.”²⁶ After the Constitution’s drafting, its Federalist proponents sought to persuade Native peoples as well as U.S. citizens of the document’s merits. The result was that Indigenous communities had their own internal deliberations over the Constitution—what this Article terms the “Native ratification debates”—where, like their white neighbors, Natives split over the document’s merits.²⁷ Moreover, just as constitutional meaning and authority continued to be contested throughout the Early Republic during the nation’s “long Founding,” Native peoples continued to engage with and fight over the Constitution’s implications for them, especially during the constitutional crisis of forced deportation euphemized as Indian Removal.²⁸

The purpose behind this narrative choice is not to argue that categories grounded in Anglo-American experiences with the Constitution are the best way to craft a more inclusive constitutional history. Hopefully, as constitutional history engages with more diverse histories, it will follow scholarship on U.S. history more broadly, and new categories and periodizations will emerge. Rather, this Article’s choice to use conventional categories is strategic. Partly, this approach offers the proverbial spoonful of sugar: It seeks to make the history recounted here more legible to legal audiences unfamiliar with this past. This account also hopes to rebut the counterargument that inclusive constitutional history, while all very interesting, is not relevant to constitutional meaning because it does not fit within carefully policed traditional frameworks. Of course, scholars should query whether, when “relevance” is thus wielded as a weapon to validate some stories and exclude others, the fault might rest with the category itself.²⁹ But this Article takes a different tack: It seeks to reclaim and reconceive such categories, long used to naturalize a narrow conception of the past, to facilitate a broader historical vision.

A similar point holds for historical methodologies. There should be, and hopefully will be, constitutional histories that draw from ethnohistory and take seriously Indigenous oral traditions and languages. But we can work to partially recover the perspectives of marginalized communities using written English-language historical sources, too. By the late eighteenth century, many Native leaders, well-familiar with written texts, spoke and wrote in English; in other instances, Native voices were translated and recorded by government officials.³⁰ Their constitutional views

26. See *infra* section I.B.

27. See *infra* Part II.

28. See *infra* Part III.

29. Cf. Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 *Va. L. Rev.* 1203, 1286 (2015) (“[A]ny judgment of relevance implies some normative criterion as to what *matters*.”).

30. For works exploring Native uses of writing in the early United States, see generally Lisa Brooks, *The Common Pot: The Recovery of Native Space in the Northeast*, at xxii, xxx–

appear throughout the period's official and informal correspondence, narratives, and minutes of treaty negotiations. Like all historical evidence, such intermediated texts should be read carefully and contextually, and historians of Native America have developed a skilled repertoire to interpret these documents.³¹ In many ways, then, recovering the constitutional arguments of Native peoples—and potentially other marginalized communities—simply calls for doing what constitutional scholars have long urged: expanding our constitutional histories beyond a limited set of canonical texts to encompass the records of the multiple sites in the Early Republic where constitutional meaning was made and debated.³²

What, then, is the purpose of writing inclusive constitutional histories? In one sense, incorporating Native voices into constitutional history should be—and *is*—unsettling. This Article does not seek to redeem or defend originalism or offer a Panglossian celebration of the Founding by providing a more democratic veneer against critiques of its exclusionary history.³³ The constitutional history of Native peoples is not a multicultural pageant of progress by which even marginalized communities came to claim the Constitution. On the contrary, most Native peoples decided to reject the Constitution and the political system it offered them—and yet they were nonetheless forcibly and unwillingly *included* within the nation. Recovering their forceful and repeated *refusals* of the United States vividly and concretely undercuts our happy Founding story that our government rests on the “consent of the governed.”³⁴

xxxiii (2008) (“This book . . . is a mapping of how Native people in the northeast used writing as an instrument to reclaim lands and reconstruct communities, but also a mapping of the *instrumental* activity of writing . . .”); Frank Kelderman, *Authorized Agents: Publication and Diplomacy in the Era of Indian Removal* (2019) (exploring literary collaborations between Native and non-Native individuals as influenced by Native diplomacy); Mark Rifkin, *Speaking for the People: Native Writing and the Question of Political Form* (2021) (demonstrating how nineteenth- and twentieth-century Indigenous intellectuals used their writings to represent modes of Indigenous governance to a non-Native public); Phillip H. Round, *Removable Type: Histories of the Book in Indian Country, 1663–1880*, at 48–72 (2010) (uncovering the various ways in which Native peoples produced and utilized printed books).

31. For a discussion of such methodological explorations, see generally James H. Merrell, “I Desire All that I Have Said . . . May Be Taken Down Aright”: Revisiting Teedyuscung’s 1756 Treaty Council Speeches, 63 *Wm. & Mary Q.* 777 (2006); Mt. Pleasant et al., *supra* note 24.

32. See Hendrik Hartog, *The Constitution of Aspiration and “The Rights that Belong to Us All”*, 74 *J. Am. Hist.* 1013, 1032–33 (1987) (advocating for a “vision of constitutional history” that employs “perspective wide enough to incorporate the relations between official producers of constitutional law, and those who at particular times and in particular circumstances resisted or reinterpreted constitutional law”).

33. Cf. Christina Mulligan, *Diverse Originalism*, 21 *U. Pa. J. Const. L.* 379, 381, 401–02 (2018) (attempting to “resolve originalism’s race and gender problem” by “incorporating more diverse populations into the corpus of evidence of founding-era meaning”).

34. The Declaration of Independence para. 2 (U.S. 1776).

Yet this Article also suggests that inclusive constitutional history helps move the conversation beyond arguments over “taint” and “original sin” surrounding the U.S. Constitution’s entanglements with colonialism. The value of more inclusive constitutional history is not to relitigate the past but to help build more inclusive law now. In particular, this Article’s recovery of the importance of Indigenous law and constitutional debates during the Founding shows us how the contributions of Native peoples should be recognized as “our law.”³⁵ As a source of eighteenth-century law that bound both Anglo-Americans and Native peoples, the diplomatic constitution serves as an essential component of the law of the past, providing a “backdrop” to our constitutional order, akin to the common law.³⁶ And both the diplomatic constitution and Native interpretations of the Constitution alter our narrative of who the Constitution belongs to. Although this reconstruction cannot remedy the violence and harm of Native peoples’ forcible inclusion into the United States, it nonetheless affirms the role that Native peoples played as co-creators of American constitutional law. In this sense, too, this constitutional history is part of “our law,” the shared constitutional narrative that all Americans identify with.

In exploring these ideas, this Article proceeds in four Parts. The first three provide a historical account of Native peoples’ engagement with American constitutionalism, revealing how Native peoples both constructed and interpreted colonial legal practices and the U.S. Constitution. Part I introduces the concept of the diplomatic constitution—the prerevolutionary set of norms, practices, and principles that governed relationships between Native peoples and Euro-Americans—and discusses its crisis during and after the American Revolution as federal weakness failed to restrain the land hunger and violence of state officials and white settlers. Part II examines the aftermath of this crisis: the Native ratification debates of the 1790s. It explores how Native peoples discussed federal officials’ attempts to sell them on the new Constitution as a continuation of the diplomatic constitution and how they then, in a sense, “voted” on its merits. Part III discusses the renewed Native ratification debates, when, in the 1820s and 1830s, some Native nations that had bet on the Constitution and its promises for protecting Native autonomy and land challenged Removal but ultimately found their hopes disappointed. Part IV then offers some broader implications for this history, including recognizing the diplomatic constitution as part of the law of the past,

35. Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* 240 (2011) [hereinafter Balkin, *Constitutional Redemption*]; Jack M. Balkin, *Living Originalism* 59–70 (2011) [hereinafter Balkin, *Living Originalism*]; William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 *Law & Hist. Rev.* 809, 811–13 (2019) [hereinafter Baude & Sachs, *Originalism and the Law of the Past*].

36. Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813, 1881 (2012) [hereinafter Sachs, *Constitutional Backdrops*].

broadening out the “public” considered in original public meaning, and addressing questions surrounding the Constitution’s legitimacy.

I. THE CRISIS OF THE DIPLOMATIC CONSTITUTION

By 1787, Native peoples and their would-be Anglo-American colonizers had lived alongside each other, contesting for authority, for over two centuries.³⁷ Collectively, they had developed a complex amalgam of norms, practices, and customs rooted in both Indigenous and European law to govern their relations. Historians have long noted the significance of this hybrid legal order in colonial North America, variously described as a “middle ground”³⁸ or a “begrudging, mostly peaceful coexistence” between Natives and Anglo-Americans.³⁹ This Article dubs this syncretic legal order the “diplomatic constitution.”

This Part examines two aspects of this diplomatic constitution. The first section identifies its key features, which developed through decades of negotiation prior to the American Revolution. The second section examines how the Revolution prompted a constitutional crisis, as the new United States sought to discard or repudiate much of this shared constitutional heritage.

This Part uses the term “constitution” to describe this prerevolutionary order to simultaneously orient and yet challenge readers familiar with conventional accounts of constitutional law and history. Neither Natives nor Anglo-Americans used this term at the time—they spoke instead of the “modes and customs”⁴⁰ or “covenants”⁴¹ that governed their relations. Yet, taken together, these “customs” were constitutional in the term’s eighteenth-century sense. As numerous scholars have traced, “constitution” at the time described not a single foundational text but the broader set of practices, institutions, and discourses that governed power

37. See Pekka Hämäläinen, *Indigenous Continent: The Epic Contest for North America* 37–322 (2022).

38. Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (1991).

39. Daniel K. Richter, *Facing East From Indian Country: A Native History of Early America* 151 (2001). Other works dealing with the hybridity of law in early America include Vicki Hsueh, *Hybrid Constitutions: Challenging Legacies of Law, Privilege, and Culture in Colonial America* (2010); Kathleen DuVal, *Cross-Cultural Crime and Osage Justice in the Western Mississippi Valley, 1700–1826*, 54 *Ethnohistory* 697 (2007); Nancy O. Gallman & Alan Taylor, *Covering Blood and Graves: Murder and Law on Imperial Margins*, in *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* 213 (Brian P. Owensby & Richard J. Ross eds., 2018).

40. Report of the Secretary at War: Indian Affairs (May 2, 1788), in 2 *The Territorial Papers of the United States* 103, 104 (Clarence Edward Carter ed., 1934).

41. Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* 24–27 (2013) [hereinafter Calloway, *Treaties and Treaty Making*].

and authority.⁴² Moreover, for Native peoples in particular, the customs and rules that collectively formed the diplomatic constitution also had the status of fundamental law: They served as the ground norms that determined the validity of laws regulating relations between Natives and Anglo-Americans.⁴³

Similarly, although present-day scholars classify laws governing relations *between* separate sovereigns as international, not constitutional, law, this distinction did not yet exist.⁴⁴ Both contemporaneous legal thought and the complexities of empire blurred what would today be separate categories within public law.⁴⁵ Britain's American colonies, for instance, occupied an uncertain and much debated position within the British Empire.⁴⁶ Native peoples' status was even more fraught, as Anglo-Americans argued over whether Native nations were fully independent sovereigns or subjects, in some uncertain sense, within the imperial structure.⁴⁷ Thus, as a binding set of customs and practices defining and

42. See, e.g., Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* 2 (2004) [hereinafter Bilder, *Transatlantic Constitution*] ("I use the term *constitution* in a sense unfamiliar to some readers. Through most of the seventeenth and eighteenth centuries, that term did not refer to a specific document or even a specific, known set of laws."); Daniel Joseph Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*, at 40 (2005) [hereinafter Hulsebosch, *Constituting Empire*] ("The English constitution was not a thing. Rather, it was a cultural commons, a customary repository of rhetorical strategies that could be invoked to assert powers, rights, and duties, as well as simply to make sense of the political landscape."); Farah Peterson, *Constitutionalism in Unexpected Places*, 106 *Va. L. Rev.* 559, 572 (2020) ("To the Founding generation, the word 'constitution' described the constituted arrangement of their community as it had developed over time. The word embraced the arrangement of institutions, the practices of political engagement, the doctrines of legal restraint on power, and the formal relations between the orders of society."). For additional background on this sense of constitutionalism in early America, see John Phillip Reid, *Constitutional History of the American Revolution* (abridged ed. 1995) [hereinafter Reid, *Constitutional History*].

43. See *infra* section I.B.

44. But see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 *Harv. L. Rev.* 1791, 1794–95 (2009) (questioning whether the "apparent differences between international and constitutional law really run as deep as is commonly supposed" and arguing instead for a "more important and generative conceptual divide between public law and ordinary domestic law").

45. See, e.g., David C. Hendrickson, *Peace Pact: The Lost World of the American Founding 15–19* (2003) (arguing that the U.S. Constitution was itself a "system of states" in an international law sense).

46. This question would ultimately be core to the imperial crisis that spawned the American Revolution. For one exploration that underscores the diversity of complicated legal arrangements within the British Empire, see 1 William Blackstone, *Commentaries on the Laws of England* 93–115 (Oxford, Clarendon Press 1765) (recounting the extraordinary range of "Countries Subject to the Laws of England").

47. For explorations of this question, see Gregory Evans Dowd, *War Under Heaven: Pontiac, the Indian Nations, & the British Empire 178–90* (2002) [hereinafter Dowd, *War*

restraining both Native and Anglo-American authority, the diplomatic constitution fit comfortably within late eighteenth-century Anglo-American constitutional thought.

In this sense, then, arguing for the significance of the diplomatic constitution adds to long-standing efforts to reconstruct the fullness of early American constitutionalism. Legal scholars of all stripes have long read the U.S. Constitution against a wide array of prior law—English common law,⁴⁸ British constitutionalism,⁴⁹ natural law,⁵⁰ the transatlantic imperial constitution,⁵¹ the early modern law of nations,⁵² corporate law,⁵³ diverse strands of early modern political philosophy, and many others.⁵⁴

Under Heaven] (noting the tensions between royal proclamations describing Natives as separate from the British and British military officer labels of Natives as colonial subjects); Jenny Hale Pulsipher, *Subjects Unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* 3–6 (2005) (contrasting some reports of subjugation by Massachusetts officers with relationships of “friendship” between Natives and Plymouth Colony).

48. See, e.g., Bernadette Meyler, *Towards a Common Law Originalism*, 59 *Stan. L. Rev.* 551, 552–54 (2007) (describing how originalists invoke eighteenth-century common law to interpret constitutional provisions).

49. See, e.g., Reid, *Constitutional History*, *supra* note 42, at 20–25 (describing how American colonists reacted to British constitutionalism and adopted older understandings of the rule of law).

50. See Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* 37 (2021) (discussing the significance of natural law for the Founding generation); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L.J.* 907, 909–10 (1993) (arguing that in the late eighteenth century, “natural law was assumed to have a role in constitutional analysis”).

51. See, e.g., Bilder, *Transatlantic Constitution*, *supra* note 42, at 2 (“This transatlantic constitution existed as both an unwritten and a written constitution . . . located in the history and purpose of the English empire in America.”).

52. See, e.g., Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 *Colum. L. Rev.* 835, 931 (2020) (describing the Constitution’s inclusion of “a term of art drawn from the law of nations”); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 *Va. L. Rev.* 729, 731 (2012) (filling a gap in research on “the role of the law of nations in understanding the powers assigned to the federal political branches by Articles I and II of the Constitution”); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. Rev.* 932, 1000 (2010) (discussing how “many of the Constitution’s provisions refer to key institutions and doctrines that were part of the early modern law of nations”).

53. See, e.g., Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *Yale L.J.* 502, 504 (2006) (arguing that “judicial review arose from a longstanding English corporate practice”); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 *Stan. L. Rev.* 1397, 1406 (2019) (explaining “how a corporate charter in New England evolved into a ‘Constitution’—while in Old England the idea of a constitution remained intangible”).

54. The literature on the relationship between the U.S. Constitution and prerevolutionary constitutional law is vast. For some key recent entries, see Bilder, *Transatlantic Constitution*, *supra* note 42, at 6 (exploring the “imperial constitution”—“the traditional term for the constitutional relationship between England and the American colonies”); Hulsebosch, *Constituting Empire*, *supra* note 42, at 6 (arguing that “[r]ecovering the nexus between empires and constitutions should . . . help revitalize

The diplomatic constitution was simply another body of law in the pluralist world of early America—one that loomed much larger in the realities of governance than Thucydides or Pufendorf.⁵⁵ Prior scholarship has neglected this frame not because it was unimportant but because fights over the diplomatic constitution appear within unfamiliar sources that fit poorly within a circumscribed vision of intellectual history focused solely on traditional texts.

Yet the diplomatic constitution was also fundamentally different from other, more familiar sources of constitutionalism in ways that push scholars to expand and reconceive the category. The diplomatic constitution was not a solely Anglo-American creation: It also reflected Native understandings and Indigenous law, which Anglo-Americans only dimly grasped. Moreover, as events revealed, Anglo-Americans lacked the authority to redefine this law unilaterally. The diplomatic constitution can thus seem unfamiliar and strange, making it difficult to imagine that it enjoyed the same influence and legitimacy as other, better-known bodies of law. In part, this perspective reflects the biases of Anglo-Americans themselves, who, even as they spoke of obeying Native “customs,” refused to acknowledge Indigenous law *as* law, instead defining Native peoples as “lawless.” Reconstructing the diplomatic constitution helps us escape this blinkered outlook. It underscores that Indigenous law, although very much of the law of the Native communities that created it, is also “our” law, in the same way that we can imagine the English common law—created by radically different people in a different time—as part of a common legal heritage.

A. *The Diplomatic Constitution*

The Native nations living in what became the United States in 1783 had their own legal systems and constitutions. Although laws and practices differed among these diverse communities, there were shared features: decentralized, localized governance loosely organized into the confederacies

British-American constitutional history”); Alison L. LaCroix, *The Ideological Origins of American Federalism* 3 (2010) (describing the role of “structures and institutions of the British Empire as the source of the concept of divided authority” for understanding federalism’s origins); Golove & Hulsebosch, *supra* note 52, at 936–39 (expounding on the role of international norms and recognition in the Constitution’s framing).

55. Cf. The Founder’s Library: Intellectual Foundations of the American Founding, Nat’l Const. Ctr., <https://constitutioncenter.org/the-constitution/historic-document-library/time-period/intellectual-foundations> (last visited Feb. 20, 2022) (presenting different documents from antiquity as part of the “primary texts of moral and political philosophy that influenced the Founding generation”).

that Anglo-Americans labeled “tribes” or “nations”;⁵⁶ an emphasis on suasion rather than coercion as the foundation for authority; and individualized and clan-based reciprocity as the remedy for legal harms.⁵⁷

Anglo-Americans also had their own legal orderings, rooted in the common law and the English constitution. In some respects, the colonists’ laws resembled Indigenous practices: They, too, lived in a highly localized system where authority derived from the community.⁵⁸ But colonists’ law also embraced legal hierarchy, formal legal texts, and spectacular punishment by the sovereign in ways foreign to Native peoples.⁵⁹

The diplomatic constitution formed when these two legal orderings collided. Neither wholly Indigenous nor Anglo-American, the diplomatic constitution was a syncretic blend of both that governed the encounter between Native peoples and their would-be colonizers, alongside practices that hardened into custom through long usage.⁶⁰

The core of this constitution was diplomacy and negotiation. It was most visible in the grand formal meetings, often involving thousands of people, in which Native and Anglo-American representatives, authorized to speak on behalf of their communities, convened to resolve disputes.⁶¹ These assemblages involved extensive rituals. Native leaders expected

56. See Steven C. Hahn, *The Invention of the Creek Nation, 1670–1763*, at 5 (2004) (noting that broad tribal distinctions “fail to capture the political complexity of loosely organized tribal peoples”).

57. See Katherine Hermes, “Justice Will Be Done Us”: Algonquian Demands for Reciprocity in the Courts of European Settlers, *in* *The Many Legalities of Early America* 123, 125–27 (Christopher L. Tomlins & Bruce H. Mann eds., 2001) (arguing that Algonquians shared the legal concept of reciprocity with colonists and utilized reciprocity in disputes). On Indigenous law in early America, see generally John Phillip Reid, *A Law of Blood; The Primitive Law of the Cherokee Nation* (1970) [hereinafter Reid, *A Law of Blood*]; Justin B. Richland & Sarah Deer, *Introduction to Tribal Legal Studies* (2016); Hermes, *supra*. On the challenge of classifying Native polities, see generally Hahn, *supra* note 56; Michael J. Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (2012); Gregory Ablavsky, “With the Indian Tribes”: Race, Citizenship, and Original Constitutional Meanings, 70 *Stan. L. Rev.* 1025 (2018) [hereinafter Ablavsky, *With the Indian Tribes*].

58. See 4 William E. Nelson, *The Common Law in Colonial America: Law and the Constitution on the Eve of Independence, 1735–1776*, at 23 (2018).

59. See Peter Charles Hoffer, *Law and People in Colonial America* 51 (rev. ed. 1998) (explaining how the arrival of Europeans required Native peoples to accommodate the European ideas of law). See generally Nelson, *supra* note 58 (discussing the evolution of law in the English colonies).

60. In many ways, this account of the diplomatic constitution is deeply indebted to the work of Professor Robert Williams, Jr. See Williams, *Linking Arms Together*, *supra* note 24, at 8 (“As I try to show in this book, Indians helped create a legal world during the Encounter era—a world made up of multicultural negotiations, treaties, and diplomatic relations with Europeans. Indian visions of law and peace exercised a profound and direct impact on this world.”). To the extent it diverges from Williams’s seminal account, it is to draw parallels with Anglo-American law of the period and to emphasize some of the strategic motivations behind these norms.

61. See Calloway, *Treaties and Treaty Making*, *supra* note 41, at 12–48 (chronicling treaty negotiations between Anglo-American and Native representatives during the colonial era).

their Anglo-American counterparts to participate in edge-of-the-wood and condolence ceremonies and also demanded the distribution of goods as a manifestation of goodwill.⁶² Anglo-Americans made their own elaborate shows of legality, offering written proof of their authority and routinely awarding medals and other symbols of power to their Native counterparts.⁶³

A series of formal speeches followed these initial rituals, often in a highly metaphorical language that Anglo-Americans came to call the “Indian style” that was a staple of colonial portrayals of Native eloquence.⁶⁴ Often, Native and Anglo-American speakers alike proffered wampum belts—vital aspects of Native diplomacy—to accompany their rhetoric and establish their bona fides.⁶⁵ Their speeches routinely sought to smooth disagreements by invoking prominent, semi-mythologized figures as fonts of peace and good understanding. Royalism, especially the King’s benevolence as a father toward Native peoples, was ubiquitous.⁶⁶ Other figures, like William Penn, known as “Onas” by the Lenni Lenape, or “Corlear,” the Haudenosaunee term for all New York governors, had their own significance as the basis for good understanding between the cultures.⁶⁷

At their conclusion, some, though not all, of these negotiations ended in formalized, written treaties, signed by both sets of representatives.⁶⁸ Natives as well as Anglo-Americans kept careful track of the resulting documents; Native leaders also often memorialized the results through

62. See *id.* at 16, 19; Reid, *A Law of Blood*, *supra* note 57, at 201–13 (detailing colonial accounts of Cherokee peace rituals).

63. See Calloway, *Treaties and Treaty Making*, *supra* note 41, at 20 (recounting instances of English officials using gifts to “cement[] personal and national alliances”).

64. Carolyn Eastman, *The Indian Censures the White Man: “Indian Eloquence” and American Reading Audiences in the Early Republic*, 65 *Wm. & Mary Q.* 535, 540–41 n.8 (2008).

65. Calloway, *Treaties and Treaty Making*, *supra* note 41, at 27; Daniel F. Harrison, *Change Amid Continuity, Innovation Within Tradition: Wampum Diplomacy at the Treaty of Greenville, 1795*, 64 *Ethnohistory* 191, 192–93 (2017).

66. See Taylor, *Divided Ground*, *supra* note 11, at 41 (“[I]mperial officials . . . extolled the ‘Great King’ as the personification of perfect justice, pure power, and consummate generosity.”); see also Pulsipher, *supra* note 47, at 4–6 (describing how various groups would appeal directly to the King in order to circumvent oppressive colonial leadership). Scholars have thoroughly traced how Natives and Anglo-Americans interpreted the roles of fathers differently. See, e.g., White, *supra* note 38, at 84–90.

67. Charles W.A. Prior, *Settlers in Indian Country: Sovereignty and Indigenous Power in Early America* 20 (2020); Daniel K. Richter, *Trade, Land, Power: The Struggle for Eastern North America* 120, 204–06 (2013) [hereinafter Richter, *Struggle for Eastern North America*].

68. See, e.g., Calloway, *Treaties and Treaty Making*, *supra* note 41, at 17 (“Indians, who ‘had already sworn themselves to the truth,’ regarded signing the treaty as redundant, but they recognized that it was an important ritual for white men.” (quoting Raymond J. DeMallie, *Touching the Pen: Plains Indian Treaty Councils in Ethnohistorical Perspective*, *in* *Ethnicity on the Great Plains* 38, 42 (Frederick C. Luebke ed., 1980) (misquotation))).

wampum belts.⁶⁹ But for both sets of negotiators, the most significant result was less the specific agreement than the reaffirmation of their ongoing diplomatic relationship through such public, ritualized displays of commitment.⁷⁰ The Haudenosaunee and the English had a term of art to describe this connection: They called it the “Covenant Chain,” which they repeatedly invoked to remind each other of their mutual obligations.⁷¹

These relationships, forged on such grand occasions, provided the critical ties between Native and imperial leaders to help manage the everyday law of colonialism. Native and Anglo-American leaders alike routinely confronted “cases of trouble”—quotidian disputes and violence between their communities that always threatened to erupt into wider conflict.⁷² The trust, personal ties, and agreements created through diplomacy helped create clear channels of communication to diffuse these tensions.⁷³ A steady stream of “talks”—effectively formal letters conveying information or appeals for aid—flowed between Indian country, imperial outposts, and colonial capitals.⁷⁴ Native leaders also relied on their connections with the official representatives, “Indian agents,” sent to manage imperial relations with Native communities.⁷⁵ Although these agents furthered British aims, they also sometimes served as advocates for Native peoples *within* the imperial system. William Johnson, for instance, who became the northern superintendent for Indian affairs, was known

69. See Harrison, *supra* note 65, at 192.

70. See, e.g., Bethel Saler, *The Settlers’ Empire: Colonialism and State Formation in America’s Old Northwest* 8 (2014) (“[T]he treaties and related activities framed an emergent, transitional ‘treaty polity’ that generated its own vernacular administrative structure and rules.”).

71. See Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes With English Colonies From Its Beginnings to the Lancaster Treaty of 1744*, at xvi–xviii (1984) (examining the significance and growth of the Covenant Chain).

72. “Cases of trouble” is a long-standing anthropological frame. See, e.g., Karl N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* 21 (1941). On its application to interactions between Natives and Anglo-Americans, see Hoffer, *supra* note 59, at 61.

73. Cf. Alejandra Dubcovsky, *Informed Power: Communication in the Early American South* 159–211 (2016) (exploring communication networks between Native peoples and English colonists in the South).

74. On the role of “talks,” see Claudio Saunt, *A New Order of Things: Property, Power, and the Transformation of the Creek Indians, 1733–1816*, at 188–204 (1999) (“In the 1780s, Creeks began attributing a special significance to letters, if only because whites recognized written documents as a means of validating talks.”).

75. See Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780–1834*, at 6–20 (1962) [hereinafter Prucha, *American Indian Policy*] (describing the influence that “Indian agents like Sir William Johnson” had in early colonial trade with tribes).

for his close ties to the Mohawk Nation of the Haudenosaunee Confederacy and zealously worked to defend its interests.⁷⁶

By the late eighteenth century, these core elements of the diplomatic constitution—ritualized negotiations, metaphors of alliance, and clearly defined practices of communication—were all well established. This is not to suggest a false coherence. The diplomatic constitution was less a discrete object than a discourse that served to discipline both Native and Anglo-American leaders to practice proper behavior in their dealings with each other. Moreover, it rested on a variety of stylized fictions. In imagining the diplomatic constitution, Anglo-Americans flattened diverse Indigenous peoples, practices, and experiences into generic “Indian” customs—an approach that Native communities recognized and played upon as part of their own efforts to build pan-Native coalitions. And the diplomatic constitution grounded its norms by invoking a mythical past of harmonious dealings that never existed. But these aspects of the diplomatic constitution closely paralleled Anglo-American constitutionalism of the era, which valorized an equally imaginary and flattened “ancient constitution” of England.⁷⁷

It is also important not to romanticize the diplomatic constitution. At their core, Native and Anglo-American aims were starkly opposed: Native nations sought to preserve their authority, autonomy, and property, all of which Anglo-American colonialism sought to eliminate. The diplomatic constitution also did not forestall the rise of racialized thinking among both Natives and Anglo-Americans that posited an unbridgeable divide between the two groups.⁷⁸ Increasingly identifying themselves as “white people,” British colonists embraced a virulent anti-Indian rhetoric that they believed vindicated violence against, and even the attempted extermination of, Native communities.⁷⁹ Although such views predominated among the so-called common folk, imperial officials often shared this disdain and racial animosity against Native peoples.⁸⁰

But, if the diplomatic constitution did not solve these problems, it offered a way to manage some of them. The specter that haunted encounters between Natives and Anglo-Americans was violence. White

76. See Taylor, *Divided Ground*, *supra* note 11, at 40–42 (highlighting Johnson’s role in bringing about the Proclamation Line dividing colonial territory from Indian lands as an “intermediary between the colonial and the native peoples”).

77. John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* 8–16 (2005).

78. Richter, *Struggle for Eastern North America*, *supra* note 67, at 190–236.

79. See generally Silver, *supra* note 6 (tracing the rise of the term “white people” in the middle colonies and its role in crafting the “anti-Indian sublime”).

80. See Dowd, *War Under Heaven*, *supra* note 47, at 174 (observing that British “settlers and authorities shared in the conviction of British superiority and in the expectation that Indians would, before long, surrender their homelands to British subjects who were racially white”).

settlers lived in terror of the Indian raid, in which Native peoples, purportedly egged on by distant European overlords, brought swift and deadly violence to settlers' homes.⁸¹ Native peoples dreaded the exterminatory, even genocidal, attacks of Anglo-American mobs bent on claiming supposed revenge by massacring "all bearing the name of [I]ndians."⁸² The diplomatic constitution offered, it seemed, one of the only alternatives to this "dark and bloody ground."⁸³

It also provided Native nations one of the only effective legal tools with which to resist white settlers' ceaseless demands for Native land and sovereignty. Confronted with such aggressions, Native peoples developed a well-worn strategy in which they appealed to imperial officials for assistance by invoking the relationships with the Crown and the British Empire repeatedly reaffirmed on the treaty ground. Strikingly, they often won, as the Empire endorsed Native legal claims over those of their white neighbors⁸⁴—most notably in the Proclamation of 1763, issued at the end of the Seven Years' War, which codified a centralized system of diplomacy and barred white settlement on Native land.⁸⁵

These outcomes reflected not imperial altruism but interest convergence. Native power was too significant for imperial officials to risk the all-too-literal costs of violating the diplomatic constitution's norms. When the British attempted to unilaterally recraft the terms of their relationship with Native peoples at the end of the Seven Years' War, the violent resistance of Anishinaabe and other Native communities in what was known as Pontiac's War swiftly forced the British to restore earlier principles.⁸⁶

Moreover, Native and British leaders had a shared goal: constraining Anglo-American colonists on the frontier. British officials viewed these restive, violent wanderers as a threat to imperial governance and good order, while for Natives, these settlers' disdain for Indigenous property

81. Silver, *supra* note 6, at 41–69.

82. Enclosure from Henry Knox to George Washington (June 15, 1789), in 2 *The Papers of George Washington: Presidential Series* 490, 490 (Dorothy Twohig ed., 1987). On genocide against Native peoples, see generally Jeffrey Ostler, *Surviving Genocide: Native Nations and the United States From the American Revolution to Bleeding Kansas* (2019); Benjamin Madley, *Reexamining the American Genocide Debate: Meaning, Historiography, and New Methods*, 120 *Am. Hist. Rev.* 98 (2015).

83. Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* 157 (2007) [hereinafter Griffin, *American Leviathan*].

84. For examples of such strategies—and successes—see Bilder, *Transatlantic Constitution*, *supra* note 42, at 136–39; Craig Bryan Yirush, *Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1743*, 29 *Law & Hist. Rev.* 333, 369–73 (2011).

85. See Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* 92–95 (2006). For a recounting of the history and effects of the Proclamation, see generally *id.*

86. See generally Dowd, *War Under Heaven*, *supra* note 47 (recounting the history of Pontiac's War and its legacy).

and governance posed an existential challenge.⁸⁷ The result was a structural dynamic found in imperial borderlands throughout the globe: Indigenous peoples turned to imperial states to demand they restrain local colonizers' avarice, even as imperial states used the threat of Indigenous resistance to vindicate the states' own claims to authority over their own colonists.⁸⁸ As a result, prerevolutionary conflicts over Native rights within the British Empire were never simple contests between Natives and whites. Instead, they routinely played out as complex struggles involving multiple factions *within* Anglo-American and Native societies, all jockeying for imperial support.

Unlike other sources of constitutional ideas in early America, the diplomatic constitution could not easily be studied in books, although the era's ethnographers did attempt to capture some of its features in key texts.⁸⁹ But this constitution was nonetheless familiar to many Anglo-Americans from experience, because negotiating with Native nations was much of what governments in early America actually did. This was especially true for the men described as the Founders. George Washington fought with and against Native peoples during the Seven Years' War;⁹⁰ Benjamin Franklin's decades of service in Pennsylvania's government brought him into close contact with the colony's negotiations with Native nations;⁹¹ James Madison and James Monroe attended the treaty meeting with the Haudenosaunee at Fort Stanwix in 1784;⁹² Thomas Jefferson hosted Native delegations while governor of Virginia and appended a speech of Mingo Chief Logan to the *Notes of the State of Virginia*.⁹³ These men did not always honor and respect Native demands, but that does not mean that they did not understand them. On the contrary, Native

87. Daniel K. Richter, Native Americans, the Plan of 1764, and a British Empire that Never Was, *in* *Cultures and Identities in Colonial British America* 269, 269–92 (Robert Olwell & Alan Tully eds., 2005).

88. Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*, at 168–208 (2002).

89. See Cadwallader Colden, *The History of the Five Indian Nations Depending on the Province of New-York in America* (1727) (describing the history of the Haudenosaunee Confederacy); see also James Adair, *The History of the American Indians* 62 (Kathryn E. Holland Braund ed., 2005) (1775) (“My grand objects, were to give the Literati proper and good materials for tracing the origin of the American Indians . . .”).

90. See Colin G. Calloway, *The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation* 125–47 (2018).

91. See Benjamin Franklin, *Remarks Concerning the Savages of North-America* (Jan. 7, 1784), reprinted in *41 The Papers of Benjamin Franklin* 412, 416–23 (Ellen R. Cohn ed., 2014); see also Benjamin Franklin, *Franklin's Autobiography* 159 (Frank Woodworth Pine ed., 1912) (1771).

92. Gregory Ablavsky, *The Savage Constitution*, 63 *Duke L.J.* 999, 1023 (2014) [hereinafter Ablavsky, *The Savage Constitution*].

93. Thomas Jefferson, *Notes on the State of Virginia* 226–58 (William Peden ed., 2006) (1785); Peter S. Onuf, “We Shall All Be Americans”: Thomas Jefferson and the Indians, 95 *Ind. Mag. Hist.* 103, 103–04 (1999).

expectations were framed within a legal discourse that nearly everyone involved in the era's politics could grasp.⁹⁴ In this sense, the vocabulary and principles of the diplomatic constitution were as familiar and integral a part of early American constitutional discourse as Blackstone and Locke. Native and Anglo-American leaders alike recognized the diplomatic constitution as a binding body of law that governed how their distinct communities were supposed to interact.

B. *Indian Country's Critical Period*

The American Revolution and its aftermath were a constitutional crisis in multiple senses. The war was a crisis in what scholars have termed the "imperial constitution," as Anglo-American colonists clashed bitterly with metropolitan thinkers over the meaning and nature of authority within the British Empire.⁹⁵ After the war, the United States experienced what scholars have long dubbed "the critical period," when governance seemed to fail and Anglo-Americans hotly debated how to constitute authority.⁹⁶

Yet the American Revolution resulted from, and spawned, a crisis in the diplomatic constitution, too. As the long-standing principles that had governed Native relations with European powers frayed, Native peoples experienced their own critical period when their very survival seemed at stake.

On paper, the newly created United States sought to perpetuate the diplomatic constitution. The Continental Congress replicated British imperial structures early on⁹⁷ and continued formal diplomatic meetings with Native leaders that resulted in written treaties.⁹⁸ Initial drafts of the Articles of Confederation reserved sole congressional authority over "Indian affairs," though the final version undercut federal power by protecting states' "legislative right."⁹⁹

94. Cf. Williams, *Linking Arms Together*, supra note 24, at 11 (observing how this "diplomatic language . . . functioned paradigmatically to prescribe what the actors within the North American Encounter era treaty system might say and how they might say it").

95. The literature on this topic is enormous. For key works, see generally Bernard Bailyn, *The Ideological Origins of the American Revolution 198–228* (1967) (tracing contestations between American and British thinkers over the meaning of sovereignty); Wood, supra note 8 (recounting how Anglo-Americans came to break with British thought on constitutionalism); Barbara A. Black, *Constitution of Empire: The Case for the Colonists*, 124 U. Pa. L. Rev. 1157 (1976) (describing the revolutionary debate over the basis for authority within the British Empire and arguing in defense of the Anglo-American position).

96. The term "critical period" traces to John Fiske, *The Critical Period of American History, 1783–1789* (1888). For a recent examination, see *From Independence to the U.S. Constitution: Reconsidering the Critical Period of American History* (Douglas Bradburn & Christopher R. Pearl eds., 2022).

97. Prucha, *American Indian Policy*, supra note 75, at 27–40.

98. *Articles of Agreement and Confederation*, Del. Nation-U.S., Sept. 17, 1778, 7 Stat. 13.

99. *Articles of Confederation of 1781*, art. IX, para 4. On the drafting history of this provision, see Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1098–105 (1994).

This compromise hinted at the chaotic reality. The Revolutionary War engulfed Indian country in waves of disorganized violence seemingly outside the control of any sovereign. Native communities divided: A few allied with the United States but many sided with the British.¹⁰⁰ The United States—desperate to maintain its tenuous cohesion—promoted a vituperative, exterminatory anti-Indian rhetoric.¹⁰¹ Gangs of white settlers, loosely organized into militias, repeatedly invaded Native lands, culminating in genocidal attacks like the 1781 Gnadenhuetten Massacre—in which Pennsylvania militia members murdered nearly one hundred Christian, pacifist Lenape living in present-day Ohio.¹⁰²

In 1783, the Treaty of Paris ended the war between the United States and Great Britain.¹⁰³ But the treaty merely deepened the crisis for Native nations, who discovered that their erstwhile allies had transferred Indigenous homelands to the new United States without any Native involvement.¹⁰⁴ Moreover, the fractured and uncertain authority within the new United States produced an enormous, and chaotic, scramble for Indigenous lands. Individual white settlers invaded Native homelands, defying distant officials who attempted to stop them.¹⁰⁵ Seizing on the ambiguity of the Articles of Confederation, states asserted their own authority, deemed Native peoples conquered, and sold their lands to speculators.¹⁰⁶ Dubious militia expeditions—often little more than mobs of local settlers—massacred entire Native towns in purported retaliation for raids.¹⁰⁷

These actions flagrantly violated the diplomatic constitution, which had always emphasized clear, well-established legal channels for communication. Now, Native leaders confronted a cacophony of

100. See generally Colin G. Calloway, *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities* (1995) [hereinafter Calloway, *Crisis and Diversity*] (recounting the diverse responses among Native nations to the crisis prompted by the American Revolution).

101. See Robert G. Parkinson, *The Common Cause: Creating Race and Nation in the American Revolution* 474 (2016) (“Patriot newspapers propagated images that described all Indians as ‘British Savages’ . . .”). See generally David J. Silverman, *Racial Walls: Race and the Emergence of American White Nationalism*, in *Anglicizing America: Empire, Revolution, Republic 181, 181* (Ignacio Gallup-Diaz, Andrew Shankman & David J. Silverman eds., 2015) (“Even as the northern states began phasing out slavery in the 1780s and 1790s, and even as regional divisions between North and South appeared at the Constitutional convention, hardly anyone doubted that white superiority, black degradation, and Indian dispossession would remain basic features of life throughout the United States.”).

102. Rob Harper, *Looking the Other Way: The Gnadenhuetten Massacre and the Contextual Interpretation of Violence*, 64 *Wm. & Mary Q.* 621, 621–22 (2007).

103. 25 *Journals of the Continental Congress, 1774–1789*, at 683–94 (Gaillard Hunt ed., 1922).

104. See Calloway, *Crisis and Diversity*, supra note 100, at 272–91.

105. See Griffin, *American Leviathan*, supra note 83, at 185–210.

106. Ablavsky, *With the Indian Tribes*, supra note 57, at 1018–33.

107. Gregory Ablavsky, *Federal Ground: Governing Property and Violence in the First U.S. Territories* 141–45 (2021) [hereinafter Ablavsky, *Federal Ground*].

purported authorities. All was “confusion and uncertainty,” one group of Chickasaw leaders complained to the Continental Congress.¹⁰⁸ “We are daily receiving talks from one place or another, and from people we know nothing about,” they lamented.¹⁰⁹ “We know not who to mind, or who to neglect.”¹¹⁰ To the north, Haudenosaunee leaders similarly complained that the conflicting calls for “great council fire[s]” left them “like drunken men, reeling from side to side.”¹¹¹

The diplomatic constitution faced other challenges, too. One was the rampant abuse of the treaty process. Settlers, state representatives, and land companies would find some Natives, perhaps ply them with goods or cajole them with threats of force, and then—despite Natives’ protestations that they “had no Authority to Treat about Lands”¹¹²—extract their signatures on purported treaties.

Native nations refused to submit to this new order. They instead demanded the return of the centralized negotiations of the diplomatic constitution. “We are told that you are the head Chief of a grand Council which is above these Thirteen Councils,” the Chickasaws demanded of Congress.¹¹³ “[I]f so, why have we not had talks from you? We are head Men and Chiefs and Warriors also, and I have always been accustomed to speak with great Chiefs and Warriors.”¹¹⁴ Muscogee leader Alexander McGillivray cited similar principles to reject states’ shallow, cynical use of the treaty process. “[A] proper representation of our Nation never met the Americans in Congress to negotiate any treatys,” he wrote.¹¹⁵ “Without such representation no business is ever done by Indian Nations”¹¹⁶ For his part, Haudenosaunee leader Joseph Brant noted “some Difficulty in our Minds that there should be two separate Bodies to manage these Affairs, for this does not agree with our ancient Customs.”¹¹⁷

108. Talk from Chickasaw Chiefs to the President of Congress (July 28, 1783) [hereinafter Talk from Chickasaw Chiefs], in 18 Early American Indian Documents: Treaties and Laws, 1607–1789, at 370, 370 (Colin G. Calloway ed., 1994) [hereinafter 18 Early American Indian Documents].

109. *Id.*

110. *Id.*

111. Letter from Arthur St. Clair to Henry Knox (July 5, 1788), in 2 The St. Clair Papers: The Life and Public Services of Arthur St. Clair 48, 48–49 (William Henry Smith ed., 1881) [hereinafter 2 The St. Clair Papers].

112. Talk Delivered to Col. Joseph Martin by Old Corn Tassel (Sept. 19, 1785), in Cherokee Collection, Tenn. State Libr. & Archives, Nashville, Tenn. (on file with the *Columbia Law Review*).

113. Talk from Chickasaw Chiefs, *supra* note 108, at 370.

114. *Id.*

115. Letter from Alexander McGillivray to Esteban Miró (May 1, 1786), in McGillivray of the Creeks 106, 108–09 (John Walton Caughey ed., 2007).

116. *Id.* at 109.

117. 1 Proceedings of the Commissioners of Indian Affairs 54 (Franklin B. Hough ed., Albany, Joel Munsell 1861).

Brant's appeal to "ancient Customs" underscores how Native leaders used the diplomatic constitution to try to blunt settler venality. Deploying a well-worn approach, Native leaders repeatedly intervened in the intense jurisdictional struggles of the 1780s by invoking federal authority against states. Brant, for instance, refused to negotiate with New York, arguing that "self Interest throughout your State is too prevalent."¹¹⁸ Instead, the Six Nations would only permit that "our Difference . . . be determined by Congress."¹¹⁹ Southern nations deployed the same strategy. Having "lost all Confidence in promises made them by the neighboring States," Cherokee officials reported that they "were universally desirous of being under the protection of the United States."¹²⁰

Yet Native peoples' turn to the federal government to restore the diplomatic constitution faced two principal challenges. First, the new national government's own commitment to the diplomatic constitution's principles was shaky. Many federal officials shared the widespread belief that the Native nations had been "conquered" during the Revolution and advocated for abandoning the diplomatic constitution altogether.¹²¹ Native leaders, however, effectively insisted that they had never been conquered, flummoxing federal officials, who began to retreat.¹²² "[T]he United States may conform to the modes and customs of the [I]ndians," Secretary at War Henry Knox informed Congress, "without the least injury to the national dignity."¹²³ Congress, badgered by Native demands, began to return to the principles of the diplomatic constitution, urging "treat[ing] with the Indians . . . on a footing of equality."¹²⁴

But this success merely underscored the era's other, even more substantial challenge to the diplomatic constitution: federal weakness. Even when Native leaders cited federal promises that "the soil of our Lands was our own," white settlers invaded anyway.¹²⁵ Seeming federal powerlessness dashed Native hopes. Despite congressional promises "that the white

118. Letter from Joseph Brant and Other Indians to the Governor of New York (July 30, 1789), *in* 18 Early American Indian Documents, *supra* note 108, at 531, 531–32.

119. *Id.*

120. Letter from the Hopewell Commissioners to Charles Thomson (Dec. 1785), microformed on Henry Knox Papers, Microform 138, reel 47 (Gilder Lehrman Inst.).

121. These officials routinely included such provisions in the era's Indian treaties. See, e.g., Treaty, Shawanoe Nation-U.S., art. II, Jan. 31, 1786, 7 Stat. 26, 26 ("The Shawanoe nation do acknowledge the United States to be the sole and absolute sovereigns of all the territory ceded to them by a treaty of peace, made between them and the King of Great Britain . . .").

122. See, e.g., Samuel C. Williams, Tatham's Characters Among the North American Indians, 7 *Tenn. Hist. Mag.* 174, 176–78 (1921) (quoting a speech of Onitositah denying conquest).

123. Report of the Secretary at War: Indian Affairs, *supra* note 40, at 104.

124. 33 *Journals of the Continental Congress, 1774–1789*, at 479 (Roscoe R. Hill ed., 1936).

125. Extracts from the Proceedings of the Treaty at Fort Herkimer Between New York and the Oneidas and Tuscaroras (June 23, 1785), *in* 18 Early American Indian Documents, *supra* note 108, at 332, 334–35 (emphasis omitted).

people should not come over,” Cherokee leader Old Tassel observed, “[W]e always find that after a treaty they settle much faster than before.”¹²⁶ Earlier, he noted, “[W]hen we treated with Congress we made no doubt but we should have justice.”¹²⁷ Now, he and his fellow Cherokees credited rumors “that the Americans only meant to deceive us” until “all our lands is settled.”¹²⁸ Muscogee leader McGillivray told federal officials that such suspicion of their promises had become “universal through the Indians.”¹²⁹

By the late 1780s, then, the United States confronted a stark choice. One option was to completely abandon the diplomatic constitution, as many state leaders and white settlers demanded, and wholly embrace exterminatory violence against Native communities. Events along the Georgia and Kentucky frontiers were already headed in that direction.¹³⁰ Yet many in the new federal government quailed at a wholesale turn to violence. They profoundly doubted its justice, and they also worried whether an impoverished and ineffectual United States could win such a conflict.¹³¹

The alternative was to do what Native leaders demanded: to recommit to the principles of the diplomatic constitution and establish a federal negotiating partner that could actually enforce the promises that it made against recalcitrant states and white settlers. This, ultimately, was the path that much of the Anglo-American political elite settled on.¹³² In their call for a strengthened national union, they sought to remedy the challenges that state interference and the diffusion of authority had prompted in Indian affairs. The new Constitution that they crafted, written in response to the chaos of the critical period, attempted to do that. Its drafters and advocates repeatedly told Native nations that the new Constitution restored the principles of the diplomatic constitution. Native nations would debate whether they credited this interpretation.¹³³

II. THE NATIVE RATIFICATION DEBATES

The Constitution had many intended audiences. Scholars have devoted the most attention to one of those audiences: the legal and political

126. Talks from Cherokees to Colonel Martin (Mar. 24, 1787), *in* 18 Early American Indian Documents, *supra* note 108, at 444, 444.

127. *Id.*

128. *Id.*

129. Alexander McGillivray to the U.S. Commissioners (Sept. 15, 1788), *in* 18 Early American Indian Documents, *supra* note 108, at 471, 471.

130. See Ablavsky, *The Savage Constitution*, *supra* note 92, at 1025, 1031–33 (discussing violence in Georgia and Kentucky rising in part due to a distrust that the federal government could contain settlers’ violence).

131. An Indian war, Secretary at War Henry Knox darkly predicted, might mean “destruction to the republic, under its present circumstance.” Report of the Secretary at War: Indian Affairs, *supra* note 40, at 166.

132. See *infra* section II.A.

133. See *infra* section II.B.

elites that dominated state-level debates over ratification.¹³⁴ But the document's drafters were also deeply concerned about its reception by what was known as the "people out of doors"—the broader population of the new nation, voters and non-voters alike, who expressed their approbation or disapproval of the document through mass mobilization.¹³⁵ The document had external audiences, too, as a wealth of recent scholarship has underscored.¹³⁶ Anxious about the new nation's credibility and creditworthiness, the Constitution's drafters sought to establish the United States as a "treaty-worthy nation" on the international stage.¹³⁷ Those foreign audiences, historian Daniel Hulsebosch has demonstrated, then hotly debated the document's meaning, particularly around treaties and credit, in what he dubs the "foreign ratification debate."¹³⁸

As this Part explores, the Constitution had another, less-examined external audience: Native nations. Section II.A examines the complicated relationship between the new Constitution and the diplomatic constitution. In centralizing and bolstering federal authority, the Constitution's drafters sought, in part, to respond to Native complaints and demands

134. This has been the focus of most of the canonical historical accounts of the Constitution. See, e.g., Akhil Reed Amar, *America's Constitution: A Biography* 5–6 (2005) (discussing the role of "the continent's most eminent men" in early debates); Richard Beeman, Plain, Honest Men: The Making of the American Constitution, at xi (2009) (situating the historical discussion in the context of the Founders' environments); Klarman, *supra* note 12, at 6–7 (discussing the debates among state representatives); Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at xi (2010) [hereinafter Maier, *Ratification*] ("The state ratifying conventions and the debates that surrounded the election of delegates to those conventions are at the center of the book."); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 113–28 (1996) (acknowledging the impact of state-level debates on ratification); Wood, *supra* note 8, at xv–xvi (emphasizing the need to understand "the assumptions from which the constitution-makers acted" and the "political literature of the period" to make sense of the Constitution).

135. For works grappling with the popular audience and interpretation of the Constitution, see generally Cornell, *People's vs. Lawyer's Constitution*, *supra* note 19, at 303; Seth Cotlar, *The View From Mount Vernon Versus the People Out of Doors: Context and Conflict in the Ratification Debates*, 69 *Wm. & Mary Q.* 369 (2012); Alfred F. Young, *The Framers of the Constitution and the "Genius" of the People*, 42 *Radical Hist. Rev.* 8, 9 (1988).

136. See Max M. Edling, *Peace Pact and Nation: An International Interpretation of the Constitution of the United States*, 240 *Past & Present* 267, 269–70 (2018) (providing an overview and summary of recent literature that "points to international and intra-union, rather than domestic, relations in the analysis of both the causes and the consequences of the Constitution").

137. Eliga H. Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* 12 (2012) ("[T]he book's focus is . . . on the broader process by which Americans sought to make themselves appear worthy of peaceful relations with other nations."); see also Golove & Hulsebosch, *supra* note 52, at 935 ("The fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize . . . as a 'civilized state' worthy of equal respect in the international community.")

138. Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 *Wm. & Mary L. Rev.* 1239, 1245 (2018).

about failures under the Articles of Confederation.¹³⁹ At the same time, they also sought to reassure U.S. citizens about the new government's strength against potential Native enemies. Nonetheless, after the new Constitution's adoption, the new federal government aggressively sold and promoted the new document to Native audiences as a restoration of the core principles of the diplomatic constitution.

Yet Native peoples were less certain. Section II.B flips perspective to consider how Native peoples argued about the document's implications for them in the 1790s, in what we term, borrowing Hulsebosch's formulation, the "Native ratification debates." Ultimately, just like their Anglo-American neighbors, Native peoples split over whether to embrace the new document. Of course, unlike some of their white neighbors, Native peoples could not directly vote on the new Constitution's merits. But they expressed approbation or disapproval in other ways. While some Native peoples came to embrace the promise of the United States and what it offered, others—likely the majority—remained skeptical that the new federal government would be able to resist the demands of popular pressure. Arguably, those who rejected the new Constitution proved more prescient about what the future of federal power augured for Native status within the new nation.

A. *The U.S. Constitution and the Diplomatic Constitution*

The U.S. Constitution had a complicated relationship with the prerevolutionary diplomatic constitution. In one sense, it represented a return to some of the older constitution's tenets and practices. Just as under the British Empire, the interests of Native leaders and the Anglo-American political elite once again converged: Both sought a strengthened federal government that could constrain peripatetic settlers and recalcitrant states.¹⁴⁰ When James Madison attacked the "wars and Treaties of Georgia with the Indians" as one of the "vices" of the Articles of Confederation, he was lamenting the weakness of "federal authority" but also reaffirming the centralization of the diplomatic constitution.¹⁴¹

Ultimately, the U.S. Constitution reaffirmed some of the diplomatic constitution's core principles. As one of us has traced more fully elsewhere, the new Constitution's provisions strongly embraced federal over state authority in Indian affairs.¹⁴² The Indian Commerce Clause

139. See *supra* section I.B.

140. See *supra* section I.A (discussing the interest convergence of the British Empire and Native leaders); *supra* section I.B (discussing the desires of some Native leaders for a more centralized government).

141. James Madison, *Vices of the Political System in the United States* (1787), reprinted in 9 *The Papers of James Madison: Congressional Series* 345, 348–58 (J.C.A. Stagg ed., 2010).

142. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *Yale L.J.* 1012, 1039–50 (2015) [hereinafter Ablavsky, *Beyond the Indian Commerce Clause*].

stripped away the Articles' limitations on federal power;¹⁴³ federal treaties became supreme law, binding on the states;¹⁴⁴ and the Property Clause granted the federal government, not the states, authority over western territory.¹⁴⁵ Moreover, as historian Mary Bilder has recently traced, the Convention took place even as Cherokee, Chickasaw, and Choctaw delegations were visiting Philadelphia to importune federal assistance against encroaching white settlements.¹⁴⁶ She suggestively linked these meetings reaffirming the diplomatic constitution—repeatedly described as the “chain of friendship”—to the Convention’s endorsement of the federal treaty power.¹⁴⁷

Yet many newly minted U.S. citizens had their own vision of how federal power would operate. They hoped and anticipated that the newly strengthened federal government would use its expanded financial and military power not to *protect* but to *dispossess* Native peoples.¹⁴⁸ State-level debates over ratification encouraged this view. Ratification, after all, was not a staid exegesis of political philosophy but an extensive, hard-fought political battle.¹⁴⁹ In this campaign, Federalists advocating ratification—and especially standing armies—to skeptical audiences routinely found political purchase in invoking Native peoples as a kind of bogeymen, a threat that only a newly empowered federal government could counter.¹⁵⁰ Ultimately, such invocations helped secure Federalist success in the hard-fought battle for state ratification.¹⁵¹

Unsurprisingly, the Federalists told Native audiences a very different story about the new Constitution than the one they spun for their own citizens. Now, they harped on the fact that the new Constitution would remedy Natives’ earlier grievances by reestablishing the principles of the diplomatic constitution. “[A] happy change has taken place in our national Government,” congressional commissioners informed Muscogee leaders in 1789.¹⁵² “Our Union, which was a child, is grown up to manhood[] One great council is established, with full powers to promote the public good.”¹⁵³ This newly empowered government would,

143. U.S. Const. art. I, § 8, cl. 3.

144. *Id.* art. VI, cl. 2.

145. *Id.* art. IV, § 3.

146. Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 *Fordham L. Rev.* 1707, 1727–42 (2021).

147. *Id.* at 1742–53.

148. See Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 142, at 1058–71.

149. See Maier, *Ratification*, *supra* note 134, at x–xi.

150. See Ablavsky, *The Savage Constitution*, *supra* note 92, at 1060–67.

151. *Id.*

152. *Abortive Negotiations at Rock Landing, Address Before the Ceremony of Black Drink* (1789), *in* 18 *Early American Indian Documents*, *supra* note 108, at 547, 549–50.

153. *Id.* at 550.

they promised, ensure “that justice shall be done to the nations of Indians situated within the limits of the United States.”¹⁵⁴

The 1790 Trade and Intercourse Act, which prohibited all purchases of Native land except under federal authority—itsself an endorsement of long-standing principles of the diplomatic constitution—played a key role in this campaign for Native endorsement.¹⁵⁵ “Here then is the security for the remainder of your lands,” then-President George Washington wrote to a group of Senecas anxious over New York’s land schemes.¹⁵⁶ “No state nor person can purchase your lands, unless at some public treaty held under the Authority of the United States. The general Government will never consent to your being defrauded—But it will protect you in all your just rights.”¹⁵⁷ Washington then pointed to “the law of Congress, for regulating trade and intercourse with the Indian-tribes” as conclusive proof of the “fatherly care the United States intend to take of the Indians.”¹⁵⁸ In subsequent years, the federal government freely distributed copies of the statute, under seal in tin cases with “marks of solemnity,” to Native leaders so that they had tangible evidence of federal protection that they could present to any would-be intruders.¹⁵⁹

There was a deep irony in these arguments. During the state ratification debates, Federalists had paraded the threat of marauding Natives to encourage whites to embrace expanded federal authority under the new Constitution. Now, many of these same advocates invoked the threat of marauding *whites* to encourage *Natives* to accept federal power. Which was the truer account of the newly empowered federal government and how it would function? This was what Native peoples had to decide.

B. *Native Nations Debate the Constitution*

Did the Federalists persuade Native audiences about the merits of the new Constitution? Here there are some clear divergences with the state ratification debates. For one, although many Native leaders had ready access to writing and used it for formal diplomacy, print was primarily a technology for managing relationships with outsiders.¹⁶⁰ Native peoples thus lacked the internal print culture of Anglo-American society that

154. *Id.*

155. Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138.

156. Letter from George Washington to the Seneca Chiefs (Dec. 29, 1790), in 7 *The Papers of George Washington: Presidential Series* 146, 146–50 (Edward G. Lengel, Mark A. Mastromarino, Elizabeth B. Mercer, Beverly H. Runge, Dorothy Twohig & Jack D. Warren, Jr. eds., digital ed. 2008).

157. *Id.* at 147.

158. *Id.* at 148.

159. Letter from Thomas Jefferson to George Washington (Mar. 13, 1793), in 12 *The Papers of George Washington: Presidential Series* 314, 314–15 (Christine Sternberg, Patrick Pinheiro & John C. Pinheiro eds., 2005) [hereinafter 12 *Papers of George Washington*].

160. For background on Native uses of writing during this period, see *supra* note 30.

preserved state-level ratification debates. For another, unlike in the states, there was no formal process for Native approval, which meant there was no official decision as to whether Native nations ultimately formally ratified.

Neither of these differences is as stark as it seems. Careful analysis of the surviving archival record, especially one remarkable Native-authored document, helps us reconstruct how Native peoples argued over the Constitution and its meaning. As for the formal ratification process, the franchise and the ratification conventions were only one, often highly circumscribed, way for Anglo-Americans to participate in the raucous law and politics of the Early Republic.¹⁶¹ Historians have highlighted the many and varied other ways that U.S. citizens expressed their constitutional views.¹⁶² Indeed, many state constitutions of the era were not formally ratified; instead, as one historian has emphasized, thinkers of the period believed that “the people might convey their assent to a constitution in a variety of ways.”¹⁶³ A similarly expansive understanding of what it might mean for Native peoples to ratify the Constitution yields a story in which Native nations, like their Anglo-American neighbors, split, but where most arguably came to *reject* the new Constitution and what it promised them.

1. *The Constitutional Debate in Indian Country: The Voyage of Hendrick Aupaumut*. — One source for considering Native views of the Constitution is Native leaders’ formal responses to federal officials’ boosterism. Outwardly, their proclamations expressed approbation for the new governance. But these endorsements also came tinged with demands: reminders of how the United States had earlier failed to adhere to the diplomatic constitution and outlining their demands that the new federal government do better.

In 1789, for instance, Haudenosaunee representatives gathered in upstate New York sent a message to the new President. “We the Sachems, Chiefs, and Warriors of the Five Nations Assembled in Council at our Great Council fire at Buffalo Creek,” they wrote, “Congratulate You upon Your New System of Government, by which You have one Head to Rule Who we can look to for redress in all disputes which have arose or which may arise

161. See Introduction to *Beyond the Founders: New Approaches to the Political History of the Early American Republic* 10 (Jeffrey L. Pasley, Andrew W. Robertson & David Waldstreicher eds., 2004) (“Nonvoters participated enthusiastically and often effectively in crowds, in taverns, and at celebrations. These and other cultural forms became clearing-houses for the invention and revision of political attitudes, rhetoric, and identities.”).

162. See, e.g., Kramer, *supra* note 19, at 25 (noting the right to petition as one mechanism, among others, to express constitutional viewpoints); Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 *Chi.-Kent L. Rev.* 883, 883, 894–902 (2006) [hereinafter Cornell, *Mobs, Militias, and Magistrates*] (acknowledging “the manifold ways in which popular constitutionalism shaped . . . early debates”).

163. Anne Twitty, *The Rise and Fall and Rise of Ratification in the Early United States* 9 (Sept. 29, 2022) (unpublished manuscript) (on file with the *Columbia Law Review*).

between Your people and ours.”¹⁶⁴ This statement was striking: both for its insistence on Haudenosaunee unity in language that uncannily, if likely unconsciously, echoed the Constitution’s preamble, and for its praise of the new Constitution for reestablishing the core principles of the diplomatic constitution. The letter continued by making this parallel explicit. The Haudenosaunee, they complained, had been “injured” by the cacophony of Anglo-American actors trying “to do Business with us.”¹⁶⁵ “[I]t has always been the Custom with our Forefathers to have one Great Council fire kept Burning,” they observed, “and there to do all public Business which respected the five Nations in General.”¹⁶⁶ This grievance made clear that the Haudenosaunee expected the new Constitution to reestablish the “Custom” of the diplomatic constitution, under which unified Native peoples negotiated with an equally unified United States.

The Cherokee Nation sent Washington a very similar letter the same year. “We rejoice much to hear that the great Congress have got new powers, and have become strong,” the Cherokee representatives wrote to the new federal government in response to federal overtures proclaiming transformed U.S. governance.¹⁶⁷ But they continued on, just as the Haudenosaunee had, to voice a critique that showed how far the United States had earlier fallen short of their expectations: “We now hope that whatever is done hereafter by the great council will no more be destroyed and made small by any State.”¹⁶⁸

These Cherokee and Haudenosaunee statements praising the Constitution’s adoption should be read critically. They appeared within the highly formalized space of official diplomacy, as part of stage-managed negotiations between sovereigns. There, just as federal officials tailored their pronouncements for Native audiences, Native leaders carefully crafted their communiqués for federal consumption. These letters suggest some Natives’ *aspirations* for the federal Constitution but not their genuine thoughts about whether it would actually fulfill their demands.

One remarkable Native-penned source recounts this debate within Indian country, as Native leaders forthrightly argued over the Constitution’s meaning and implications for them. The document is a 1792 narrative written, in English, by the Mohican sachem (leader) Hendrick Aupaumut of a journey to the Glaze in present-day Ohio.

164. Letter from the Five Nations at Buffalo Creek to George Washington (June 2, 1789), in 18 Early American Indian Documents, supra note 108, at 517, 517.

165. Id. at 518.

166. Id.

167. Letter from Representatives of the Cherokee Nation to George Washington (May 19, 1789), in 4 American State Papers: Indian Affairs 56, 57 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832) [hereinafter 4 American State Papers].

168. Id.

Aupaumut was a member of the Muhheakunnuk (Mohican) peoples, descendants of the original inhabitants of the Hudson Valley who had relocated to Haudenosaunee territory in upstate New York.¹⁶⁹ He was a Christian, fluent in English, educated in Anglo-American schools, and intimately familiar with white society; he had even served in the Continental Army during the Revolution.¹⁷⁰ But he also was deeply rooted in the diplomatic norms and practices of Algonquin peoples.¹⁷¹

The federal government turned to Aupaumut as a mediator in the conflict known as the Northwest Indian War—the nation’s first major military conflict under the new Constitution.¹⁷² In the 1780s, Anglo-American rapacity convinced many Shawnees, Lenapes, Wyandots, Anishinaabeg, and other Native peoples of the Ohio Country that the United States would not rest “until they have extirpated us entirely, and have the *whole* of our land!”¹⁷³ This was a plausible interpretation, since many Anglo-Americans of the time routinely spoke in such terms. Against this backdrop, U.S. professions of goodwill—and seeming inability to prevent violence against Native peoples—looked like duplicity. Many of the region’s Native peoples concluded that the only way to prevent extermination was violent resistance.

In 1790, the new federal government sent a military expedition into the territory of the Wabash Confederacy, in present-day Indiana, in what was intended to be a narrowly targeted attack against “renegade Indians” raiding white settlements.¹⁷⁴ But amid the climate of deep distrust and suspicion, this invasion confirmed Native peoples’ worst fears about U.S. intentions. A broad Indigenous confederation mobilized in response, spanning across the Ohio Country and into the Great Lakes. Their military

169. For background on Aupaumut, see generally Brooks, *supra* note 30, at 106–62; Alan Taylor, *Captain Hendrick Aupaumut: The Dilemmas of an Intercultural Broker*, 43 *Ethnohistory* 431 (1996) [hereinafter Taylor, *Dilemmas of an Intercultural Broker*].

170. Taylor, *Dilemmas of an Intercultural Broker*, *supra* note 169, at 436.

171. Brooks, *supra* note 30, at 130–31.

172. For background on the war, see generally Colin G. Calloway, *The Victory With No Name: The Native American Defeat of the First American Army* (2014) [hereinafter Calloway, *Native American Defeat of the First American Army*]; William H. Guthman, *March to Massacre: A History of the First Seven Years of the United States Army, 1784–1791*, at 141–69 (1974); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783–1802* (1975); Jeffrey Ostler, ‘Just and Lawful War’ as Genocidal War in the (United States) Northwest Ordinance and Northwest Territory, 1787–1832, 18 *J. Genocide Resch.* 1, 5–11 (2016).

173. Jeffrey Ostler, “To Extirpate the Indians”: An Indigenous Consciousness of Genocide in the Ohio Valley and Lower Great Lakes, 1750s–1810, 72 *Wm. & Mary Q.* 587, 609 (2015) (internal quotation marks omitted) (quoting John Heckwelder, *A Narrative of the Mission of the United Brethren Among the Delaware and Mohegan Indians* 481 (William Elsey Connelley ed., 1907) (misquotation)).

174. See Calloway, *Native American Defeat of the First American Army*, *supra* note 172, at 63–68; Letter from Henry Knox to Arthur St. Clair (June 7, 1790), *in* 2 *The St. Clair Papers*, *supra* note 111, at 147, 147–48.

resistance doomed the U.S. expedition. Two years later, the confederacy routed a disorganized U.S. Army, which suffered its worst loss at Native hands in U.S. history.¹⁷⁵

Hoping to avoid another spectacular defeat, the federal government sought to resolve the conflict through negotiation. But, when Native leaders killed the two white officers that the United States dispatched to negotiate, the federal government turned to Aupaumut instead. Aupaumut agreed, ultimately making four voyages into the Ohio Country.¹⁷⁶ He recounted one of these journeys in a “short narration,” written in English, intended for federal officials, in which he attempted to translate Algonquin practices for them.¹⁷⁷

Aupaumut, for instance, explained that he undertook the federal mission because of his nation’s long-standing diplomatic role as the “front door” for Algonquin peoples.¹⁷⁸ “It was the business of our fathers to go around the towns of these nations to renew the agreements between them,” he discussed, “and tell them many things which they discover among the white people in the east, &c.”¹⁷⁹ He saw his journey as a continuation of this practice. “When I come to reflect in the path of my ancestors, the friendship and connections they have had with these western tribes,” he wrote, “I conclude that I could acquaint them my best knowledge with regard of the dispositions, desires, and might of the United States, without partiality”¹⁸⁰

Aupaumut’s journey took him to the Glaize, a series of villages along Lake Erie, in summer 1792.¹⁸¹ There, he met the assembled leaders of the multinational western Native confederacy. Aupaumut faced a skeptical audience. As proof of U.S. hostility, the leaders of the Confederacy cited ample evidence of Anglo-Americans’ duplicity and wanton violence against Native peoples.¹⁸² The “principal” complaint of the confederation’s leaders, Aupaumut recorded, was “that the white people are deceitful in their dealings with us the Indians The white people have taken all our lands from us, from time to time, until this time, and that they will continue the same way, &c.”¹⁸³

175. Calloway, *Native American Defeat of the First American Army*, supra note 172, at 115–28.

176. Taylor, *Dilemmas of an Intercultural Broker*, supra note 169, at 432–33.

177. Hendrick Aupaumut, *A Narrative of an Embassy to the Western Indians*, in 2 *Memoirs of the Historical Society of Pennsylvania* 61, 76 (Philadelphia, Carey, Lea & Carey 1827).

178. *Id.* at 111.

179. *Id.* at 77–78.

180. *Id.* at 76.

181. See generally Helen Hornbeck Tanner, *The Glaize in 1792: A Composite Indian Community*, 25 *Ethnohistory* 15 (1978) (providing background on the Glaize).

182. Aupaumut, supra note 177, at 124–26.

183. *Id.* at 126.

Aupaumut attempted to rebut these critiques by conveying to his audience the newly constituted government's insistence that it would remedy a half-century of Native grievances. In particular, he stressed the Federalist view that the United States had created a new, and more favorable, body of law. Native complaints, he observed, were valid, but they were now a thing of the past. The theft of Native lands had "been too much so, because these white people was governed by one Law, the Law of the great King of England; and by that Law they could hold our lands But now they have new Laws their own, and by these Laws Indians cannot be deceived as usual, &c."¹⁸⁴ He continued: "[S]ince [the Americans] have their Liberty—they begin with new things, and now they endeavour to lift us up the Indians from the ground"¹⁸⁵

Even more important than the law's content was the federal government's expanded powers of enforcement under the Constitution. For many years, Aupaumut acknowledged, Native lands had been plagued by the Big knives—a translation of the Lenape term "Mechanschican" that Native residents of the Ohio Country used to describe *all* white settlers and their violent tendencies.¹⁸⁶ These settlers, Aupaumut observed, had been "lawless" exiles who had fled so far "from the United States, that in these several years the Law could not reached them."¹⁸⁷ The United States was not unique in confronting this challenge: Native nations, he noted, "have such people also," pointing to Cherokees present who, Aupaumut claimed, had fled that nation's "strict Laws."¹⁸⁸ But now, Aupaumut stressed, the Big knives could flee no longer: "[T]he people of the United States settle among them, and the Law now binds them"¹⁸⁹

Aupaumut worked especially hard to convince his audience that the new government was trustworthy. The new nation's leaders, he insisted, were different from the "Big knives." "If the great men of the United States [had had] the like principal or disposition as the Big knives had," he argued, "My nation and other Indians in the East would been a long ago annihilated."¹⁹⁰ He then pointed to a specific constitutional provision to justify this trust in the new government:

And further I told them, the United Sachems will not speak wrong. Whatever they promise to Indians they will perform. Because out of 30,000 men, they chuse one men to attend in their

184. *Id.*

185. *Id.* at 127.

186. *Id.* at 128. On the term "Big" or "Long Knives" and its evolution, see John Heckewelder, *An Account of the History, Manners, and Customs of the Indian Nations, Who Once Inhabited Pennsylvania and the Neighboring States* 143 (Philadelphia, Abraham Small 1819); Richter, *Struggle for Eastern North America*, *supra* note 67, at 202–03.

187. Aupaumut, *supra* note 177, at 128.

188. *Id.*

189. *Id.*

190. *Id.* at 127.

great Council Fire—and such men must be very honest and wise, and they will do Justice to all people &c.¹⁹¹

Aupaumut's argument on behalf of the new federal government was striking in how closely it paralleled the arguments that many Federalists had marshaled within the *state* ratification debates. Like many Federalists, Aupaumut invoked the idea that filtration would ensure better governance, even citing the same provision for electing representatives discussed by Madison in *The Federalist Papers*.¹⁹² Aupaumut's account of the new and expanded reach of law to control the lawless frontiers also closely echoed the aspirations of many of the Constitution's advocates.

And yet Aupaumut's audience found good reasons to doubt his account. They suspected—accurately, as we have seen—that federal officials offered a different story to their own citizens than the one they sold Native leaders. “[T]he great men of the U.S. . . . speak good words to the Muhheconnuk [Mohicans],” they pointed out, “but . . . they speak contrary to the Big knives, that the Big knives may prepare for war and fall upon the Indians unawares”¹⁹³ Nor could they readily credit Aupaumut's claim that independence represented a meaningful departure from prior practice. The white settlers, they pointed out, “have take away our lands since they have their own way [i.e., since independence].”¹⁹⁴ Several Natives reported meeting George Washington, seeing his “heart and bowels,” and hearing him maintain firsthand the United States' claim to their lands.¹⁹⁵

But above all, much of Aupaumut's audience questioned whether the new government actually possessed the power it claimed for itself. “[T]he United States could not govern the hostile Big knives,” they urged, “and . . . the Big knives, will always have war with the Indians.”¹⁹⁶ Perhaps, they continued, “[i]f the United States could govern them, then the peace could stand sure. But the Big knives are independent, and if we have peace with them, they would make slaves of us.”¹⁹⁷ They accordingly asked Aupaumut to relay a message. If the United States earnestly desired peace, “manifest your power in withdrawing the Big knives from the forts which stands on our land,” Big Cat, a Lenape leader, conveyed.¹⁹⁸ “Then we can assure the back nations that you have a power to govern the hostile Big knives, and that you mean to have peace Then the war party will be speechless.”¹⁹⁹

191. *Id.*

192. *The Federalist* No. 58, at 290 (James Madison) (Lawrence Goldman ed., 2008).

193. Aupaumut, *supra* note 177, at 124.

194. *Id.* at 126.

195. *Id.* at 113.

196. *Id.* at 127.

197. *Id.* at 127–28.

198. *Id.* at 125.

199. *Id.*

Aupaumut's account revealed that Native debates over the Constitution's implications paralleled many aspects of the state ratification debates. The state ratification debates had been wide-ranging, but they had centered on whether the new federal government represented a radical departure from what had come before—and whether U.S. citizens could credit the promises of its would-be leaders. Native peoples sought to assess these same questions but from a different perspective. The great fear of the Constitution's Anti-Federalist opponents was consolidation: that the new federal government would be *too* powerful and overwhelm the autonomy of the states.²⁰⁰ Native skeptics had the opposite anxiety. They worried that the new federal government would not be strong or committed *enough* to fulfill the promises that it made to them.

Aupaumut's narrative is exceptional in several ways. Native-authored texts from the Early Republic are very rare; almost all the accounts of debates within Native nations were from European observers. Even Aupaumut's account was drafted for, and likely shaped by, an anticipated audience of federal officials. Yet the skepticism about the federal government that Aupaumut encountered at the Glaize, though unusually blunt and detailed, echoes similar statements from Native leaders littering the historical record.

Such skepticism was, after all, deeply rooted in Native experiences. Indeed, at points, Aupaumut himself seemed to share it. Despite his self-presentation as a staunch Federalist (perhaps in a conscious effort to demonstrate his loyalty to his anticipated audience) doubt crept into his account:

In all my arguments with these Indians, I have as it were [been] oblige[d] to say nothing with regard of the conduct of the [New] Yorkers, how they cheat my fathers, how they taken our lands Unjustly, and how my fathers were groaning as it were to their graves, in loseing their lands for nothing, although they were faithful friends to the Whites; and how the white people artfully got their Deeds confirm in their Laws, &c. I say had I mention these things to the Indians, it would agravate their prejudices against all white people, &c.²⁰¹

Aupaumut's fascinating and telling aside underscores both the stakes and challenges of Native ratification. Though ratification had important consequences for U.S. citizens, the Constitution's immediate context for

200. See, e.g., Holton, *supra* note 12, at 255–71 (“The new national government was, by design, considerably less responsive to the public will than its state-level counterparts.”); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *Stan. L. Rev.* 1031, 1049 (1997) (“[T]he most succinct summative formula would rank the danger of *consolidation* as the chief evil that Anti-Federalists ascribed to the Constitution. The fundamental, overarching danger that its adoption would pose was to the survival of the states as independent, autonomous jurisdictions.”).

201. Aupaumut, *supra* note 177, at 128.

Native peoples was the literal life or death issue of whether the new federal government could, or would, resist many of its citizens' demands for Native extirpation. As Aupaumut's quote demonstrates, most Native peoples had little reason for optimism: On the contrary, their prior experiences had given them scarce basis to trust Anglo-American law. In these debates, then, Aupaumut and other advocates for the new federal government were asking their fellow Natives—and Aupaumut himself, as his doubts demonstrate—to take a considerable leap of faith.

2. *Native Nations Decide.* — Native nations never had a formal process to determine their views on the Constitution. Indeed, by the time Native leaders debated the document's merits, the Constitution had already been officially ratified, and the new federal government was already operating. And yet, as federal officials' diplomatic appeals and correspondence amply demonstrate, the new nation still desperately needed Native support. U.S. authority in the borderlands remained highly uncertain, the nation's British and Spanish neighbors rejected its boundaries and sought to ally with Native nations supposedly within U.S. borders, and the new government was ill-equipped for war.²⁰² In this sense, then, the United States still very much wanted Native nations to ratify the new federal government, albeit in ways other than a formal election.

And Native nations *did* decide whether to endorse the new government. These actions, of course, took place in a different political and legal context than the state-level ratification debates: Native nations decided, in this sense, through diplomacy and formal negotiation rather than ratification conventions. But their decisions still had high stakes for both Native peoples and the United States.

Treaties were one tangible sign of Native approbation. In 1790, the Muscogee leader McGillivray, having long resisted negotiations with the federal government, finally met with federal officials in the capital of New York. During his journey, observers recorded that McGillivray

spoke freely of the contemptableness of the State of Georgia and in exalted terms of the federal Government, expressed a great desire to form a lasting treaty with the latter which he declared to be the Object of his Visit to Congress but said as a Condition that the Lands the Georgians had taken from him must be restored.²⁰³

And in the end, McGillivray got what he wanted. The resulting Treaty of New York became the first treaty ratified under the new Constitution.²⁰⁴

202. See François Furstenberg, *The Significance of the Trans-Appalachian Frontier in Atlantic History*, 113 *Am. Hist. Rev.* 647, 659–68 (2008) (describing the challenges that faced the early United States in asserting control over the Trans-Appalachian West).

203. Letter from William Blount to John Steele (July 10, 1790), in 1 *The Papers of John Steele* 67, 69 (H.M. Wagstaff ed., 1924).

204. Treaty of Peace and Friendship, Creek Nation-U.S., Aug. 7, 1790, 7 Stat. 35.

It invalidated Georgia's purported earlier treaties with the Muscogee Nation and guaranteed the Nation's borders and land title.²⁰⁵

The pomp surrounding the treaty's signing was a dramatic public affirmation of *both* the U.S. and diplomatic constitutions. McGillivray, wearing a blue and red uniform, and the other Muscogee leaders gathered in Federal Hall together with President Washington, clothed in purple robes, along with an extensive federal entourage.²⁰⁶ After the treaty was read aloud, Washington delivered a speech translated to assembled Muscogee leaders, who reportedly "gave an audible assent."²⁰⁷ The President then signed the treaty and also presented McGillivray a string of wampum "as a token of perpetual peace" and tobacco "to smoke in remembrance of it."²⁰⁸ In response, McGillivray delivered his own short speech and shook Washington's hand, followed by each Muscogee leader, who performed the "shake of peace" in which they took Washington "by the elbow, entwined their arms with his, and ardently expressed their satisfaction."²⁰⁹ The signing concluded after the Muscogees performed a song of peace.²¹⁰ This elaborate event at once brought the rituals of the diplomatic constitution to the heart of the federal capital while also underscoring the solemnity and authority of the new national government. It was, in its own way, as spectacular an endorsement of the new constitutional order as the grand processions celebrating ratification that had happened in New York only two years earlier.

Alliance was another sign of Native approbation. The Chickasaw Nation in present-day western Tennessee had long been divided between pro- and anti-Spanish factions as part of an effort to maintain a balance between competing European empires.²¹¹ But in the wake of the Constitution's adoption, the Chickasaw war leader Piominko gained increasing authority and pushed the Chickasaw Nation to ally ever more closely with the United States.²¹² He saw strategic advantage in this alliance—the Chickasaws, a comparatively small nation, hoped for U.S. aid and support in their frequent conflicts with neighboring Muscogees and Cherokees.²¹³ By 1795, Piominko was proclaiming that the Chickasaws "are

205. *Id.* arts. IV, V.

206. Article IX: Mrs. Judith Murray, 19 *Universalist Q. & Gen. Rev.* (n.s.) 140, 150–51 (1882).

207. New-York, August 14, *Gazette of the United States* (N.Y.), Aug. 14, 1790, at 559.

208. *Id.*

209. *Id.*; see also Article IX: Mrs. Judith Murray, *supra* note 206, at 150–51.

210. Article IX: Mrs. Judith Murray, *supra* note 206, at 150–51.

211. See generally James R. Atkinson, *Splendid Land, Splendid People: The Chickasaw Indians to Removal* (2004) (providing an overview of Chickasaw history in this period).

212. Thomas W. Cowger & Mitch Caver, *Piominko: Chickasaw Leader* 39–44 (2017) (discussing Piominko's strategic moves to ally with the United States).

213. Ablavsky, *Federal Ground*, *supra* note 107, at 161–63.

now people of the United States”—an uncanny echo of the Constitution’s preamble.²¹⁴

Piominko’s gamble on federal authority brought benefits to both him and his nation. Over the course of the 1790s, the United States poured goods, arms, and food into the Chickasaw Nation; white volunteers from Nashville even came to aid Piominko in defending the Nation against Muscogee attacks.²¹⁵ Piominko had such confidence in the United States that he and a number of other Chickasaws and Choctaws joined the U.S. Army in the campaigns of the Northwest Indian War—the first, although hardly last, Native allies to aid the U.S. military in wars against other Native peoples.²¹⁶

Yet many other Native leaders and communities remained skeptical of the promises of the new United States. Some voted with their feet. Because Britain and Spain retained territory immediately neighboring the new United States, many Native peoples opted to move out of U.S. territory. Many Haudenosaunee left their traditional homelands in upstate New York to resettle in British Canada.²¹⁷ Thousands of them moved to Grand River, Ontario, within a community established by Brant, who remained deeply skeptical of the United States and the future that it offered his people.²¹⁸ Similar efforts occurred in the Native South, where Native leaders—including, at points, McGillivray—sought to keep their nations outside U.S. control by exploiting postwar border disputes between Spain and the United States. These leaders regarded the assurances of the United States as transparently false and self-interested. “We recognized in these [promises] the cunning of the rattlesnake that caresses the squirrel in order to devour it,” as Ugalayacabe, a Chickasaw leader—and rival to Piominko—put it.²¹⁹ “[T]he Americans . . . have no other desire than to drive us out and take all our land as if they were God[.]”²²⁰

Yet hopes in British and Spanish alliances as a possible alternative to the United States proved illusory. In 1795, the Spanish conceded U.S. jurisdiction over much of the South, which led Ugalayacabe to lament that his nation had been “abandon[ed] . . . like small animals to the claws of tigers and the jaws of wolves.”²²¹ And so many Native communities turned

214. Letter from James Robertson to William Blount (Jan. 13, 1795), *in* 4 *American State Papers*, supra note 167, at 556, 556–57.

215. Ablavsky, *Federal Ground*, supra note 107, at 161–64.

216. Atkinson, supra note 211, at 148–50, 161.

217. See Taylor, *Divided Ground*, supra note 66, at 118–33 (describing settlement throughout British Canada).

218. See Isabel Thompson Kelsay, *Joseph Brant, 1743–1807: Man of Two Worlds* 369–70 (1984) (“All in all, 1,843 Indians had settled on the Grand River . . .”).

219. Charles A. Weeks, *Of Rattlesnakes, Wolves, and Tigers: A Harangue at the Chickasaw Bluffs, 1796*, 67 *Wm. & Mary Q.* 487, 511 (2010).

220. *Id.* at 512.

221. *Id.*

to the most forceful and forthright rejection of the federal government: violence.

Force might seem the antithesis of legal discourse.²²² But violence had long played a key role in Indigenous law²²³—as it did for Anglo-Americans, who had, after all, just fought a war styled an “appeal to heaven” to settle a constitutional debate.²²⁴ Moreover, in the Early Republic, popular action and even mob violence were thought of as quasi-legitimate ways to defend legal rights.²²⁵ As scholars of popular constitutionalism have suggested, the armed resistance against federal authority endemic to the 1790s—events like the Whiskey Rebellion and Fries’s Rebellion—were themselves part of a continued Anti-Federalist populist tradition.²²⁶

Viewed in this light, Natives’ armed resistance was a legal argument of its own, a rejection of the blandishments of the United States and its pretensions to rule. Nowhere was this clearer than in the Northwest Indian War, which actually consisted of intermittent and brief military campaigns with lengthy periods of intense diplomatic negotiation in between.²²⁷

The year after Aupaumut’s seemingly fruitless journey, President Washington dispatched a new delegation, this time of specially appointed federal officials.²²⁸ These negotiators went as far as they believed they legally could in acceding to Native demands and affirming a new relationship between Native nations and the United States.²²⁹ They offered a series of “concessions” to the representatives of the Northwest Confederacy: an

222. For a thoughtful exploration of this jurisprudential dilemma, see Cynthia Nicoletti, *The American Civil War as a Trial by Battle*, 28 *Law & Hist. Rev.* 71, 77–81 (2010).

223. See Reid, *A Law of Blood*, *supra* note 57, at 73–93, 173–84 (describing the law of homicide and war customs in Cherokee law).

224. See Patrick Griffin, *America’s Revolution* 96 (2012) (noting the emergence of the idea of an “appeal to heaven” from the failure of sovereignty to resolve disputes); see also Farah Peterson, *Our Constitutionalism of Force*, 122 *Colum. L. Rev.* 1539, 1542 (2022) (“The appeal to arms as a way of validating legal arguments is worked deeply into our intellectual history and culture.”).

225. On the role of mobs and law in the Early Republic, see generally Paul A. Gilje, *Rioting in America* (1996); Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 *Wm. & Mary Q.* 3, 4 (1970).

226. See Cornell, *Mobs, Militias, and Magistrates*, *supra* note 162, at 894–902 (discussing the Whiskey Rebels’ beliefs “that the people might spontaneously assemble in arms to defend liberty”).

227. On the Northwest Indian War, see *supra* notes 172–180 and accompanying text.

228. Calloway, *Native American Defeat of the First American Army*, *supra* note 172, at 146–48.

229. The Washington Cabinet debated whether they thought the federal government could constitutionally restore Native land it had earlier purchased: Jefferson argued this exceeded federal authority while Hamilton insisted that the federal treaty power was “plenipotentiary.” Thomas Jefferson, *Notes on Cabinet Opinions* (Feb. 26, 1793), in 25 *Papers of Thomas Jefferson: Main Series* 271, 271–74 (James P. McClure & J. Jefferson Looney eds., digital ed. 2008). Ultimately, the federal officials did not offer back land that had already been settled. *Cabinet Opinion on a Proposed Treaty at Lower Sandusky* (Feb. 25, 1793), in 12 *Papers of George Washington*, *supra* note 159, at 215, 215–17.

enormous payment and constant supplies of goods for previously sold lands, a firm renunciation of the earlier right of conquest, and an explicit and unequivocal recognition of Native ownership.²³⁰

It was not enough. The assembled Native nations reiterated that the earlier treaties had violated the diplomatic constitution by occurring without general Native consent.²³¹ They proposed that the United States use the promised vast payments—as well as the “great sums you must expend in raising and paying armies, with a view to force us to yield you our country”—to compensate its own citizens to vacate Native lands.²³² They continued:

You have talked to us about concessions. It appears strange that you should expect any from us, who have only been defending our just rights against your invasions. We want peace. Restore to us our country, and we shall be enemies no longer.

Brothers: You make one concession to us by offering us your money; and another by having agreed to do us justice, after having long, and injuriously, withheld it—we mean in the acknowledgment you have now made, that the King of England never did, nor ever had a right to give you our country, by the treaty of peace. And you want to make this act of common justice a great part of your concessions: and seem to expect that, because you have at last acknowledged our independence, we should, for such a favor, surrender to you our country.²³³

This response was a sharp challenge to the fundamental assumption that underlay so many federal leaders’ views about the new constitutional order. They regarded the federal government’s return to some of the principles of the diplomatic constitution under the new Constitution as an act of great magnanimity for which Native peoples should show gratitude to the United States.²³⁴ Native peoples did not share this view. In their view, the diplomatic constitution was the law that governed relations among sovereigns. Returning to that law was no favor; it was, simply, an adherence to what the law already required.

230. Speech of the Commissioners of the United States to the Deputies of the Confederated Indian Nations at the Rapids of the Miami River (July 31, 1793), *in* 4 *American State Papers*, *supra* note 167, at 352, 352–54.

231. Reply of the Indian Council to the Commissioners of the United States (Aug. 16, 1793), *in* 4 *American State Papers*, *supra* note 167, at 356, 356–57 [hereinafter *Reply of the Indian Council*].

232. *Id.* at 356.

233. *Id.*

234. See *supra* notes 152–159 and accompanying text.

C. *The Outcome of the Native Ratification Debates*

In the end, the United Indian Nations opted to reject what the United States was offering them, and the war continued.²³⁵ Ultimately, this course is what a majority of Native peoples and nations implicitly chose in the 1790s. Close U.S. allies like Piominko and the (divided) Chickasaws were rare;²³⁶ most of the Native peoples of the Ohio Country and beyond, stretching up into the Great Lakes, opted to join the Northwest Confederacy resisting U.S. expansion.²³⁷ Even many in McGillivray's Muscogee Nation rejected the Treaty of New York and continued to raid Anglo-American settlements, as did many among the neighboring Cherokee Nation.²³⁸ Throughout much of the 1790s, the United States confronted either open warfare or low-level violence from most of the Native peoples enfolded within the new nation.²³⁹ Even Aupaumut turned out to have his doubts: He returned from his journeys reportedly more skeptical of "white people" and what they promised.²⁴⁰

What exactly were these Native peoples rejecting—the new Constitution specifically or the United States more generally? In some sense, this is an impossible question to answer, since Native peoples conflated the Constitution with the existence of the United States itself. But this conflation was plausible for Native peoples, since, for them, the relevant constitutional question was less the precise form of government than the fundamental issue of sovereignty itself. Yet the abstract idea of sovereignty could not be separated from the Constitution, which, as the preamble demonstrated, purported to be both the foundation and the instantiation of U.S. sovereignty. In this sense, the inextricable entanglement between the Constitution, federal power, and U.S. sovereignty in the minds of most Native peoples was not only understandable but accurate.

In a more specific sense, Native peoples were rejecting what their federal interlocutors repeatedly promised them: that the new federal government, strengthened by the Constitution, would restore the diplomatic constitution and do justice for Native peoples.²⁴¹ Yet Native peoples saw—often more clearly than the Federalists themselves—how federal power would operate in the new nation. Aupaumut's critics were right: Washington and other federal leaders *did* routinely engage in

235. See Reply of the Indian Council, *supra* note 231, at 357.

236. See *supra* notes 211–216 and accompanying text.

237. See Calloway, *Native American Defeat of the First American Army*, *supra* note 172, at 96–102 (describing the tribes that participated in the Northwest Confederacy).

238. See Ablavsky, *Federal Ground*, *supra* note 107, at 161 (describing raids in the Native South that targeted both Anglo-American and Native towns).

239. *Id.* at 109.

240. Taylor, *Dilemmas of an Intercultural Broker*, *supra* note 169, at 447–48 (“Aupaumut’s trip westward . . . had weakened his ability to mask his profound ambivalence about the American advance.”).

241. See *supra* notes 152–159 and accompanying text.

doublespeak, playing a complicated political game in which they told only half-truths to Natives and U.S. citizens alike to assuage both.²⁴² Moreover, Native skeptics had accurately forecast how little control the federal government would enjoy over the Big knives. These restive settlers routinely skirted, defied, and violated federal law²⁴³—right up until the time they needed federal aid, at which point their politicians and representatives effectively exploited their political clout to sway national policy in their direction.²⁴⁴

Yet this Native rejection had no formal legal consequence—the clearest divide between the state and Native ratification debates. Ultimately, the United Indian Nations lost the Northwest Indian War after an expanded federal army under Anthony Wayne won an equivocal victory over Native forces at the Battle of Fallen Timbers.²⁴⁵ Even more significantly, the United States won a diplomatic victory by coercing the British government to abandon its erstwhile Native allies.²⁴⁶ Thus abandoned, the Native confederacy, seeing no viable path forward, reluctantly signed the Treaty of Greenville, which not only failed to restore any Native land but forced the Native signatories into ceding the United States much of present-day Ohio.²⁴⁷

The negotiations over the Treaty of Greenville were a striking moment. Outwardly, they adhered to the forms of the diplomatic constitution, including presentations of wampum, the use of Native diplomatic rituals, and the dominance of the familiar metaphorical rhetoric.²⁴⁸ And the treaty purported to be a consensual exchange of Native land in return for federal payment. Yet all involved knew that it was force that had compelled the agreement.²⁴⁹ Native leaders had reportedly

242. See *supra* notes 152–159 and accompanying text.

243. See, e.g., Ablavsky, *Federal Ground*, *supra* note 107, at 128–32 (describing how federal officials largely failed to punish crimes against Native peoples under federal law).

244. See *infra* notes 257–258 and accompanying text.

245. See Calloway, *Native American Defeat of the First American Army*, *supra* note 172, at 150–51 (describing how the Native forces, despite their ability to fight again, largely gave up after the British refused to assist them).

246. *Id.* at 152.

247. *Treaty of Peace, Tribes-U.S.*, Aug. 3, 1795, 7 Stat. 49; see Calloway, *Native American Defeat of the First American Army*, *supra* note 172, at 151 (referring to the agreement as the Treaty of Greenville).

248. Minutes of a Treaty with the Tribes of Indians Called the Wyandots, Delawares, Shawanese, Ottawas, Chippewas, Pattawatamies, Miamies, Eel River, Kickapoos, Piankeshaws, and Kaskaskias, Begun at Greenville (June 16, 1795), *in* 4 *American State Papers*, *supra* note 167, at 564, 564–83; see also Andrew R.L. Cayton, “Noble Actors” Upon “the Theatre of Honour”: Power and Civility in the Treaty of Greenville, *in* *Contact Points: American Frontiers From the Mohawk Valley to the Mississippi, 1750–1830*, at 235, 235–69 (Andrew R.L. Cayton & Fredrika J. Teute eds., 1998).

249. Cayton, *supra* note 248, at 238 (noting that “little serious negotiation took place at Greenville” and that because Little Turtle “could protest, but not refuse, Wayne’s demands,” Wayne “got exactly what he wanted when the treaty was signed”).

critiqued such negotiations years earlier: “[H]ow can a treaty of this kind be binding on men thus forced to agree to what is dictated to them in a strong prison and at the cannon’s mouth . . . ?”²⁵⁰

The “People of the United States,” through the states, were given the option whether to choose the Constitution. Native nations, too, were urged to embrace the new federal government. But their choice was ultimately illusory. As the Northwest Indian War demonstrated, Native peoples who clearly and consciously rejected the United States and its promises, even to the point of armed resistance, would be subjected to the new Constitution anyway.

III. NATIVE DEPORTATION AND THE RENEWED RATIFICATION DEBATES

Just as for Anglo-Americans, Native debates over the Constitution did not end in the 1790s. Like their neighbors, Native peoples, too, experienced a “long Founding moment”—a sustained period when the basic structures and meaning of the U.S. Constitution remained unsettled and contested.²⁵¹ Throughout the early decades of the nineteenth century, Native peoples continually contended with the scope of federal and state power,²⁵² articulated a right to remain in their homelands,²⁵³ and challenged the assumption that they were subject to U.S. sovereignty.²⁵⁴ These issues became especially pressing during the constitutional crisis surrounding the proposed mass deportation of Native peoples from their homelands east of the Mississippi that Anglo-Americans euphemized as Indian Removal.

Removal is the rare moment when Native nations appear within conventional narratives of U.S. constitutional history. Scholars and judges have explored Removal as a constitutional crisis that posed pressing

250. Heckewelder, *supra* note 186, at 186.

251. See Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 *Stan. L. Rev.* 397, 403 (2015) (internal quotation marks omitted).

252. See, e.g., Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790–1880*, at 19–38 (2007) (describing challenges to New York’s exercise of jurisdiction over Native peoples); Saler, *supra* note 70, at 1 (describing the book’s project as studying Native peoples’ interactions with the federal and territorial governments in the portion of the Old Northwest Territory that would become Wisconsin).

253. See Samantha Seeley, *Race, Removal, and the Right to Remain: Migration and the Making of the United States* 103–36, 286–96 (2021).

254. This resistance to U.S. control in the early nineteenth century is most clearly illustrated by the pan-Indian movement formed by the Shawnee leader Tecumseh and his brother Tenskwatawa and its alliance with the British during the War of 1812. See White, *supra* note 38, at 510–17. For studies of this movement, see generally Gregory Evans Dowd, *A Spirited Resistance: The North American Indian Struggle for Unity, 1745–1815* (1992); Adam Jortner, *The Gods of Prophetstown: The Battle of Tippecanoe and the Holy War for the American Frontier* (2012).

questions of federalism, judicial review, and separation of powers.²⁵⁵ Yet these accounts almost invariably present Native nations as the *subjects* of Anglo-American constitutional debates.

A different perspective emerges if we view Removal from the perspectives of the Native peoples—especially the Chickasaw, Cherokee, Muscogee, and Choctaw Nations, who confronted deportation from their homelands in the Native South. As discussed above, these were the nations that had “voted” most enthusiastically to embrace the new Constitution. Many of them had credited Federalist promises that the Constitution would restore the core principles of the diplomatic constitution and make space for Native autonomy. Under the auspices of expanded federal power, they had signed numerous treaties with the United States, accepted its civilization programs, and fought alongside it during the War of 1812.²⁵⁶

Centering the voices of these nations’ leaders crafts a different portrait of Removal. Like their white neighbors, Native leaders argued over the constitutional authority of the U.S. Supreme Court and the precise balance of power between the state and federal governments. But these debates occurred in the shadow of a much larger, existential issue: whether, as Native leaders repeatedly insisted, the Constitution enshrined the diplomatic constitution by protecting Native peoples’ right to remain as sovereigns within their ancestral homelands.

In the 1790s, as we have seen, Federalists sought to secure Native support by selling them this interpretation of the Constitution. But by the 1820s and 1830s, ever more Anglo-Americans rejected this constitutional reading. In their view—championed by President Andrew Jackson and many southern states—the Constitution itself presented Native nations with an ultimatum. Native peoples could choose to remain in their homelands, but they would have to forfeit any claim to sovereignty or separateness. They would be fully subject both to the U.S. Constitution *and* to the constitution and laws of the states that purported to govern them.

255. See, e.g., Amar, *The Words that Made Us*, supra note 21, at 634–40 (studying Removal with a focus on the interaction between the executive and judicial branches of the federal government); Leonard & Cornell, supra note 13, at 200–07 (exploring Removal as a conflict in which the Marshall Court and Andrew Jackson’s Democratic Party fought over constitutional meaning); Jill Lepore, *These Truths: A History of the United States* 215–16 (2018) (arguing that Removal was a Jacksonian policy made possible by Jackson ignoring Supreme Court decisions); Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 87 *Ga. Hist. Q.* 408, 425–26 (2003) (arguing that the Cherokee cases ultimately strengthened the power of the Supreme Court); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 *Stan. L. Rev.* 500, 501, 530–31 (1969) (using the Cherokee cases as a study of the motivations of the Marshall Court).

256. For overviews of these nations’ histories in the Early Republic, see generally Atkinson, supra note 211; James Taylor Carson, *Searching for the Bright Path: The Mississippi Choctaws From Prehistory to Removal* (1999); Michael D. Green, *The Politics of Indian Removal: Creek Government and Society in Crisis* (1982); William G. McLoughlin, *Cherokee Renaissance in the New Republic* (1986).

As Jackson put it, “Submitting to the laws of the States, and receiving, like other citizens, protection in their persons and property, they will, ere long, become merged in the mass of our population.”²⁵⁷ Alternatively, Native peoples could opt to maintain their sovereign independence—but only by leaving their homelands within the states and removing beyond the Mississippi. Only there could Native nations “be secured in the enjoyment of governments of their own choice.”²⁵⁸

An intense battle ensued over whose interpretation of the Constitution—Natives’ or their Jacksonian opponents’—was correct. Especially among elite Cherokee leaders, Native peoples proved active and effective participants in early American print culture, deploying petitions, letters, and newspapers to advance their cause and marshal white allies. They then made their case through the channels that the Constitution had created: They appealed to the executive branch, submitted memorials to Congress, and pursued litigation in the Supreme Court. Throughout, they defended the core principles of the diplomatic constitution: centralized authority over Indian affairs as against state sovereignty, the supremacy of treaties, and Native nations’ autonomy and equality within the United States.

In the short term, these nations succeeded. To an extent prior scholarship has not recognized, *Worcester v. Georgia* endorsed Native readings of the U.S. Constitution, as the Court affirmed tribal sovereignty and the supremacy of treaties and federal law.²⁵⁹ But in the larger struggle, these nations failed. The ultimate outcome of the Removal debates was the narrow passage of the Indian Removal Act, the forcible deportation of dozens of Native nations, the loss of thousands of Native lives at the hands of incompetent and brutal federal administrators, and the destruction of Native sovereignty throughout most of their ancestral homelands.²⁶⁰

The debates over Removal were about many constitutional questions: the authority of treaties, the structure of federalism, the powers of the federal branches, and the recognition of tribal sovereignty. But, although rarely presented so squarely, this interpretive struggle was, at its core, a renewal of the earlier ratification debates: Had Natives been right to trust the promises of the United States about what the Constitution meant for

257. Andrew Jackson, Message From the President of the United States, S. Doc. No. 21-1, at 17 (1st Sess. 1829).

258. *Id.* at 16.

259. 31 U.S. (6 Pet.) 515, 595 (1832) (noting that treaties and laws between the United States and the Cherokee Nation were the “supreme laws of the land” and “guarantied to [the Cherokee Nation] their rights of occupancy, of self-government, and the full enjoyment of those blessings which might be attained in their humble condition”).

260. For a comprehensive history of Indian Removal, see Claudio Saunt, *Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory*, at xv-xix (2020) [hereinafter Saunt, *Unworthy Republic*] (studying the “state-administered mass expulsion of indigenous peoples” in the 1830s).

them? And would their interpretation of the Constitution, grounded in those promises, prevail? The ultimate outcome vindicated many Natives' earlier skepticism that the federal government could not control, and would ultimately endorse, the Big knives. It proved to many Natives that the Constitution was not meant for Native peoples. And it made inescapably clear that the federal government would utilize its constitutional power to subjugate, not protect, Indigenous land and peoples.

A. *Winning the Interpretive Battle*

In the wake of the ratification of the U.S. Constitution, appeals to the document became the basis and defining feature of Anglo-American political discourse.²⁶¹ Native nations likewise turned to constitutional argumentation to defend rights to autonomy and land that they had consistently articulated since the colonial period. By the 1820s, some Native nations even emulated the U.S. Constitution by crafting their own written constitutions.²⁶²

Such assertions of sovereignty transformed Removal from a policy debate into a constitutional crisis. Alongside invocations of their treaties with the United States, Native nations spoke the language of U.S. constitutionalism to resist states' assaults. The southern nations marshaled arguments concerning federalism, the supremacy of federal law and treaties, and judicial review against state oppression and federal acquiescence in it. And the Cherokee Nation pursued a multi-pronged legal campaign, eventually receiving support for their constitutional arguments in the Supreme Court case of *Worcester v. Georgia*. As the Removal debates reveal, Native peoples proved themselves to be adept, and victorious, advocates for the recognition of tribal sovereignty within U.S. constitutional law.

1. *Constitutional Claims for Tribal Sovereignty*. — The Removal debates began with a robust defense of tribal sovereignty. In 1826 and 1827 respectively, the Choctaw and Cherokee Nations formalized their governments through the first two written tribal constitutions.²⁶³ Neither constitution explicitly mentioned the U.S. Constitution, but its influence was clear. This was especially true for the Cherokees, who began their constitution with a preamble that closely replicated the corresponding

261. See, e.g., Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* 205 (2018) (describing the immense role constitutional arguments played in congressional debates during the 1780s and 1790s).

262. See *infra* note 263 and accompanying text.

263. Constitution of the Cherokee Nation, W. Carolina Univ. (1827), <https://www.wcu.edu/library/DigitalCollections/CherokeePhoenix/Vol1/no01/constitution-of-the-chokeee-nation-page-1-column-2a-page-2-column-3a.html> [https://perma.cc/BE5E-2DNF]; see also Peter Perkins Pitchlynn, *A Gathering of Statesmen: Records of the Choctaw Council Meetings, 1826–1828*, at 45 (Marcia Haag & Henry Willis trans. & eds., 2013) (“[W]e are the three districts of the Choctaw nation, and gathered in session to conference: What value can we provide for our nation? This shall be our concern.”).

language of the U.S. Constitution.²⁶⁴ Both constitutions also unambiguously asserted that the Cherokee and Choctaw Nations would remain sovereign states in their homelands. “The land where we reside belongs to all who are called Choctaw people,” the Choctaw constitution declared, requiring that all three of the Nation’s districts had to agree on any land cession.²⁶⁵ The Cherokee constitution’s first article defined the nation’s territory as “the lands solemnly guarantied and reserved forever to the Cherokee Nation by the Treaties concluded with the United States” and prohibited any sale of any territory.²⁶⁶ “The boundaries of this Nation,” the constitution proclaimed, “shall forever hereafter remain unalterably the same.”²⁶⁷

Such pronouncements of permanence from nations that white Americans expected to vanish produced a “clamour” in the South.²⁶⁸ Ignoring the long-standing existence of Native governments, southern states’ officials claimed that the act of tribal constitutionmaking unconstitutionally established new governments within state borders.²⁶⁹ State legislatures insisted that they possessed the sole right to exercise jurisdiction over all the lands and peoples within their borders:²⁷⁰ Alabama, Georgia, Mississippi, and Tennessee all enacted state law extension acts, which applied state law to Native peoples and land within the state.²⁷¹ These acts outlawed tribal governments, stripped Native

264. The preamble of the 1827 Cherokee Constitution reads:

WE THE REPRESENTATIVES of the people of the CHEROKEE NATION in Convention assembled, in order to establish justice, ensure tranquility, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with humility and gratitude the goodness of the sovereign Ruler of the Universe, in offering as an opportunity so favorable to the design, and imploring his aid and direction in its accomplishment, do ordain and establish this Constitution for the Government of the Cherokee Nation.

Cherokee Const. pmbl. (1827).

265. Pitchlynn, *supra* note 263, at 50–51.

266. Cherokee Const. art. I, § 1 (1827).

267. *Id.*

268. Letter from William Hicks & John Ross to Hugh Montgomery (Apr. 16, 1828), *in* 1 *The Papers of Chief John Ross* 162, 162 (Gary E. Moulton ed., digital ed. 1985) [hereinafter 1 *Ross Papers*].

269. See, e.g., H.R. Journal, 12th Sess., at 93 (Ala. 1831) (describing the existence of the state government and the Cherokee government within the boundaries of Alabama as “a state of things that never has or can exist”).

270. See, e.g., H.R. Journal, 10th Sess., at 220 (Ala. 1829) (“Upon general principles, [the committee] hold[s] it unquestionable, that all sovereign states have a right of jurisdiction over their entire charged limits and that this right does not depend on the class of subjects upon which it operated.”).

271. See Act of Jan. 16, 1832, 1832 Ala. Laws 7–8; Act of Dec. 22, 1830, 1830 Ga. Laws 114–17; Act of Dec. 19, 1829, 1829 Ga. Laws 98–101; Act of Dec. 20, 1828, 1828 Ga. Laws 88–89; Act of Jan. 19, 1830, ch. 1, 1830 Miss. Laws 5–6; Act of Feb. 4, 1829, ch. 77, 1829 Miss. Laws 81–83; Act of Nov. 8, 1833, 1833 Tenn. Pub. Acts 10–12.

people and land of legal protections, and subjected Native people to a second-tier status that denied them the right to give testimony in courts.²⁷²

The federal executive backed the states. Invoking Article IV of the Constitution, President Andrew Jackson stated that he could not allow the creation of tribal governments within state borders.²⁷³ Because, in Jackson's view, Native governments were unconstitutional, Native peoples had to "submit to the laws of those States."²⁷⁴

The southern Native nations met these constitutional claims with constitutional arguments of their own. Their governments were not unconstitutional; on the contrary, it was states' actions that were "in defiance of the laws of the United States, and the most solemn treaties existing."²⁷⁵ They made several constitutional arguments to support this conclusion. First, Native leaders reminded American officials that their nations were independent of the United States. Interim Cherokee Chiefs William Hicks and John Ross reminded President John Quincy Adams that the Cherokee Nation was subordinate to neither the state *nor* the federal governments: The Nation, they insisted, had "never surrendered her right to self Government, or the exercise of internal and domestic regulation."²⁷⁶ Rather than being subsumed within the U.S. Constitution, the Cherokee Nation was an external sovereign, "being connected and related to the United States *alone* by Treaty."²⁷⁷ A Cherokee delegation reiterated this argument several years later, reminding the Secretary of War that the Cherokee Nation "had no voice in the formation of the confederacy of the Union, and has ever been unshackled with the laws of individual States."²⁷⁸ Because the Cherokee had not consented to join the Union, the Constitution and state law could not apply to them.

272. See, e.g., Act of Jan. 16, 1832, § 14, 1832 Ala. Laws 8 (upholding the validity of contracts regarding the sale of Native improvements); Act of Dec. 20, 1828, §§ 8–9, 1828 Ga. Laws 89 (declaring tribal laws void and prohibiting Native testimony).

273. Andrew Jackson, Message From the President of the United States, S. Doc. No. 21-1, at 15 (1st Sess. 1829) ("If the General Government is not permitted to tolerate the erection of a confederate State within the territory of one of the members of this Union, against her consent; much less could it allow a foreign and independent government to establish itself there.").

274. *Id.* at 16.

275. Letter from John Eaton to John Ross, Richard Taylor, Edward Gunter & William S. Coodey (Apr. 18, 1829), in 1 Ross Papers, *supra* note 268, at 188, 188 (internal quotation marks omitted) (quoting Letter from John Ross, Richard Taylor, Edward Gunter & William S. Coodey to P.B. Porter (Feb. 17, 1829)).

276. Letter from William Hicks & John Ross to Hugh Montgomery, *supra* note 268, at 162; see also *id.* (asserting that the Cherokee Nation "had no relation or connection to a *State* to ask of it, its Consent" to form a constitutional government).

277. *Id.*

278. Letter from John Eaton to John Ross, Richard Taylor, Edward Gunter & William S. Coodey, *supra* note 275, at 188 (internal quotation marks omitted) (quoting Letter from John Ross, Richard Taylor, Edward Gunter & William S. Coodey to P.B. Porter (Feb. 17, 1829)).

Native leaders further argued that the federal treaties mandated federal action. In the earliest treaties between the southern nations and the United States, federal commissioners had agreed to “receive them into the favor and protection of the United States of America.”²⁷⁹ Now, southern nations argued that these treaty provisions obligated the federal government to protect them from state jurisdiction. When Mississippi considered extending its laws over the Native nations, the Choctaw District Chief David Folsom cited this provision and asked the federal Indian agent, “[H]as not the American government always sustained and protected us, agreeable to the solemn treaties with this nation? And should the people of Mississippi wish to extend their laws over us and distress us, such measures would be attended with misery and destruction to us.”²⁸⁰

Although these arguments sounded in treaty interpretation, the question of “protection” also implicated constitutional concerns—issues that, for most Native peoples, were not separable. As recounted above, federal officials had sold the Constitution to Native nations as a solution to the oppression of states like New York and Georgia in the wake of the Revolution.²⁸¹ And Native nations who had accepted the Constitution saw the centralization of authority and the promise to restrain the states and white settlers as a continuation of the earlier diplomatic constitution.²⁸² Echoing these principles of the diplomatic constitution, Native peoples contended that the new constitutional order—as well as treaties—bound the United States to protect them from the laws of the states.²⁸³ In their eyes, the importance of federal power was that the new nation could control the actions of its subordinate parts.

These treaty arguments reflected Native peoples’ understanding of the significance of treaties within American constitutional law. The leaders of the southern Native nations consistently used weighty language to describe the power that treaties possessed over the actions of the United States. As Chief Folsom’s statement illustrates, the most common word employed to describe treaties was “solemn”: “solemn bonds,”²⁸⁴ “solemnly pledged,”²⁸⁵ “solemn obligations,”²⁸⁶ and “[s]olemnly guaranteed.”²⁸⁷ In

279. Treaty, Choctaw Nation-U.S., Jan. 3, 1786, 7 Stat. 21.

280. Letter from David Folsom to William Ward (Nov. 7, 1829), *in* 26 *The Missionary Herald* 82, 83 (Boston, Crocker & Brewster 1830).

281. See *supra* section II.B.

282. See *supra* section II.B.

283. See *supra* section II.B.

284. Memorial of the Delegation of the Cherokee Nation of Indians (Mar. 2, 1835), H.R. Doc. No. 24-286, at 125 (1836).

285. John Ross, Annual Message (Oct. 13, 1828), *in* 1 *Ross Papers*, *supra* note 268, at 166, 168.

286. Memorial of John Ross, Richard Taylor, Edward Gunter & William S. Coody (Feb. 27, 1829), *Cherokee Phoenix & Indians’ Advoc.* (New Echota), June 17, 1829, at 1.

287. Letter from John Ross to the Cherokees (Apr. 14, 1831), *in* 1 *Ross Papers*, *supra* note 268, at 241, 242.

using this word, Native peoples communicated that treaties represented a deep and lasting commitment on the part of the United States to maintain tribal sovereignty and land ownership. The term also imparted gravitas to these agreements, with Native leaders reiterating, in the words of Cherokee Chief John Ross, that “[o]ur treaties of relationship are based upon the principles of the federal constitution.”²⁸⁸ In subsequent correspondence, Ross explained this statement by drawing from the language of the Supremacy Clause, stating that the actions of the states were “repugnant to the Constitution, statutes and *treaties* of the United States.”²⁸⁹

Ross’s statement underscores Native leaders’ broader effort to invoke the Constitution—especially the Supremacy Clause—to counter southern states’ federalism arguments. In his annual message to the Cherokee people in 1831, Ross asserted that the states, as well as the federal government, had explicitly bound themselves to the treaties with Native nations: “The numerous subsisting treaties between the United States and this nation were negotiated, entered into, and constitutionally ratified on the part of the States by the competent authorities thereof; and they compose a part of ‘*the supreme law of the land*’”²⁹⁰ Ross also argued that specific provisions of the Constitution, including the prohibition on states entering treaties and the Commerce Clause, explicitly prohibited states from interfering with the treaties or engaging with Native nations.²⁹¹ In extending her laws over the Cherokee people and violating treaties and the Constitution, Ross concluded, Georgia had “march[ed] across the line of her constitutional boundary.”²⁹²

To support their arguments for federal supremacy, the Cherokees invoked a simultaneous constitutional debate: the nullification crisis.²⁹³ When South Carolina asserted the constitutional right to nullify a federal tariff, President Jackson and the legislatures of other southern states firmly rejected South Carolina’s claims.²⁹⁴ The Cherokees found their protests hypocritical, since Georgia and the other southern states had similarly nullified federal laws. According to Ross, “[T]he only difference in the principle as maintained by South Carolina and Georgia, is that the former

288. John Ross, Annual Message (Oct. 14, 1829), *in* 1 Ross Papers, *supra* note 268, at 195, 197 [hereinafter Ross, 1829 Annual Message].

289. See, e.g., Letter from John Ross to David Crockett (Jan. 13, 1831), *in* 1 Ross Papers, *supra* note 268, at 236, 236 (emphasis added).

290. John Ross, Annual Message (Oct. 24, 1831), *in* 1 Ross Papers, *supra* note 268, at 250, 251 (quoting U.S. Const. art. VI, cl. 2).

291. *Id.*

292. *Id.*

293. For a comprehensive history of the nullification crisis, see generally Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States’ Rights, and the Nullification Crisis* (1987).

294. See President Andrew Jackson’s Proclamation Regarding Nullification, December 10, 1832, reprinted in *The Avalon Project: Documents in Law, History, and Diplomacy*, Yale L. Sch., https://avalon.law.yale.edu/19th_century/jack01.asp [<https://perma.cc/BWL5-7FPZ>] (last visited Oct. 7, 2022).

has only asserted it in theory, when the latter has reduced it to practice.”²⁹⁵ Elias Boudinot, the editor of the first tribal newspaper, the *Cherokee Phoenix*, put it more colorfully: “The conduct of the Georgia Legislature is indeed surprising—one day they discountenance the proceedings of the nullifiers of South Carolina—at another, they even out-do the people of South Carolina, and authorize their Governor to hoist the flag of rebellion against the United States!”²⁹⁶ For the Cherokees, Georgia’s actions, and Jackson’s acquiescence, threatened to upset the federal system set out in the Constitution.

2. *The Cherokee Legal Campaign.* — Beyond widely publicizing their constitutional arguments, Native leaders waged a prolonged legal campaign to vindicate their claims. They first targeted the President—the “Great Father”²⁹⁷ who administered Indian affairs policy and treaty provisions—to receive protection from the state law extension acts.²⁹⁸ When President Jackson refused to intercede, Cherokee and Muscogee leaders petitioned Congress to uphold their rights.²⁹⁹ But they faced disappointment there, too, when Congress, after an intense and prolonged debate that hotly contested constitutional interpretation, narrowly passed the Indian Removal Act in May 1830, providing legislative and financial support for ostensibly “voluntary” Native removal.³⁰⁰

Cherokee leaders turned, finally, to “the Supreme Court of the United States, in which tribunal, as the conservatory of the Constitution, Treaties and laws of the Union, we can yet hope for justice.”³⁰¹ The Cherokees chose to pursue a “Judicial decision” to, in their words, “evinced[] a pacific disposition,” rather than go to war, and to “show[] that they do not desire to grasp at any extravagant pretensions of power, more than can be awarded to them by the laws of the land.”³⁰² Thus, even if the

295. Letter from John Ross to the General Council (May 13, 1833), *in* 1 Ross Papers, *supra* note 268, at 293, 293.

296. Elias Boudinot, High Movement, *Cherokee Phoenix & Indians’ Advoc.* (New Echota), Jan. 8, 1831, at 2 [hereinafter Boudinot, High Movement].

297. Elias Boudinot, Editorial, *Cherokee Phoenix & Indians’ Advoc.* (New Echota), Nov. 12, 1831, at 2.

298. See Letter from John H. Eaton to the Cherokee Delegation (Apr. 18, 1829), *Cherokee Phoenix & Indians’ Advoc.* (New Echota), June 17, 1829, at 1–2.

299. See Saunt, *Unworthy Republic*, *supra* note 260, at 73–74 (describing Cherokee and Creek pleas).

300. See Indian Removal Act, Pub. L. No. 21-148, 4 Stat. 411 (1830); see also Saunt, *Unworthy Republic*, *supra* note 260, at 76 (noting the slim margin of 102 to 97 by which the Act passed).

301. John Ross, Message to the General Council (July 10–16, 1830), *in* 1 Ross Papers, *supra* note 268, at 216, 216.

302. Letter from John Ross to Hugh Montgomery (July 20, 1830), *in* 1 Ross Papers, *supra* note 268, at 219, 219.

Cherokee Nation stood outside the constitutional system, it would abide by the Court's decision "for the sake of good neighborhood."³⁰³

The Cherokee Nation pursued its litigation strategy with vigor. However, its first two attempts to press its case to the Court failed. They first appealed a Georgia state court conviction of Cherokee George Tassel for murder, challenging state jurisdiction. But Georgia Governor George Gilmer, at the behest of the state legislature, executed Tassel before the case could be heard.³⁰⁴ The Nation then tried to circumvent the state courts by filing a case as a foreign nation under the Supreme Court's original jurisdiction.³⁰⁵ In *Cherokee Nation v. Georgia*, Chief Justice John Marshall expressed sympathy for the Cherokee plight, but—ruling that Native nations were "domestic dependent nations," not foreign states—concluded that they could not avail themselves of the Court's original jurisdiction.³⁰⁶

But the Cherokee Nation finally forced the Supreme Court to address the merits of the state jurisdictional claims in a third case, *Worcester v. Georgia*.³⁰⁷ Two Anglo-American missionaries who resided in the Cherokee Nation challenged their conviction under a Georgia law requiring them to obtain a state license.³⁰⁸ And this time, the Cherokees succeeded, with Chief Justice Marshall holding that Georgia's extension acts were "void, as being repugnant to the constitution, treaties, and laws of the United States."³⁰⁹ Although former U.S. Attorney General William Wirt and his co-counsel John Sergeant argued the case,³¹⁰ Marshall's decision was fundamentally a vindication of Natives' long-standing constitutional arguments. Marshall stated that the federal constitutional authority to make treaties and regulate commerce with Indian tribes gave the federal government full and exclusive jurisdiction over Indian affairs, excluding state interference.³¹¹ He also pointed out that the Supremacy Clause made all treaties, including those with Native nations, the supreme law of the land.³¹² Finally, Marshall reiterated that the Cherokee Nation remained "a distinct community occupying its own territory, with boundaries accurately

303. *Id.*

304. See Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* 111, 119–22 (2002).

305. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15–16 (1831); see also Garrison, *supra* note 304, at 126 (describing the Cherokee Nation's argument in a bill for injunction under Article III, Section 2 that the Nation "was a foreign state seeking redress from one of the United States and that the controversy required an immediate hearing before the Court").

306. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17–20.

307. 31 U.S. (6 Pet.) 515 (1832).

308. See Garrison, *supra* note 304, at 169–76.

309. *Worcester*, 31 U.S. (6 Pet.) at 562–63.

310. See Garrison, *supra* note 304, at 109, 175–77.

311. *Worcester*, 31 U.S. (6 Pet.) at 559, 561–62.

312. *Id.* at 559–60.

described, in which the laws of Georgia can have no force,” closely echoing Native arguments emphasizing their autonomy.³¹³

The success of the Cherokee Nation’s litigation reflected the power of Native nations’ constitutional arguments. Native peoples were not the only ones who espoused nationalist readings of the Constitution, of course. But they faced perhaps the greatest stakes in how the Constitution was interpreted—for them, a literally life-or-death issue. Their response, a forceful and wide-ranging articulation of their constitutional arguments through the many venues of constitutional contention in the early United States, made their sovereignty over their homelands the era’s defining constitutional question. It also allowed them to construct a broad-based, cross-racial coalition in their defense. Ultimately, the strength of their arguments successfully pressured a reluctant Chief Justice Marshall—who had only a few years earlier summarily rejected Native sovereignty—to draft a bold and politically costly decision that went far beyond any prior judicial recognition of tribal sovereignty and autonomy.³¹⁴ In the end, because of the efforts that the southern Native nations—especially the Cherokee Nation—made to protect themselves, the U.S. legal system grappled with Native understandings of sovereignty and federal supremacy, ultimately enshrining their arguments into U.S. constitutional jurisprudence.

B. *Losing Constitutional Faith*

For many nations, *Worcester* came too late. By late 1832, federal treaty commissioners had used a mixture of bribery, deceit, and scaremongering to pressure the Choctaw, Muscogee, and Chickasaw Nations to sign removal treaties.³¹⁵ But for the Cherokees, *Worcester* vindicated their position that they could remain within the boundaries of states as a sovereign nation under the Constitution. In the words of Ross, “The decision of the Supreme Court, under the Treaties, Laws & Constitution, is the strong shield by which our rights must be respected & protected”³¹⁶

313. *Id.* at 561.

314. See Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 *Duke L.J.* 875, 898–99 (2003) (describing *Worcester* as the “broadest assertion ever made by a Court that was always eager to proclaim federal supremacy” and an “expansive” endorsement of “Cherokee rights”).

315. See Green, *supra* note 256, at 166–71 (“There can be no doubt that the Jackson administration was using the hardships imposed upon the Creeks by the intruders and the operation of Alabama law to force them into accepting removal to the West.”); Saunt, *Unworthy Republic*, *supra* note 260, at 87–90, 109 (describing various instances of deceptive practices to coerce tribes to sign treaties).

316. Letter from John Ross to Richard Taylor, John Baldrige, Sleeping Rabbit, Sicketowee & Wahachee (Apr. 28, 1832), *in* 1 *Ross Papers*, *supra* note 268, at 268, 268.

The strength of that shield was soon tested. President Jackson refused to abide by the *Worcester* decision.³¹⁷ Due to the threat that Georgia might support South Carolina's nullification efforts if *Worcester* was enforced against it, the two white missionaries accepted pardons from the Georgia governor, and Jackson avoided a direct confrontation with Georgia.³¹⁸ More significantly, Jackson failed to forestall the state law extension acts, hoping that such pressure would induce the Cherokee Nation to agree to removal.³¹⁹ In blatant defiance of federal law, Georgia militia invaded Cherokee territory while the state legislature literally handed out Cherokee lands by lottery.³²⁰ Despairing that it would be impossible to remain, a small group of Cherokee leaders broke from Chief Ross and the Cherokee National Council to sign a removal treaty—the Treaty of New Echota—in secret in 1835.³²¹

These events profoundly tested the Cherokee Nation's faith in the United States and its Constitution. In public addresses, letters, and petitions, the Cherokees had repeatedly expressed their belief and trust in the constitutional system to vindicate their rights. "[W]e can only look with confidence to the good faith and magnanimity of the General Government," one such speech from Ross read, "whose precepts and profession inculcate principles of liberty and republicanism, and whose obligation are solemnly pledged to give us justice and protection."³²² Undoubtedly strategic, these professions also showed that Native leaders took the United States at its word—that if they played the American constitutional game and won, as they had, their rights would be secure.

The Treaty of New Echota in particular tested this faith in the rule of law. Without authorization from the Cherokee National Council, a group of seventy-five Cherokees had signed the treaty, which ceded all of the

317. See Garrison, *supra* note 304, at 192–93.

318. See *id.* at 193–97.

319. See Letter from Lewis Cass to John Ross, Richard Taylor, John F. Baldrige & Joseph Vann (Feb. 2, 1833), *in* 1 Ross Papers, *supra* note 268, at 284, 284 ("[Jackson] cannot see any help coming from the government's purchase of lands in Georgia for the Cherokees, since the Indians would still be subject to state laws. His solution for all Cherokee problems is the tribe's removal."); Letter from Lewis Cass to John Ross, Richard Taylor, John F. Baldrige & Joseph Vann (Feb. 20, 1833), *in* 1 Ross Papers, *supra* note 268, at 290, 290 ("President Andrew Jackson considers he has no right to interfere in the laws of Georgia."); Memorial to the Senate and House of Representatives (May 17, 1834), *in* 1 Ross Papers, *supra* note 268, at 316, 316–17 ("[Y]our memorialists further respectfully represent that the Executive of the United States has not only refused to protect [them] against the wrongs they have suffered, and are still suffering, at the hands of unjust cupidity, but has done much more.").

320. See Saunt, *Unworthy Republic*, *supra* note 260, at 98, 161–62, 233 (describing how a Georgia legislature committee "called for the immediate survey of Cherokee lands and the distribution of lands by lottery to the citizens of Georgia" on the same day that state appellate judges affirmed state jurisdiction over the Cherokees).

321. See *id.* at 238 (describing how, "while Ross was away," twenty men signed the Treaty of New Echota).

322. Ross, 1829 Annual Message, *supra* note 288, at 197.

Nation's lands east of the Mississippi.³²³ Defying Cherokee protests, the Senate ratified the treaty by a single vote.³²⁴ Members of the Cherokee Nation then submitted several petitions, with over 15,000 signatures in total—almost the entire Cherokee population—to Congress, pleading that the treaty be rescinded.³²⁵

In these petitions, the Cherokee people forcefully invoked the principles of the diplomatic constitution, particularly around treaty-making, that they believed had been enshrined by the U.S. Constitution. The Senate, they argued, could not ratify a treaty that did not express the consent of the Cherokee Nation.³²⁶ As they explained, the “instrument purporting to be a treaty with the Cherokee people . . . is fraudulent, false upon its face, made by unauthorized individuals, without the sanction, and against the wishes, of the great body of the Cherokee people.”³²⁷ A Cherokee delegation reiterated the point in a letter to Martin Van Buren on his ascendancy to the presidency, remarking that the situation was akin to the Cherokee Nation signing a treaty with twenty random citizens of the United States and having it enforced against the whole nation.³²⁸ Only because the United States had a larger population and military, they noted, could it decree that the Treaty of New Echota was a valid expression of Cherokee consent.³²⁹ But if politics and force could override the law, then what was the Constitution even for? From the Cherokees' perspective, the United States had finally abandoned the principles and practices of the diplomatic constitution.

The Cherokees launched one final effort to press their constitutional argument and foreclose removal. In their petition to Congress in June 1836, the Cherokees argued that “the President and Senate have no constitutional power to accomplish” their nonconsensual expulsion.³³⁰

323. See McLoughlin, *supra* note 256, at 450.

324. See Calloway, *Treaties and Treaty Making*, *supra* note 41, at 145–47.

325. See Letter from John Ross . . . in Answer to Inquiries From a Friend (July 2, 1836), in 1 Ross Papers, *supra* note 268, at 470, 470. For the population figure, see William G. McLoughlin & Walter H. Conser, Jr., *The Cherokees in Transition: A Statistical Analysis of the Federal Census of 1835*, 64 *J. Am. Hist.* 678, 678 (1977).

326. See Memorial and Protest of the Cherokee Nation (June 22, 1836), H.R. Doc. No. 24-286, at 2 (1836) [hereinafter Memorial of June 1836].

327. *Id.*; see also Protest of Cherokee Citizens of Aquohee and Taquohee Districts (n.d.), H.R. Doc. No. 24-286, at 108 (1836) (arguing that the thought that the Senate could construe the signature of a few rogue individuals as “a treaty vitally affecting the liberties, the property, and the personal rights of a whole people, appears to us so utterly repugnant to reason and justice”).

328. Letter from the Cherokee Delegation to Martin Van Buren (Mar. 16, 1837), in 1 Ross Papers, *supra* note 268, at 506, 509.

329. *Id.* at 509–10 (“[T]he whole weight and influence of the government have been exerted, to aid the small faction which has usurped the right to bind us, to alarm the timid, to overpower the resolute, to persuade the confiding, to compel the weak among us, to give their sanction to this instrument.”).

330. Memorial of June 1836, *supra* note 326, at 2.

They could not validly do so under the Treaty Clauses, they argued, because treaties are “contracts, not rules prescribed by a superior, and therefore binding only by the assent of the parties.”³³¹ Nor could the President and Senate mandate removal under the Indian Commerce Clause because that power “belongs to Congress.”³³² Finally, no existing treaty stipulation or constitutional provision regarding the federal government’s obligation to states “confer[red] any power upon the President and Senate to alienate [the Cherokees’] legal rights, or to prescribe the manner and time of their removal.”³³³

As the Cherokees likely expected, Congress ignored their pleas. The consequence was deep Cherokee disillusionment with the U.S. Constitution. Some questioned how the United States could survive such blatant challenges to its fundamental law. “If such proceedings are sanctioned by the majority of the people of the [United] States,” the Cherokee leader Boudinot wrote, “the Union is but a tottering fabric, which will soon fall and crumble into atoms.”³³⁴ But other Cherokee leaders increasingly concluded that the Constitution was, in fact, operating just as designed. It was “the peaceful principles of unionism,” one Cherokee delegation opined, that had allowed for “the practical operation of Georgia nullification.”³³⁵ They continued: “[I]t is evident that when the political interests of the States come[] into contact with the rights of the Indian, the Government will not afford that necessary protection which the Indian right demands; consequently, the weaker power will be forced to yield to the pretensions of the greater power.”³³⁶ The Constitution, they now concluded, had placed them on a profoundly unequal footing that made it impossible to defend their rights from the states’ assault.

Abandoning their earlier faith in the Constitution, the Cherokee Nation now contemplated escaping its reach. One possibility, reviving the earlier vision animating the Northwest Indian Confederacy, was the creation of an independent intertribal polity entirely outside U.S. control. Writing to representatives of the Seneca Nation, one of the Six Nations of the Haudenosaunee Confederacy, Cherokee representatives now acknowledged that they could not “see any permanent relief for those Tribes who have removed West of the Mississippi” from the oppression of the United States.³³⁷ Instead, the Cherokees proposed that Congress establish a permanent boundary line between the Native nations and the

331. *Id.*

332. *Id.*

333. *Id.*

334. Boudinot, *High Movement*, *supra* note 296, at 2.

335. Letter from the Cherokee Delegation to Lewis Cass (Feb. 14, 1835), H.R. Doc. No. 24-286, at 130 (1836).

336. *Id.*

337. Letter from the Cherokee Delegation to the Seneca Delegation (Apr. 14, 1834), *in* 1 *Ross Papers*, *supra* note 268, at 310, 311.

United States, relinquishing title and jurisdiction over the West to the nations.³³⁸ The Native nations could then “form a Confederation for the purpose of Uniting as one Nation,” which would enter a “General treaty of alliance” with the United States as equal powers.³³⁹

Another possibility was for the Cherokee Nation to completely sever its ties to the United States and “seek a home within the dominion of some other power.”³⁴⁰ Chief Ross even made steps to arrange this in a letter to Joaquín María del Castillo y Lanzas, the chargé d’affaires of Mexico to the United States, in 1835.³⁴¹ Ross stated that the Cherokees would immediately emigrate to Mexico “provided they could effect an arrangement with [the Mexican Government] so as to secure them, lands sufficient for their accommodation—and also the enjoyment of equal rights and privileges of citizenship.”³⁴² He also suggested that Mexico set aside territory for the creation of a state in which the Native nations who emigrated from the United States could reside.³⁴³ In Mexico, Ross sought the constitutional protections and inclusion the U.S. Constitution would not provide.

Ultimately, neither of the Cherokee Nation’s proposals came to fruition. Unwilling to renegotiate the Treaty of New Echota, President Van Buren sent the United States military into the Cherokee Nation in 1838 to round up its members and force them to remove west.³⁴⁴ Over the next several years, most Cherokee people would leave their homelands and follow the Choctaws, Chickasaws, and Muscogeas on the Trail of Tears to Indian Territory. As Evan Jones, a white Baptist missionary who resided in the Cherokee Nation, recounted, the submission of the Cherokee people to removal “is not to be viewed as an acquiescence in the principles or the terms of the treaty; but merely as yielding to the physical force of the [United] States.”³⁴⁵ Unable to avail themselves of the Constitution’s protections, the Cherokees were nevertheless subject to its power.

C. *The Constitutional Campaign of Forced Inclusion*

The renewed Native ratification debates ended in much the same way as the earlier ones. Although the southern Native nations—and many

338. *Id.*

339. *Id.*

340. *Id.*

341. Letter from John Ross to Joaquín María del Castillo y Lanzas (Mar. 22, 1835), *in* 1 Ross Papers, *supra* note 268, at 360, 360–61.

342. *Id.* at 360.

343. *Id.*

344. See Major General Winfield Scott, Address to the Cherokee (May 10, 1838); see also Saunt, *Unworthy Republic*, *supra* note 260, at 275–81 (detailing the 1838 Removal).

345. Letter from Evan Jones to the Baptist Missionary Magazine (July 11, 1838), *in* The Cherokee Removal: A Brief History With Documents 161, 161 (Theda Perdue & Michael D. Green eds., 3d ed. 2016).

northern ones as well³⁴⁶—as a whole rejected the chance to incorporate into the American polity and subject themselves to the U.S. Constitution by removing west, the choice was illusory. With the help of bribes, coercion, and settler avarice, the United States would use the tools provided by the Constitution—the treaty-making power, the expansive and discretionary powers of the executive, and provisions for a military—to secure the cession of Native lands and forced expulsion of Native nations.

Yet the constitutional arguments that Native peoples made during the removal debates nonetheless helped preserve their autonomy in Indian Territory. According to the treaties signed by the Choctaw, Muscogee, and Cherokee nations, the lands ceded to the Native nations would “in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.”³⁴⁷ Additionally, the treaties bound the United States to secure to the nations “the jurisdiction and government of all the persons and property that may be within their limits,” recognizing the sovereignty that Native nations still possessed outside the Constitution.³⁴⁸ The removed Native nations would use this autonomy to reestablish their governments, construct robust public school and social welfare systems, and foster economic development.³⁴⁹ And these nations would test the limits of their ability to reject the U.S. Constitution when some allied themselves with the Confederate States of America during the Civil War.³⁵⁰ The Confederacy’s defeat, however, led to restrictive treaties that began to curb the authority of the Native nations.³⁵¹

346. For a history of northern Indian removal, see generally John P. Bowes, *Land Too Good for Indians: Northern Indian Removal* (2016).

347. Treaty, Cherokee Nation-U.S., art. 5, Dec. 29, 1835, 7 Stat. 478; see also Treaty, Creek Tribe-U.S., art. XIV, Mar. 24, 1832, 7 Stat. 366; Treaty, Choctaw Nation-U.S., art. IV, Sept. 27, 1830, 7 Stat. 333.

348. See treaties cited *supra* note 347.

349. See generally, e.g., Angie Debo, *The Rise and Fall of the Choctaw Republic* (1975) (describing the political and economic history of the Choctaw Nation in the nineteenth century); Julie L. Reed, *Serving the Nation: Cherokee Sovereignty and Social Welfare, 1800–1907* (2016) (describing the rise of nationally administered social services in the Cherokee Nation); Christina Snyder, *Great Crossings: Indians, Settlers, and Slaves in the Age of Jackson* (2017) (recounting the development of the public school system in the Choctaw Nation).

350. See Bradley R. Clappitt, Introduction: The Civil War and Reconstruction in Indian Territory, *in* *The Civil War and Reconstruction in Indian Territory* 1, 4–7 (Bradley R. Clappitt ed., 2015).

351. *Id.* at 11. The end of the Civil War and the signing of Reconstruction treaties between the Five Tribes and the United States signaled the end of any ability the nations had to exist outside of the control of the United States. These treaties undermined tribal sovereignty by forcing the Five Tribes to cede lands, emancipate their slaves, provide access to railroads, and agree to a consolidated, territorial government for Indian Territory. See Christopher B. Bean, Who Defines a Nation?: Reconstruction in Indian Territory, *in* Clappitt, *supra* note 350, at 110, 125–26. By subjecting the nations to congressional control and paving the way for incorporation into the United States through statehood, the federal

By 1907, their lands were allotted, their governments and courts were abolished, and their peoples were declared citizens of the United States and of the new state of Oklahoma.³⁵²

The experience of Native nations in the Indian Territory paralleled the broader history of the nineteenth century, as the United States pressed its campaign of land grabs and violence to weaken Native nations.³⁵³ In 1871, Congress discontinued the policy of making treaties with Native nations;³⁵⁴ in 1885, the Supreme Court declared that Congress possessed plenary power over all Native peoples within the limits of the United States.³⁵⁵ The transition from the United States recognizing Native nations as treaty-worthy sovereigns to considering them as subjects of unlimited legislative power had voided the promise of the diplomatic constitution.

And yet, the history explored here has not ended; Native peoples and power have not vanished. Over the course of the twentieth century, Native nations successfully reinvigorated their claims to autonomy, giving rise to the current “self-determination era.”³⁵⁶ Native nations’ arguments continue to force the United States and the Supreme Court to reassess the complicated status of Native peoples within the constitutional order.³⁵⁷ Moreover, notwithstanding the assertions of U.S. sovereignty, modern Native peoples still engage in what the anthropologist Audra Simpson terms “refusal”—continuing to reject their purported inclusion within the United States.³⁵⁸ In this sense, the Native ratification debates never really ended, as Native peoples continue to debate the U.S. Constitution’s meaning for them and seek to reaffirm some of the principles of the diplomatic constitution.

government reneged on the recognition of Native autonomy provided for in the Removal treaties. See *id.*

352. See Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* 159–90 (1972). For an overview of this transition from Indian Territory to Oklahoma statehood as it impacted the Five Civilized Tribes, see generally *id.*

353. See Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 108–228 (1986) (detailing the various phases of United States aggression against Native control of land in the nineteenth century).

354. See *id.* at 164–66.

355. See *United States v. Kagama*, 118 U.S. 375, 382–85 (1886).

356. See Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 281 (2005). For a history of the political activism and legal campaigns waged by Native peoples in the twentieth century, see generally *id.*

357. See, e.g., Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 *Mont. L. Rev.* 11, 12 (2019) (reviewing recent Supreme Court cases that analogize the status of Native nations to foreign nations, states, and territories).

358. See Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* 2, 11 (2014) (“The Mohawks of Kahnawà:ke are nationals of a precontact Indigenous polity that simply refuse to stop being themselves. In other words, they insist on being and acting as peoples who belong to a nation other than the United States or Canada.” (footnote omitted)).

IV. IMPLICATIONS: BEYOND TAINT TO “OUR LAW”

The Constitution has always been both law and symbol—a talisman of national identity and arguably the key text in our national civic religion.³⁵⁹ Yet symbols, as the nation has recently been repeatedly reminded, can divide as well as unite.³⁶⁰ The Constitution is, in its own way, a flawed symbol. It wears its exclusions on its sleeve, of course, with its circumlocutions euphemizing chattel slavery and its complete omission of women.³⁶¹ But recent scholarship has further underscored just how thoroughly the Constitution both justified and came to stand for a legal system built on racial exclusion and violence.³⁶²

This challenge to the Constitution as both symbol and law comes in the freighted language of “taint.”³⁶³ According to this view, the Constitution’s origins are too flawed—too implicated in various “original sins”—for it to merit authority today.³⁶⁴ In response, the Constitution’s defenders have either rejected or sidestepped the critique by insisting that the Constitution fills an essential need for unifying symbols or that subsequent amendments have absolved the document of its original flaws.³⁶⁵

In one sense, the history presented here further underscores the Constitution’s tainted nature. It shows that a more inclusive constitutional history does not necessarily redeem the Constitution and restore its symbolic power, as some have suggested.³⁶⁶ It does not undo the harms of

359. See, e.g., Michael G. Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* 22–23 (1986) (describing the fluctuations in the veneration of the Constitution over American history).

360. Recent controversies in the United States over symbols have swirled around the Confederate flag and statues of individuals with ties to colonialism, slavery, and other forms of racial violence. See Maria Cramer, *Confederate Flag an Unnerving Sight in Capitol*, N.Y. Times (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html> (on file with the *Columbia Law Review*) (last updated Jan. 14, 2021); *How Statues Are Falling Around the World*, N.Y. Times (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/confederate-statues-photos.html> (on file with the *Columbia Law Review*) (last updated Sept. 12, 2020).

361. See, e.g., U.S. Const. art. I, § 2, cl. 3 (requiring that, for the purpose of congressional representation, the population counted all free persons, “excluding Indians not taxed, three fifths of all other persons”); id. art. I, § 9, cl. 1 (allowing “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit” until at least 1808).

362. See *supra* notes 14–15 and accompanying text.

363. See Louis Michael Seidman, *America’s Racial Stain: The Taint Argument and the Limits of Constitutional Law and Rhetoric*, 2 *Am. J.L. & Equal.* 165, 169 (2022); see also W. Kerrel Murray, *Discriminatory Taint*, 135 *Harv. L. Rev.* 1190, 1195 (2022) (examining discriminatory taint in the context of statutes and policies).

364. Seidman, *supra* note 363, at 165–66 (“There is no simple way for a document born in original sin to cleanse itself of its own impurity.”).

365. See *infra* notes 419–420 and accompanying text.

366. But see Mulligan, *supra* note 33, at 401–02, 428–37 (“Incorporating diverse perspectives and seeking the opinions of a variety of interpreters will also serve to improve

past exclusion to observe that those exclusionary efforts did not entirely succeed. Indeed, in this instance, many Native peoples correctly diagnosed the document's flaws and accurately predicted how it would be used.³⁶⁷ Many rejected its authority—and yet found themselves subject to it nonetheless.³⁶⁸

But in another sense, the history explored here undercuts some current hand-wringing that constitutional critique might undermine effective political organizing today. Such accounts are heavily shaped by narratives of antebellum battles between Garrisonian abolitionists, who rejected the Constitution, and Frederick Douglass and Lysander Spooner, who came to embrace it.³⁶⁹ Yet as experiences of Native peoples and others show, these narratives present a circumscribed view of constitutional possibilities. Though most Native nations had few illusions about the goodness of the underlying document, this recognition did not preclude effective constitutional politics.³⁷⁰ Native peoples did not have to believe in the Constitution to wield it as a weapon.

This observation suggests a broader point. The debate over taint is at once important and unanswerable: It seeks to impose an origin story and an essence on a remarkably complex history. And for many scholars, any resolution of the issue is beside the point. Whatever its value, the Constitution remains “our law.”

The early history of Native engagement with the Constitution helps move beyond the question of taint to embrace, and reimagine, what more inclusive history might mean for “our law.” This Part examines how the history recounted here might shift different conceptions of this term. Using the term in its positivist sense embraced by Professors Will Baude and Steve Sachs, section IV.A argues that Native conceptions and the diplomatic constitution should be considered part of “our law.” Section IV.B examines some of the doctrinal implications that might flow from such a reimagining. And section IV.C takes up the question of the Constitution's legitimacy. It turns to another conception of “our law”—one advanced by Professor Jack Balkin that stresses the identification between present and past.³⁷¹ It suggests that a more inclusive constitutional history might better facilitate present-day Americans' recognition that even those the Constitution marginalized and harmed nonetheless shaped its meaning.

the originalist project, by making it easier to identify and correct for mistaken interpretations of historic text.”).

367. See *supra* section II.B.1.

368. See *supra* section II.B.2.

369. E.g., Seidman, *supra* note 363, at 187; Randy E. Barnett, Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation, 28 *Pac. L.J.* 977, 977 (1997); Randy E. Barnett, Who's Afraid of Unenumerated Rights?, 9 *U. Pa. J. Const. L.* 1, 9–11 (2006).

370. See *supra* section III.A.

371. See *infra* notes 425–428 and accompanying text.

A. “Our Law”: Positivist Theories

Constitutional interpretation presents a dilemma. Constitutional law, many insist, mandates that the Constitution’s meaning was fixed at the time of adoption. But this approach, critics argue, also entrenches the exclusionary conceptions of law and the people at the time of the Founding.

This dilemma is real. But it also rests on a partial understanding of Founding-era law. That law, this Article argues, was less exclusionary than either its progressive critics or conservative defenders realize. This was not because the Founders embraced present-day inclusionary and democratic norms, but because they lived in a legally pluralist society in which a fledgling United States had to accept other peoples’ law to survive.

One helpful framing is Professors Baude and Sachs’s recent defense of originalism based on a theory of positive law.³⁷² In this argument, the Constitution, as well as the other sources of binding law of the Founding era, even if unwritten, remain “our law” unless legally changed.³⁷³ But Baude and Sachs urge a highly cabined exploration of what constituted the law of the past—one that “focus[es] on operative legal texts and on ‘internal’ accounts of legal doctrine (e.g., treatises and court cases)” based on what past officials or experts identified as law.³⁷⁴

This Article suggests a different account of the law of the past that blurs Baude and Sachs’s tidy dichotomy between “internal legal sources” and “broader reconstructions of the past.”³⁷⁵ Baude and Sachs seem to envision an eighteenth-century version of Westlaw that carefully curated sources of law. In fact, as the history explored here suggests, the law of the past was messy and chaotic, appearing not only in treatises but in the realities of everyday governance and negotiation.³⁷⁶ In our view, the

372. For an overview of these arguments, see William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *Nw. U. L. Rev.* 1455, 1456–59 (2019) [hereinafter Baude & Sachs, *Grounding Originalism*] (offering a general defense of legal positivism); William Baude, *Is Originalism Our Law?*, 115 *Colum. L. Rev.* 2349, 2351 (2015) (arguing for an assessment of originalism based on positive law, “embodied in our legal practice”); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *Harv. L. Rev.* 1079, 1082 (2016) (“Interpretation isn’t just a matter of language; it’s also governed by law.”); Baude & Sachs, *Originalism and the Law of the Past*, supra note 35, at 810 (“Whether and how past law matters today is a question of current law, not one of history.”); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *Harv. J.L. & Pub. Pol’y* 817, 821 (2015) (arguing that, under originalism, “each change in our law since the Founding needs a justification framed in legal terms, and not just social or political ones”).

373. See, e.g., Baude & Sachs, *Originalism and the Law of the Past*, supra note 35, at 810 (summarizing the “positive turn” in originalist scholarship).

374. *Id.* at 814–15.

375. *Id.*

376. Cf. Jonathan Gienapp, *Against Constitutional Originalism: A Historical Critique* (forthcoming 2023) (manuscript at 272) (on file with the *Columbia Law Review*) (“What [Baude and Sachs] fail to recognize, however, is that so many of those early constitutional struggles they are quick to minimize or bracket *were* internal to Founding-era law . . .”).

diplomatic constitution presents a striking, although likely not exceptional, instance of a widely known and influential eighteenth-century body of law that nonetheless rarely appeared in the sorts of conventional legal sources that Baude and Sachs emphasize.³⁷⁷

Skeptics might quibble over whether the diplomatic constitution was actually law—a tricky issue that turns on deeper jurisprudential questions. This Article contends that, under the positivist standard that Baude and Sachs urge,³⁷⁸ it was: Both Native and Anglo-American officials regarded it as a legally binding set of norms.³⁷⁹ Eighteenth-century Anglo-American law was eclectic and permeable, and a common law society that imagined law as the organic expression of a community found it easy to acknowledge, and even incorporate, other peoples' legally binding customs—especially given how much the era's law of nations rested on such foundations.³⁸⁰ But the diplomatic constitution represented law in the bad-man sense, too, in that there were consequences for violating it. When the early federal government initially sought to transform the principles governing its relationship with Native nations, it failed, and federal officials explicitly acknowledged that they were retreating to prior customs.³⁸¹

Critics might still disagree with this assessment. Yet, under most positivist jurisprudence, proving it wrong would require deep engagement with historical “social facts.”³⁸² The absence of a treatise entitled the

377. See *supra* section I.A.

378. See Baude & Sachs, *Grounding Originalism*, *supra* note 372, at 1459 (“[W]e’ve generally worked from the conventional assumption that ‘what counts as law in any society is fundamentally a matter of social fact.’” (quoting Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *Hart’s Postscript: Essays on the Postscript to The Concept of Law* 355, 356 (Jules Coleman ed., 2001))).

379. See *supra* section I.A. This evidence parallels Hart’s defense of international law as law:

It is clear that in the practice of states certain rules are regularly respected even at the cost of certain sacrifices; claims are formulated by reference to them; breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation or retaliation. These, surely, are all the elements required to support the statement that there exist among states rules imposing obligations upon them. The proof that ‘binding’ rules in any society exist, is simply that they are thought of, spoken of, and function as such.

H.L.A. Hart, *The Concept of Law* 231 (2d ed. 1994).

380. See Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, With Three Early Essays on the Origins and Nature of Natural Law and on Luxury* 77 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758) (“Certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law, form the *customary law of nations*, or the *custom of nations*.”).

381. See *supra* notes 152–159 and accompanying text.

382. See Baude & Sachs, *Grounding Originalism*, *supra* note 372, at 1459 (internal quotation marks omitted) (quoting Brian Leiter, *Legal Realism, Hard Positivism, and the*

“diplomatic constitution” hardly suffices. We should also be wary of circular assumptions based on ill-supported conventional wisdom about which rules—and maybe more to the point, *whose* rules—counted as law. Instead, these critics would have to engage with precisely the kinds of sources that most constitutional histories have rarely consulted and have attempted to hive off.

Still others might object that Native peoples’ constitutional views were irrelevant since, as this Article has traced, most Native peoples *rejected* the U.S. Constitution and fought to remain separate. But of course, judges and scholars have long given legal weight to the views of people who rejected the Constitution. The Anti-Federalists vehemently challenged the Constitution, but constitutional interpreters routinely examine their understandings because of the widespread view that their opinions shaped constitutional law and continue to illuminate it.³⁸³ But, as this Article has taken pains to suggest, Native peoples shaped that law, too. Their voices also deserve standing.

Taking the law that Natives and Anglo-Americans made together seriously as “our law” does not undercut the undisputable historical reality that the fundamental aim of the United States was the erasure of Native nations and Indigenous law. Even Anglo-Americans who acknowledged that law nonetheless anticipated that Native nations would one day vanish. But they were wrong, and they failed. Whatever their aspirations, the law of the past remained legally pluralist. As a result, some of the exclusions in current constitutional law are not properly the Founders’ law at all. Those shortcomings reflect our blindness, not theirs.

B. “Our Law”: Doctrinal Implications

If the history explored here is part of “our law,” what follows? Answering that question also depends on constitutional theory, which is notoriously diverse. But this section seeks to offer a few tentative suggestions for how this history can shape contemporary legal doctrine.

First, this history might have significance for interpreting constitutional language under various originalist approaches. Though no Native peoples wrote the Constitution, the drafters’ keen awareness of Native audiences might be relevant for explorations of original intent. Most originalist scholars and judges, however, now embrace original public meaning originalism, which views the Constitution’s semantic

Limits of Conceptual Analysis, in *Hart’s Postscript: Essays on the Postscript to The Concept of Law* 355, 356 (Jules Coleman ed., 2001)). But see Charles L. Barzun, *The Positive U-Turn*, 69 *Stan. L. Rev.* 1323, 1372–73 (2017) (critiquing Baude and Sachs’s positivist theory by observing the challenge of determining the “relevant social facts” and the centrality of this question to many variants of positivism).

383. See, e.g., *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1494–95 (2019); *District of Columbia v. Heller*, 554 U.S. 570, 597–600 & n.17 (2008).

textual meaning as key and often dispositive.³⁸⁴ The “public” here is often constructed as an ordinary speaker of English at the time of ratification, with some consideration for the significance of particular terms of art.³⁸⁵ Yet few scholars have seriously considered how capacious the “public” in original public meaning could be. The imaginary ordinary readers conjured up are usually implicitly coded as white men (and sometimes women).³⁸⁶ But, like the “reasonable person” standard, this approach risks smuggling in exclusion without any defensible justification. As this Article suggests, one could easily imagine Native constitutional readers—or readers who were Black, or propertyless white servants, or non-English speakers reading in translation.³⁸⁷ How might original public meanings change if interpreters of the Constitution embraced a more capacious definition of the public and thought carefully about how such communities grasped the constitutional text? That question cannot be answered until we have done the work.

Second, we might consider the diplomatic constitution a relevant “backdrop” for constitutional interpretation.³⁸⁸ There is an enormous literature on the relationship between written and unwritten constitutionalism in the early United States.³⁸⁹ But the idea that the U.S. Constitution should be interpreted in light of preexisting bodies of law is conventional, even banal. Scholars and judges reconstruct original understandings of foreign affairs—and even federalism—by referring to the early modern law of nations. They grasp the meaning of constitutional rights through the common law. They attempt to comprehend presidential authority by examining the royal prerogative. They seek to define the scope of federal power by analogizing the Constitution to a deed of trust. They even weigh

384. See Keith E. Whittington, *The New Originalism*, 2 *Geo. J.L. & Pub. Pol’y* 599, 604 (2004) (“[T]he new originalism is focused less on the concrete intentions of individual drafts of constitutional text than on the public meaning of the text that was adopted.”).

385. For an overview of this question, see Jack M. Balkin, *The Construction of Original Public Meaning*, 31 *Const. Comment.* 71 (2016) [hereinafter Balkin, *The Construction of Original Public Meaning*].

386. See, e.g., Robert G. Natelson, *Federal Land Retention and the Constitution*, 76 *U. Colo. L. Rev.* 327, 341–44 (2005) (interpreting the Constitution by reading the language through the eyes of the fictitious (and implicitly white) Betsy and Edmund Johnson, “intelligent and active participants in the ratification debate”); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *San Diego L. Rev.* 575, 584–85 (2011) (critiquing original public meaning originalism by summoning up a fictitious “Joe the Ploughman”).

387. See Balkin, *The Construction of Original Public Meaning*, supra note 385, at 72–73 (noting that foreign-language translations of the Constitution with different English meanings were issued for ratification, which might suggest that “there was no single original public meaning”); cf. Christina Mulligan, Michael Douma, Hans Lind & Brian Quinn, *Founding-Era Translations of the U.S. Constitution*, 31 *Const. Comment.* 1, 17–51 (2016) (tracing German and Dutch translations of the Constitution).

388. Sachs, *Constitutional Backdrops*, supra note 36, at 1816–17.

389. See generally Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 *Law & Hist. Rev.* 321 (2021).

the Constitution's implications for Indian affairs by looking to prior colonial regulatory practices. The precise *relationship* between all these bodies of law and the Constitution is, of course, a subject for debate—but no one deems them out of bounds or irrelevant.

This perspective bolsters important interpretive arguments that scholars have advanced. For instance, there are long-standing claims that Indian treaties should play a quasi-constitutional role in conceiving the relationship between Native nations and the United States.³⁹⁰ The obvious response is that treaties and constitutions are distinct legal categories, and the U.S. Constitution did away with the fiction of Native consent. But in the eighteenth century, these categories were blurry even within Anglo-American thought³⁹¹ and are blurrier still when viewed from the treaty ground. Federal officials sold the Constitution to Native nations as if it *were* a treaty: They made promises about what the new federal government would offer Native peoples in return for hoped-for Native affirmation of the document. Moreover, like treaty provisions, these constitutional promises became the subject of intense borderland negotiations between Native leaders and federal commissioners. And just as Indian treaties created a “*constitutive* relationship” between sovereigns, Native leaders and federal officials viewed the Constitution—in light of the earlier diplomatic constitution—as creating a framework for governing the interactions between the United States and Native nations.³⁹²

This analogy is significant, because treaty law is the one area of federal law that gives legal weight to Native peoples' historical understandings by interpreting treaties as their Native signatories would have.³⁹³ To find evidence of Native understandings, courts have turned to the negotiations surrounding the treaties, closely parsing the promises held out by federal

390. Davis, *supra* note 3, at 1797–99; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 *Harv. L. Rev.* 381, 385 (1993).

391. But see Hendrickson, *supra* note 45, at x (arguing the Constitution created a “system of states” akin to European peace pacts).

392. Frickey, *supra* note 390, at 408. The origins of the Indian canons in *Worcester* further support this comparison between the Constitution and Indian treaties. As the late Phil Frickey has argued, Chief Justice Marshall created the canons because he characterized Indian treaties as “quasi-constitutional in nature,” interpreting these treaties in the same manner as the Constitution. *Id.* at 385, 406–17. According to Frickey, just as the “United States Constitution functions in part as a ‘treaty’ among formerly sovereign states that structures the relations of the national government internally and with those states,” Indian treaties perform similar functions between the United States and Native nations. *Id.* at 408.

393. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 550–56 (1832) (construing treaty language in light of the understanding of the Native signatories); see also Cohen's *Handbook of Federal Indian Law* § 2.02, at 113–14 (Nell Jessup Newton ed., 2012) (describing the Indian canons of construction).

negotiators and how they were interpreted by their Native interlocutors.³⁹⁴ But we don't even have to construe the Constitution as a treaty to adopt a similar approach here. Even in the eighteenth century, the Anglo-American doctrine of *contra proferentem* stipulated looking to the views of the non-drafting party to reconstruct an ambiguous contract of adhesion.³⁹⁵

So what might it look like to take Native interpretations of the Constitution seriously as a source for constitutional meaning? Their views are, unsurprisingly, likely most relevant for the provisions around Indian affairs. In particular, interpreters might reexamine the meaning and scope of congressional authority over "Commerce . . . with the Indian tribes" in light of Indigenous understandings.³⁹⁶ In prior work, one of us emphasized the diplomatic context for this language among Anglo-Americans at the time of the Constitution's adoption and examined its possible implications: a broad interpretation of the meaning of "commerce" as well as a limitation on the scope of federal authority *over* tribes.³⁹⁷

Incorporating Native views bolsters this interpretation. As discussions before and after the ratification of the Constitution reveal, Native peoples were concerned about more than federal regulation of trade.³⁹⁸ Rather, they interpreted the Constitution as granting the federal government the authority to regulate land sales and restrain the avarice of white settlers among other things, an interpretation supported by federal officials and the 1790 Trade and Intercourse Act.³⁹⁹ At the same time, the Native nations that accepted the Constitution did not view themselves as submitting to plenary, or unchecked, federal power over tribes. According to the southern nations during the Removal era, coming under the

394. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1702–03 (2019) (examining treaty terms "as they would have been understood by the Crow Tribe"); *Wash. State Dep't of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1016–19 (2019) (Gorsuch, J., concurring) (interpreting an 1855 treaty between the United States and the Yakama Nation based on "historical evidence" of the treaty's "original meaning" to the Yakamas).

395. Seventeenth- and eighteenth-century English legal scholars recognized the power of the doctrine of *contra proferentem* in several areas of law. See 2 William Blackstone, *Commentaries on the Laws of England* 380 (Oxford, Clarendon Press 1766); 2 Edward Coke, *The First Part of the Institutions of the Law of England, or, a Commentary Upon Littleton* 183(a) (Philadelphia, Robert H. Small 1853); Francis Bacon, *A Collection of Some Practical Rules of Maxims of the Common Laws of England, With Their Latitude and Extent*, in *The Elements of the Common Lavves of England* 9 (London, I. More 1636) (separately paginated work).

396. U.S. Const. art. I, § 8, cl. 3.

397. Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 142, at 1028–33.

398. See *supra* text accompanying notes 113–117 (describing pre-ratification efforts by Native peoples to encourage the United States to adopt a centralized treaty-making system) and notes 184–189 (discussing post-ratification efforts to convince Native peoples that the U.S. government would protect against further takings of land and further violence).

399. See *supra* notes 155–159 (describing the 1790 Trade and Intercourse Act) and notes 164–168 (discussing Native diplomatic missives that supported the Constitution on the basis that it would allow the U.S. government to protect Native peoples).

protection of the United States neither abrogated their right to self-government nor precluded them from renouncing their allegiance to the United States.⁴⁰⁰

Although this Article does not undertake an originalist analysis of current cases, it recognizes that incorporating these Native understandings into an analysis of the meaning of the Indian Commerce Clause could be instrumental in resolving modern Indian law controversies. Recently, in cases before the Supreme Court, a Justice, a state, and a group of adoptive parents have all cited the clause as an insufficient source of authority for certain congressional acts in Indian affairs, narrowly equating “commerce” with “trade.”⁴⁰¹ Yet, as the history recounted here underscores, Native peoples viewed the clause as one component of the Constitution entrusting all interactions, not just trade, between Native nations and the United States to the federal government.

Recovering Native interpretations has structural implications, too. As discussed, the Constitution was drafted in the midst of intense federal-state struggles for supremacy over Indian affairs.⁴⁰² Native peoples took sides in this debate: Consistent with the diplomatic constitution, they embraced centralized authority.⁴⁰³ In so doing, they were merely invoking the Constitution as it had been explained to them—as a document that codified federal supremacy and remedied the challenges created by state meddling in Indian affairs.⁴⁰⁴ They may have been skeptical about whether the federal government could actually accomplish this, but they fully grasped what they were being assured—that “the great council will no more be destroyed and made small by any State.”⁴⁰⁵ Native nations’ lengthy battle to avoid state authority that culminated in the debates around Removal was merely an attempt to enforce the meaning of the Constitution as they understood it—a reading that Chief Justice Marshall, too, ultimately endorsed.⁴⁰⁶

400. See *supra* Part III.

401. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658–66 (2013) (Thomas, J., concurring) (“[T]he Framers of the Constitution were alert to the difference between the power to regulate trade with the Indians and the power to regulate all Indian affairs.”); Brief for Individual Petitioners at 46–55, *Haaland v. Brackeen*, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. filed May 26, 2022), 2022 WL 1786984 (“But [ICWA’s] placement preferences regulate the adoption of *children*, not anything that can be described as ‘commerce.’”); Brief for Petitioner the State of Texas at 20–24, 29–31, *Haaland v. Brackeen*, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. filed Oct. 3, 2022), 2022 WL 5305089 (“Child-custody proceedings regarding Indian children do not constitute trade with Indians.”).

402. See *supra* text accompanying notes 96–112.

403. See *supra* text accompanying notes 164–168.

404. See *supra* text accompanying notes 184–189.

405. See Letter from Representatives of the Cherokee Nation to George Washington, *supra* note 167, at 57; see also *supra* text accompanying notes 164–168.

406. See *supra* section III.A.

Utilizing an Indian canon of constitutional interpretation could dramatically shift jurisprudence regarding state power and Indian affairs. Over the past few decades, the Supreme Court has ignored the principles supported by *Worcester* and Native peoples in high-profile cases that have eroded both federal supremacy in Indian affairs and tribal sovereignty.⁴⁰⁷ Instead, the Court has privileged a nebulous and ahistorical concept of state sovereignty.⁴⁰⁸ However, if the Court took seriously the promises made by the federal government at the Founding and Native peoples' acceptance of those promises, a different narrative—one focused on the limited power that states possess over Native nations and people—could prevail. And despite Native peoples' forced inclusion into the United States, this narrative would at least honor the Indigenous understanding that tribal sovereignty would endure under the Constitution.

More broadly, the Native ratification debates might shape thinking about constitutional meaning outside Indian affairs. As recounted here, Native peoples were active participants in debates that took place in periods of significant constitutional contestation during the long Founding. And they offered their own interpretations regarding federalism, judicial review, and executive and congressional powers that had, and have, wide-ranging ramifications beyond Indian affairs. In particular, Native peoples expressed their views on the Supreme Court as the primary constitutional arbiter, the executive's duty to implement treaties, and the line between federal and state jurisdiction.⁴⁰⁹ As scholars and judges mine the debates of the Founding period to recover understandings of these constitutional issues, they should include Native peoples' arguments to examine how wider constitutional practice and public meaning were constructed. Going forward, Native peoples' views can serve as an additional, important source in elucidating the fundamental aspects of the Constitution.

C. "Our Law": *Legitimacy*

The exclusion of most of the "People" who lived in the United States from the drafting and ratification of the Constitution raises substantial questions about its legitimate claim to authority. After all, Anglo-American

407. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491, 2502 (2022) (dismissing *Worcester* in holding that states have concurrent jurisdiction with the federal government over non-Indian-on-Indian crime in Indian Country); *Nevada v. Hicks*, 533 U.S. 353, 361–62, 374 (2001) (dismissing *Worcester* in holding that tribal courts lack authority to adjudicate civil suits against state officials); *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996) (holding that Congress lacks the authority to abrogate state sovereign immunity under the Indian Commerce Clause).

408. See, e.g., *Castro-Huerta*, 142 S. Ct. at 2511 (Gorsuch, J., dissenting) (stating in reference to the Court's holding that states can exercise criminal jurisdiction over non-Indians on Indian reservations that "[t]ruly a more ahistorical and mistaken statement of Indian law would be hard to fathom").

409. See *supra* section III.A.

revolutionaries had just fought a war to vindicate the political theory that governments “deriv[e] their just powers from the consent of the governed.”⁴¹⁰ Yet most of the Constitution’s proponents seemed untroubled by the contradiction that most of the people governed by the new Constitution never actually consented.⁴¹¹

The early federal government, however, *did* worry about Native consent, which it discussed frequently and even wrote into law.⁴¹² For a long time, the United States hesitated to claim authority over Native nations without their approval.⁴¹³ And federal officials repeatedly sought to obtain Native consent, however formalistic and coerced, through treaties. Through these actions, federal officials repeatedly insisted, the “Indians themselves” had acknowledged the legitimacy of U.S. authority.⁴¹⁴

Over time, however, the federal government abandoned this fig leaf of Native consent. “Conquest gives a title which the Courts of the conqueror cannot deny,” Chief Justice Marshall baldly proclaimed in 1823 in *Johnson v. M’Intosh*—effectively asserting that U.S. sovereignty provided its own justification.⁴¹⁵ Yet federal actions show that the government never fully credited Marshall’s dubious recasting of what had always been a negotiated, if unequal, colonialism. Even after *M’Intosh*, the federal government continued treaty-making until the late nineteenth century; even today, Native consent is written into federal law.⁴¹⁶ Discomfort over the lack of Native consent persists in the Supreme Court’s modern jurisprudence. Instead of Marshall’s forthright discussion of conquest, the Court now speaks euphemistically and bloodlessly of Native nations’ “incorporation” into the United States—as if Native peoples suddenly woke up and discovered themselves part of a new nation.⁴¹⁷ Meanwhile,

410. The Declaration of Independence para. 2 (U.S. 1776).

411. See *supra* text accompanying notes 5–15; see also *supra* section II.B.2.

412. See, e.g., Northwest Ordinance, ch. 8, § 1, 1 Stat. 50, 52 (1789) (“The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent . . .”); Enclosure from Henry Knox to George Washington, *supra* note 82, at 491 (arguing that because Indians held the “right of the Soil—It cannot be taken from them unless by their free consent, or by the right of Conquest in case of a just War”).

413. See *supra* section II.B.2.

414. Letter from the American Ministers to the British Ministers (Sept. 9, 1814), in 3 American State Papers: Foreign Relations 715, 716 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832).

415. 21 U.S. (8 Wheat.) 543, 588 (1823); see also *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (“This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained.”).

416. See *supra* notes 353–354 and accompanying text.

417. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 451 (1989) (Blackmun, J., concurring in part and dissenting in part) (describing how Native tribes came “under the protection of the United States” immediately after the

Justices and attorneys have sought to restrict the scope of *tribal* authority through paeans to consent as the foundation of governance—without the slightest hint of irony.⁴¹⁸

Scholars have offered multiple solutions to this problem of the lack of consent and constitutional legitimacy. Some originalists argue that subsequent constitutional amendments resolved any concerns about exclusion by expanding democracy to include previously excluded groups.⁴¹⁹ They even attempt to provide retroactive consent: They hypothesize what women or African-Americans “would have supported 100 or 200 years ago” and then argue that the Constitution now encompasses what these excluded groups *would* have bargained for had they been included.⁴²⁰

This response seems too pat and tidy an answer that relegates the harms of exclusion to the past rather than recognizing them, as many scholars have argued, as an ongoing legacy.⁴²¹ But this approach also uncomfortably asks present-day scholars to ventriloquize on behalf of past marginalized communities. As this Article demonstrates, such dubious contortions are unnecessary. Careful, thoughtful, and contextual examinations of the historical record allow us to reconstruct what some *actual* people within these excluded groups, not just fictitious proxies conjured up by scholars, said that they wanted from the Constitution.

In this instance, however, recovering these actual voices does not solve the problem of constitutional legitimacy. Most Native nations rejected, rather than accepted, the Constitution, along with the promises that the federal government made them. And yet Native nations nonetheless found themselves unwillingly and forcibly included within the United States and

American Revolution even though they were “self-governing, sovereign, political communities” prior to this); *Montana v. United States*, 450 U.S. 544, 563 (1981) (describing how “Indian tribes have lost many of the attributes of sovereignty” through their “original incorporation in the United States”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (“Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.”).

418. E.g., *Duro v. Reina*, 495 U.S. 676, 694 (1990) (discussing, in the context of tribal authority, how “consent of the governed . . . provides a fundamental basis for power within our constitutional system”); *Petition for a Writ of Certiorari at 13, FMC Corp. v. Shoshone-Bannock Tribes*, No. 19-1143 (U.S. Mar. 16, 2020), 2020 WL 1313361 (“America was founded on the right of people to govern themselves—a right that depends on having a say in that government.”).

419. See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 101 (2013) (noting, with respect to the exclusion of African-Americans and women, that “[i]t is our judgment that many of the defects of our Constitution have been solved”).

420. *Id.* at 108; see also Mulligan, *supra* note 33, at 428–29.

421. For recent works that, among others, examine the ongoing legacies of violence and exclusion in current law, see generally Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 *Calif. L. Rev.* 283 (2008); Justin Simard, *Citing Slavery*, 72 *Stan. L. Rev.* 79 (2020).

its constitutional frame. In some sense, this lack of Native consent is an unsolvable problem *within* federal law. When the harm is forcible, unwelcome inclusion, it is hard to see how originalists' familiar narratives of greater inclusion could ever be the remedy. Indeed, it is hard to see how any resolution from *within* the Constitution could solve the problem. Here, the Constitution—at least its claim to authority—is the problem.

Other scholars have proposed more plausible solutions to the problem of constitutional legitimacy with respect to Native nations. As Professor Maggie Blackhawk has persuasively shown, there have always been readings of the Constitution that have created more space for Native sovereignty and repudiated the worst excesses of U.S. colonialism—many of them successfully advocated for and written into U.S. law by Native peoples themselves.⁴²² Professor Seth Davis tackles the problem of constitutional legitimacy directly by rejecting models of constitutional redemption rooted in the trust relationship in favor of what he terms “relational redemption.”⁴²³ This perspective restores the principles of contract and consent partly embodied in the Indigenous diplomatic traditions that shaped what we have termed the diplomatic constitution.⁴²⁴

In our view, the history explored here bolsters both approaches. But this Article also proposes an additional perspective rooted in constitutional history. Once again the key phrase is “our law,” although in a different sense than Baude and Sachs's positivist meaning.

“Our law” is the term that Professor Balkin uses in his twinned projects on constitutional redemption and interpretation to describe the work done by constitutional narratives.⁴²⁵ Stories loom large in Balkin's account; they represent the core of how a constitution actually operates and derives its legitimacy.⁴²⁶ For him, the Constitution's legitimacy stems not from “whether or not we consent to it in any official or legal sense” but from whether we regard it as “our law”—whether “we identify with it and are attached to it . . . when we view it as our achievement and the product of our efforts as a people.”⁴²⁷ Identification plays a particularly significant role for Balkin. Our constitutional narratives, he stresses, must lead “members of the political community to identify with persons in the

422. Blackhawk, *supra* note 3, at 1862–67.

423. Davis, *supra* note 3, at 1792–804.

424. *Id.* at 1793–807.

425. Balkin, *Constitutional Redemption*, *supra* note 35, at 239–43; Balkin, *Living Originalism*, *supra* note 35, at 59–70.

426. Balkin, *Constitutional Redemption*, *supra* note 35, at 2–30.

427. Balkin, *Living Originalism*, *supra* note 35, at 60; see also Balkin, *Constitutional Redemption*, *supra* note 35, at 33–70 (exploring the question of the Constitution's legitimacy).

past, and with their ideals, their deeds, their promises, their obligations, and their commitments.”⁴²⁸

For a long time, this process of identification fixated on the handful of white Anglo-American men deemed the Founders. But many people in the United States today have found it understandably difficult to identify with men who not only seemed distant and alien but who enslaved or subjugated people with whom they *do* identify—people who, as the expression goes, looked like them. One solution, embraced by the musical *Hamilton*, is to recast the Founders in more relatable ways.⁴²⁹ But another, more fundamental project is to craft a more inclusive constitutional history that offers different narratives and different people to identify with. This Article has tried to point toward such a history. Though Natives and Anglo-Americans were not part of the same nation, they were part of the same political community—the one constituted by the relationships embodied in the diplomatic constitution.

The purpose of such a narrative is not to sanitize the violence and deep inequalities that marked Native struggles to come to terms with the U.S. Constitution—to elide what scholars have deemed “constitutional evil.”⁴³⁰ Nor is it to elevate new constitutional heroes by canonizing Hendrick Aupaumut alongside James Madison. It is, rather, to reject the idea that implicitly undergirds much conventional constitutional history: the claim that “our” constitutional law was the sole preserve of only some groups. Although not by choice, Native peoples not only engaged with but helped create the constitutional law of the United States.

Inclusive constitutional history, in short, helps craft a broader vision of the Constitution as “our law.” If the Constitution is supposed to belong to everyone, as the truism runs, then we should have a constitutional history that at least attempts to meet that aspiration—that reflects the pluralist, messy, complicated nation that the United States always was.

Such a history serves important purposes that avoid rehashing old debates over the fundamental goodness—or badness—of the Constitution. It supplants an older historical account long distorted by ideological imperatives to exclude with a fuller, more accurate narrative. It portrays marginalized communities not simply as passive victims of a racist

428. Balkin, *Constitutional Redemption*, supra note 35, at 44; see also Balkin, *Living Originalism*, supra note 35, at 60 (noting the significance for considering the Constitution “our law” of “collective identification with those who came before us and with those who will come after us”).

429. See, e.g., Richard Primus, *Lin-Manuel Miranda and the Future of Originalism*, in *Hamilton and the Law: Reading Today’s Most Contentious Legal Issues Through the Hit Musical 3*, 8 (Lisa A. Tucker ed., 2020) (“Hamilton, announces the nonwhite cast communicating in a paradigmatically nonwhite genre, was *one of us* [T]he cast uses racially laden terms of identification to describe its connection to the story’s protagonist.”).

430. Graber, supra note 14, at 1.

legal order but as significant legal actors in their own right. It offers alternate legal visions from the ones that ultimately came to dominate, puncturing their aura of inevitability. And it replaces a mythic, unified, serene Founding with a more relatable world, one in which constitutional meaning was not only always contested but also inextricably bound up with often unequal struggles over power and authority—in other words, with politics in a broad sense. If our constitutional histories acknowledge these realities, they might offer a Founding with which *all* Americans can identify.

“Attachment is a different attitude from consent,” Balkin observes. “We consent to something we have a choice in; but we can become attached to something that we live with or live in over time.”⁴³¹ More than most of the country’s present residents, Native peoples lacked any real semblance of choice to become part of the United States. In fact, for many Native groups, the late eighteenth century was an *anti*-Founding, as they consistently repudiated the new United States in favor of long-standing prior laws and principles. Native peoples nonetheless had to *live with*, and *live in*, the new constitutional order more profoundly than most Americans, given how much federal power intruded in their lives. It may be too much to ask them to feel attachment to an order that has done, and continues to do, so much harm and violence to their communities. Nonetheless, an important starting point is to acknowledge that the creation, drafting, and interpretation of the U.S. Constitution is their story, too.

CONCLUSION

In the wake of the 2016 election, Shepard Fairey posters proliferated.⁴³² Labelled “We the People,” they depicted people of color who would almost certainly not have been part of the political community in 1789: a woman wearing a star-spangled hijab and a Black woman with dreadlocks.⁴³³ They powerfully affirmed these communities’ belonging and ownership of the nation when both were under attack.

The posters are a potent reminder that “We the People of the United States” are perhaps the most resonant words in the entire Constitution. As interpreted by our nation’s civic religion—the generations of schoolteachers who made their students memorize the preamble, for instance—the words epitomize the new nation’s democratic commitments. For advocates of popular constitutionalism, the phrase underscores the nation’s foundation in popular sovereignty. Others might read in these words a rank hypocrisy: a reminder of how circumscribed and exclusionary the concept of the “People” actually was at the time of the Constitution’s

431. Balkin, *Living Originalism*, supra note 35, at 61.

432. See Liisa Silander, *We the People Have Much to Say*, RISD (Jan. 20, 2017), <https://www.risd.edu/news/stories/we-people-have-much-say> [<https://perma.cc/7AAU-YED3>].

433. See *id.*

adoption. Still others might read in the same shortcoming a promise—the foundation for a struggle for inclusion in which ever more groups fought for, and won, their place among the people.

But there is another, more literal way to read this language. The Constitution does not limit or define “We the People” other than the ambiguous “of.” In this reading, any person within the borders of the United States, regardless of citizenship or any other characteristic, might be part of the “People of the United States.”

That, of course, is almost certainly not the way the document’s drafters meant this language. But the point here is not a faithful recreation of their limited imaginings. Instead, this reading invites us to examine constitutional history from a new perspective: to consider what the *actual* people in the United States—all of them, regardless of whether they were defined as part of the political community—thought about the Constitution purportedly written in their name.

This Article has examined one group with a particularly complicated relationship to the “People of the United States”: Native nations. They were, as the history explored here shows, deeply ambivalent about the new nation and its Constitution. Most rejected it; some embraced it, only to regret their decisions later. Some, like Piominko, literally referred to themselves as “People of the United States,” but most denied that label.⁴³⁴ But however they defined themselves, they constantly engaged with the Constitution and helped shape constitutional law.

It is almost a truism in constitutional law that stories about the past matter. Academic accounts about the past will never be as visceral as a Shepard Fairey poster, but they might serve a similar role. Right now, our visions of the past do not match the pluralism that the posters depict: Popular images of the Founding depict bewigged white men in a room. Yet this conception suggests more about the failure of our imaginations than about the realities of history. The new United States was born as multi-hued and pluralist as the nation Fairey depicts. Powerful people in the past were not always good at recognizing or accepting this reality, which they often sought to suppress or deny. But that doesn’t mean that we can’t do better.

434. See *supra* note 214 and accompanying text.