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THE SAVAGE CONSTITUTION

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ABSTRACT

Conventional histories of the Constitution largely omit Natives. This Article challenges this absence and argues that Indian affairs played a key role in the Constitution's creation, drafting, and ratification. It traces two constitutional narratives about Indians: a Madisonian and a Hamiltonian perspective. Both views arose from the failure of Indian policy under the Articles of Confederation, when explicit national authority could not constrain states, squatters, or Native nations. Nationalists agreed that this failure underscored the need for a stronger federal state, but disagreed about the explanation. Madisonians blamed interference with federal treaties, whereas the Hamiltonians argued the federal military was too weak to overawe the "savages."

Both accounts resulted in constitutional remedies. More important than the Indian Commerce Clause, new provisions secured by the Madisonians declared federal treaties supreme law, barred state treaty-making, and provided exclusive federal power over western territories. But expansionist states won concessions guaranteeing

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federal protection and western land claims, while other provisions created a fiscal-military state committed to western expansion.

The two narratives fared differently during ratification. While few embraced centralization, many Federalists repeatedly invoked "savages" to justify a stronger federal state and a standing army. This argument swayed Georgia, which ratified to secure federal aid in its ongoing war with the Creek Indians. But it also elevated the dispossession of Natives into a constitutional principle. The Article concludes by exploring this history's interpretive implications. It suggests the Indian affairs context unsettles conventional understandings of the Constitution as intended to restrain the power of the state, and challenges both originalist and progressive assumptions about constitutional history.

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INTRODUCTION

Only two speeches at the Constitutional Convention discussed Indians.¹ On June 19, 1787, James Madison argued for expanded federal authority, emphasizing that Georgia had “directly” violated the Articles of Confederation when it “made war with the Indians, and concluded treaties.”² A day earlier, Alexander Hamilton, in a lengthy speech arguing for a much-strengthened federal government, listed three “important objects, which must necessarily engage the attention of a national government.”³ “You have to protect your rights against Canada on the north, Spain on the south, and your western frontier against the savages,” he warned.⁴

The text the Convention produced also mentioned Indians twice: once to exclude “Indians not taxed” from the apportionment of

1. A note on terminology: I use the words “Indian” and “Native” interchangeably to describe the indigenous peoples of North America. I also use the terms “tribe” and “nation” to describe Native polities of the late eighteenth century. Native political organization was diverse and complex, and Anglo-American abstractions often fit poorly onto “a world of villages, bands, and clans.” COLIN G. CALLOWAY, *THE AMERICAN REVOLUTION IN INDIAN COUNTRY: CRISIS AND DIVERSITY IN NATIVE AMERICAN COMMUNITIES* 8–9 (1995); see RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815*, at 1–49 (1991). But I nonetheless use these terms both because they correspond with how Anglo-Americans viewed Natives at the time and because long-standing Native interaction with Europeans had helped construct Native nations that were more than simply European inventions. CALLOWAY, *supra*, at 8–9. See generally STEVEN C. HAHN, *THE INVENTION OF THE CREEK NATION, 1670–1763* (2004) (describing the historical construction of concepts of Creek nationhood). When possible and clear, I use the term “Anglo-American” to refer to the non-Native inhabitants of the United States, even though many were not English; as Daniel Richter has observed, the fact that “in the new nation Whites were the ones entitled to be called ‘Americans’” rejected earlier practice and implicitly erased the continent’s Native past. DANIEL K. RICHTER, *FACING EAST FROM INDIAN COUNTRY: A NATIVE HISTORY OF EARLY AMERICA* 2–3, 252 (2003). Finally, I use the terms “national government” and “federal government” interchangeably to describe the government created by the Articles and, later, the Constitution. This is consistent with historical usage, although these terms were not uncontested, and early Americans most frequently used the now archaic-sounding “general government.” For instances of these usages, see *infra* notes 3, 324, 336, 422, 426, 447, 470 and accompanying text.

2. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 326 (Max Farrand ed., 1911).

3. 4 THE PAPERS OF ALEXANDER HAMILTON 198 (Harold Coffin Syrett ed., 1961). Hamilton’s speech, which proposed an elective monarch who would serve for life, had little subsequent impact on the Convention; the delegates described it “praised by every body” but “supported by none.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 363; see also RON CHERNOW, *ALEXANDER HAMILTON* 230–35 (2004) (describing Hamilton’s speech as one of the “flagrant errors” of Hamilton’s career).

4. 4 PAPERS OF ALEXANDER HAMILTON, *supra* note 3, at 198.

representation in the House of Representatives,⁵ and once to grant Congress the power to “regulate Commerce . . . with the Indian Tribes.”⁶ Neither provision occasioned any recorded debate.⁷ Histories of the Constitution, even very recent ones, assume this absence reflects Indians’ irrelevance, and so almost entirely omit Natives.⁸

This Article reexamines this history and contends that debates over Indians played an important role in the Constitution’s creation, drafting, and ratification, particularly in the push for a stronger federal state. It situates Madison and Hamilton’s speeches at the Convention as exemplars of two contrasting strains of constitutional thinking about relations between Indians, the national government, and the states—one that stressed paternalism, the other that embraced militarism. And it argues that the conquest and dispossession of Native peoples were integral to the Constitution’s ratification, shaping subsequent events.

Current scholarship offers two accounts of Indians and the Constitution. Some have advanced the unpersuasive claim that the Six Nations of the Iroquois Confederacy served as a primary model for American federalism.⁹ But most writing on the topic has focused

5. U.S. CONST. art. I, § 2, cl. 3. The Fourteenth Amendment repeats this language in its repeal of the Three-Fifths Clause. *Id.* amend. XIV, § 2.

6. *Id.* art. I, § 8, cl. 3.

7. See *infra* Part II.A.

8. For instance, a comprehensive recent narrative history of the Convention contains no index entries for either Indians or Native Americans—although it does contain eight entries for the “Indian Queen,” the tavern where many delegates stayed. RICHARD R. BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 503 (2009). The most recent work on ratification mentions Indians five times in the course of a nearly five hundred page narrative. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 570 (2010). Professor Akhil Amar’s “biography” of the Constitution contains brief and scattered references to Indians, primarily in the context of western expansion, the Commerce Clause, and Fourteenth Amendment debates over citizenship. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 107–08, 270–72, 430, 439 (2005). For arguments that Indians were largely absent from constitutional history, see DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 217 (2005); DAVID ANDREW NICHOLS, *RED GENTLEMEN & WHITE SAVAGES: INDIANS, FEDERALISTS, AND THE SEARCH FOR ORDER ON THE AMERICAN FRONTIER* 93 (2008); 1 JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING* 363–65 (2005).

9. For works advancing this claim, see DONALD A. GRINDE, JR. & BRUCE E. JOHANSEN, *EXEMPLAR OF LIBERTY: NATIVE AMERICA AND THE EVOLUTION OF DEMOCRACY* (1991); Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133 (1993); Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America’s Democratic Roots*, 14 AM. INDIAN L.

on legal doctrine, particularly the interpretation of the Indian Commerce Clause and the legitimacy of federal plenary power over Indians.¹⁰ This approach, while important, banishes the topic to the specialized field of federal Indian law, reflecting the dominant twenty-first-century perspective of Indian relations as a minor and technical area of governance.¹¹ Projecting this view backward onto the Constitution's drafting makes the absence of Indians from constitutional history seem unsurprising.

But in the eighteenth century, Indians were not a political afterthought. When the Constitution was written, powerful Native nations owned and governed much of the territory mapmakers

REV. 323 (1989). For works critical of the "Iroquois Influence" hypothesis, see Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 25 (1991); Elisabeth Tooker, *The United States Constitution and the Iroquois League*, 35 ETHNOHISTORY 305 (1988); Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. CHI. L. REV. 705, 705-06 (2011) (book review). An entire forum in the *William and Mary Quarterly* was devoted to this question, with two critiques of the evidence, followed by a rebuttal by Professors Donald Grinde and Bruce Johansen. See Philip A. Levy, *Exemplars of Taking Liberties: The Iroquois Influence Thesis and the Problem of Evidence*, 53 WM. & MARY Q. 588 (1996); Samuel B. Payne, Jr., *The Iroquois League, the Articles of Confederation, and the Constitution*, 53 WM. & MARY Q. 605 (1996); Donald A. Grinde, Jr. & Bruce E. Johansen, *Sauce for the Goose: Demand and Definitions for "Proof" Regarding the Iroquois and Democracy*, 53 WM. & MARY Q. 621 (1996). In my view, the critics come out the stronger in this exchange: Professors Philip Levy and Samuel Payne convincingly demonstrate that Grinde and Johansen present partial, distorted, and misleading readings of the historical evidence.

10. For works in this vein, see VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* (1999); *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* (Oren R. Lyons & John C. Mohawk eds., 1992); FRANK POMMERSEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* (2009); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995); Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 510 (2007); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153 (2008); Miller, *supra* note 9; Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004); Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 62 (1991).

11. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993) (describing the widespread view of Indian relations as "a tiny backwater of law inhabited by impenetrably complex and dull issues"). Professor Philip Frickey also cites purported comments from Supreme Court Justices describing Indian law cases as "peewee" and "chickenshit." *Id.* (quoting BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 58, 359 (1979)).

labeled "United States."¹² Indians had shaped Anglo-American identity and politics for over two hundred years.¹³ Concerns over "Indian affairs"—a catch-all analog of "foreign affairs" that encompassed treaty-making, land title, trade, and war and peace with Native nations—drove Anglo-Americans' earliest efforts toward confederation¹⁴ and helped instigate the American Revolution.¹⁵ Relations with Indians consumed much of day-to-day federal

12. The Treaty of Paris ending the American Revolution transferred all British territory east of the Mississippi River to the United States, yet only the land along the eastern seaboard had been purchased from the Indians. In 1787, nearly all territory west of the Appalachians (except portions of present-day Kentucky and eastern Tennessee) remained Indian country, both *de facto* and *de jure*. See REGINALD HORSMAN, *EXPANSION AND AMERICAN INDIAN POLICY, 1783–1812*, at 4–15 (1967); see also *infra* notes 60–62 and accompanying text.

13. See, e.g., COLIN G. CALLOWAY, *NEW WORLDS FOR ALL: INDIANS, EUROPEANS, AND THE REMAKING OF EARLY AMERICA* 196 (1997) ("[T]he Indian presence in America's past profoundly shaped the ways in which early American history unfolded. Europeans had to take account of Indians in their wars, diplomacy, and daily lives. They lived alongside Indians and had to know something about them."); JILL LEPORE, *THE NAME OF WAR: KING PHILIP'S WAR AND THE ORIGINS OF AMERICAN IDENTITY* (1998) (emphasizing how struggles against the Indians in seventeenth-century New England helped create an American identity); RICHTER, *supra* note 1, at 252 (stressing that the United States "was born in a revolution against Indians as well as against the crown, that its prosperity was based on the expropriation of Native land, [and] that its participatory politics rested on racial exclusion"); PETER SILVER, *OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA* xviii (2008) (describing how Indian wars in the mid-Atlantic helped produce "a democratic revolution and the dignifying of ordinary people; a commitment to toleration, or at least a deep hostility to bigotry between Europeans; and, in time, most of the American republic's institutional beginnings"). See generally CARROLL SMITH-ROSENBERG, *THIS VIOLENT EMPIRE: THE BIRTH OF AN AMERICAN NATIONAL IDENTITY* 191–287 (2010) (relating how portrayals of Natives were "[e]ssential to the production of an American national identity").

14. See *The Articles of Confederation of the United Colonies of New England—1643–1684*, in 1 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA*, at 77, 77–81 (Francis Newton Thorpe ed., 1909) (establishing an agreement between the New England colonies "for offence and defence, mutual advice and succor" because "the natives have formerly committed sundry insolence and outrages upon several Plantations of the English and have of late combined themselves against us"); *Plan of a Proposd Union of the Several Colonies of Masachusetts-bay, New Hampshire, Coneticut, Rhode Island, New York, New Jerseys, Pensilvania, Maryland, Virginia, North Carolina, and South Carolina, For their Mutual Defence and Security, and for Extending the British Settlements in North America* (July 10, 1754), in 5 *PAPERS OF BENJAMIN FRANKLIN* 387, 387–92 (Leonard W. Labaree & Whitfield J. Bell, Jr. eds., 1962) [hereinafter *Albany Plan of Union*] (proposing a colonial union to "hold or direct all Indian treaties" and "make all purchases . . . from Indians for the crown"); see also TIMOTHY J. SHANNON, *INDIANS AND COLONISTS AT THE CROSSROADS OF EMPIRE: THE ALBANY CONGRESS OF 1754* (2000) (describing the creation of the Albany Plan of Union in the context of Indian diplomacy).

15. WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA* 5–40 (1999); RICHTER, *supra* note 1, at 216–20.

governance under both the Articles and the new Constitution,¹⁶ and provoked some of the nation's earliest constitutional crises.¹⁷ In the Constitution's historical context, then, the apparent absence of Indians is a striking anomaly. It is also, this Article contends, wrong.

Part of the problem is that Indians were inseparable from other critical constitutional issues. As Hamilton's Convention speech highlights, Indian affairs quickly implicated foreign relations: the Constitution's drafters feared Indians would ally with the British and Spanish in the contest for continental control. The question of Indians also lurked behind the recurrent and fraught issues of western land, territory, and statehood. Historians have focused on these aspects of the Constitution but made Indians peripheral, touching on them only in passing.¹⁸ This Article reverses this presumption and emphasizes Indian affairs, discussing other aspects when relevant.

16. See, e.g., BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA 11, 197–200, 205–11 (2009) (“Relations with Indians for much of the nineteenth century demonstrated the integral connection between the federal government, national security, territorial expansion, and the economy.”); STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY 2 (2010) (“[I]n each major era of Indian policy, and in each region into which the United States moved, ‘the Indian question’ existed near the center of concerns about the nation’s future. Indian affairs were absolutely critical to virtually all calculations of interest, of politics, of economy, of social situation, and of national survival and future development.”); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 123–32 (2009) (“Nothing preoccupied the Federalist [Washington] administration more than having to deal with . . . native peoples.”).

17. Numerous constitutional conflicts arose from Indian affairs. One such conflict was the Yazoo land fraud. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF *FLETCHER V. PECK* (1966). Another involved questions of state sovereign immunity. See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). And Indian removal occasioned one of the most significant constitutional confrontations in the antebellum United States. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); see also LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836, at 108–20 (2010) (“[T]he new federal constitution lodged Indian diplomacy and Indian land rights at the center of contests over state’s rights.”). See generally JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS (1996); Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875 (2003) (arguing for the influence of *Worcester* on the drafting of the Fourteenth Amendment).

18. A number of recent works have emphasized the international context for the Constitution. See generally, e.g., ELIGA H. GOULD, AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE (2012); DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING (2003); 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 (2010). There have been fewer works on the question of western expansion and the Constitution. The foundational work remains PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC:

To appreciate the influence of Indian affairs on the Constitution, we must begin with the Articles. After the Revolution, national Indian policy was both vital and disastrous. The impoverished Continental Congress desperately needed both peace with Indians and western land to retire its debt. It got neither. Instead, by 1787, it confronted two looming wars it could not afford against powerful Native confederacies.

Nationalists such as Madison and Hamilton agreed on the problem: Congress was too weak to exercise the authority it enjoyed on paper. Indian affairs thus propelled the creation of a more powerful national state—one that, in Madison's words, would possess the "ability to effect what it is proper [it] should do."¹⁹ The new government, its proponents hoped, would have the power to govern not merely in principle but "in reality," as Secretary at War Henry Knox wrote about Indian affairs.²⁰

A strengthened federal state, however, did not mean the same thing to all the Constitution's proponents. As his comments at the Convention suggest, Madison, the delegate most interested in Indian relations,²¹ blamed the disasters of national Indian policy on state intrusions on national authority, particularly the treatymaking power.²² The Madisonian²³ constitutional solution for Indian affairs

JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787 (1983). One important work that places Indians in the context of foreign diplomacy during the era of the Constitution's creation is LEONARD J. SADOSKY, *REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA* (2009).

19. Letter from James Madison to George Nicholas (May 17, 1788), in 18 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE* 24, 28 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

20. Report of the Secretary of War on the Southern Indians (July 18, 1787), in 18 *EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789: REVOLUTION AND CONFEDERATION* 449, 450 (Alden T. Vaughan gen. ed., Colin G. Calloway ed., 1994) [hereinafter *EARLY AMERICAN INDIAN DOCUMENTS*]. Knox's position was labeled as "Secretary at War" under the Articles. See 19 *Journals of the Continental Congress, 1774–1789*, at 126 (Worthington Chauncey Ford ed., 1912) (establishing under the Articles of Confederation the position of "Secretary at War"). He was appointed to the new position of "Secretary of War" in September 1789. See HARRY M. WARD, *THE DEPARTMENT OF WAR, 1781–1795*, at 101–02 (1962); see also Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50 (establishing the Department of War and the office of Secretary of War, a position invested with "such duties as shall be enjoined on, or entrusted to him by the President of the United States . . . relative to Indian Affairs").

21. See Jacob T. Levy, *Indians in Madison's Constitutional Order*, in JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 121, 121–25 (John Samples ed., 2002).

22. This concern over state excesses under the Articles characterized much of Madison's thinking at the time of the Constitution's drafting. See Alison L. LaCroix, *The Authority for*

accordingly recrafted federalism to ensure federal supremacy—partly through the Indian Commerce Clause, but more significantly through the Treaty, Compact, Supremacy, and Property Clauses. The Madisonian approach, briefly summarized, was paternalist: it envisioned a strengthened federal government that would protect and restrain Indians and states alike.

The Hamiltonian take was different. Hamilton had little interest in Indian affairs, but his concern over external threats dovetailed with the views of many on the frontier, who blamed the Articles' failure on national military weakness against Native power. The "savages" Hamilton referenced at the Convention were thus both impetus and justification for the creation of a federal standing army supported through direct taxation. This militarist constitutional solution to Indian affairs sought a fiscal-military state that would possess the means to dominate the borderlands at Indians' expense.²⁴

Little discussed at the Convention, these two constitutional solutions to the challenges of Indian affairs appeared more fully in the ratification debates, where they suffered divergent fates. While Madison's argument for centralization languished, Hamiltonian invocation of the "savage" threat, embraced partly out of expediency, became an important part of Federalist rhetoric. And it worked to great effect, securing the ratification of an otherwise skeptical

Federalism: Madison's Negative and the Origins of Federal Ideology, 28 LAW & HIST. REV. 451, 462–63 (2010); see also CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005); *infra* notes 202–203 and accompanying text.

23. I have borrowed the distinction between the Madisonian and other Federalist views on the Constitution from Professor Max Edling. See MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 3–11 (2003). I apply the labels "Madisonian" and "Hamiltonian" to these two perspectives on Indian affairs to reflect their respective roles in propounding these views both at the Convention and in *The Federalist*. But, although the two views diverged, they were not mutually exclusive; Madison and Hamilton, as well as many other nationalists, embraced elements of both perspectives at various points.

24. I also borrow the term "fiscal-military state" from Edling, who adopts it from the historical literature on British state formation, in which the term refers to "a state primarily designed for war." EDLING, *supra* note 23, at 47–49. As Edling argues, the United States did not adopt the British model wholesale; instead, the Constitution created a national government that was "light, and inconspicuous," but which "held the full powers of the 'fiscal-military state' in reserve." *Id.* at 47, 227. Historians use the term "borderlands" to describe "the contested boundaries between colonial domains," where sovereignty and authority were ill-defined and uneven. Jeremy Adelman & Stephen Aron, *From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History*, 104 AM. HIST. REV. 814, 816 (1999); Pekka Hämäläinen & Samuel Truett, *On Borderlands*, 98 J. AM. HIST. 338, 351–61 (2011).

Georgia anxious for federal military aid. Had Georgia failed to ratify, the Constitution's eventual success would have been much more tenuous.

But using Indians to justify the power of the new national state came with a cost: it elevated conquest of Indians to a constitutional principle. Although few Federalists were rabid Indian-haters of the sort common on the frontier,²⁵ they had sold the Constitution by promising to use federal power against Indians rather than, as Madison had anticipated, to restrain states. Expansionist states and white settlers held the federal government to its bargain. The history of national violence against Indians that followed ratification fulfilled the Hamiltonian vision, as the dispossession and settlement of western lands became one of the central projects of the new federal state.

The historical narrative presented by this Article underscores the importance of Indian affairs in creating the Constitution, particularly provisions concerning federalism and the fiscal-military state, and highlights how ratification created a document intended to conquer Indians. In addition to revising historical understandings of the Constitution, this account has theoretical and normative implications, but these depend on one's perspective. From an originalist standpoint, it recounts how multiple and even divergent intents among the Constitution's drafters became, through ratification, something akin to the document's "original public meaning." From the perspective of popular constitutionalism, the "people themselves" ultimately determined what the Constitution would mean for Indian affairs.²⁶ In short, both the Constitution's drafters and "the people" worked to create a document committed in part to the violent expropriation of the western borderlands from Indians. This outcome was not a failure of the political process. It was, rather, the cost of the Constitution's embrace of democracy and union.

To support these interpretive insights, this Article is divided into four parts. Part I recounts the failure of national Indian policy under the Articles, and reviews the nationalists' explanations for this failure in the weaknesses of the federal state. Part II describes how provisions of the Constitution offered potential solutions for these difficulties. Part III explores ratification debates over Indian affairs,

25. See *infra* notes 55–59 and accompanying text.

26. On popular constitutionalism, see generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

and demonstrates how the Hamiltonian emphasis on national military power proved critical in securing ratification, but also solidified the document's subsequent meaning. Finally, Part IV explores some of the implications of this history for interpreting the Constitution, including considering the document's commitment to dispossessing Natives alongside its entrenchment of chattel slavery.

I. THE ARTICLES' FAILURES

In 1783, the newly created "citizens of America" were optimistic.²⁷ Victory in the Revolution had rendered the nation, in George Washington's words, "the sole Lords and Proprietors of a vast tract of continent."²⁸ Four years later, hope had turned to despondence, as the Continental Congress, with an empty treasury and a barely extant military, confronted looming wars against powerful Indian confederacies on the northern and southern borderlands.

This Part explores the causes and meaning of this failure. Part I.A details the struggles over state and national authority over Indian affairs in drafting the Articles. Part I.B recounts the creation of national Indian policy from 1783 to 1784. Part I.C traces the failure of that policy in complex negotiations on the northern and southern borderlands, where the national government proved unable to constrain states, squatters, or Indians. Part I.D considers the lessons nationalists drew from these failures. Though the Madisonians and Hamiltonians agreed on the need for a strengthened national state, they diverged in their explanations: Madisonians focused on the national inability to control states, whereas Hamiltonians fixed on the military weaknesses that made the country unable to counter Native power.

A. *Drafting the Articles*

Indian affairs mattered in early America because Natives were ubiquitous. Although their numbers had declined significantly since contact with Europeans, as many as 150,000 Indians lived in the trans-

27. GEORGE WASHINGTON, THE LAST OFFICIAL ADDRESS, OF HIS EXCELLENCY GENERAL WASHINGTON, TO THE LEGISLATURES OF THE UNITED STATES 4 (Hartford, Hudson & Goodwin 1783).

28. *Id.*

Appalachian West in 1783.²⁹ The population of the United States was much larger—3.9 million by the time of the 1790 census—but heavily concentrated along the coast between New England and Virginia.³⁰ Further west and south, Anglo-American settlement, although rapidly growing, remained sparse and scattered.³¹

Trade with Native nations also remained important. Anglo-American traders competed with the British and Spanish for the Native-controlled deerskin and fur trades,³² but trade was even more vital for securing cross-cultural alliances: as George Washington stated, “[T]he trade of the Indians is a main mean of their political management.”³³ Natives’ most important economic resource, though, was land. Gripped by what one scholar has dubbed “the great land rush,” Anglo-Americans speculated wildly in western lands.³⁴ Land

29. Determining historical Native population numbers is difficult and imprecise. For an estimate of 150,000, 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); for an estimate of 100,000, see WOOD, *supra* note 16, at 123; Letter from Col. Arthur Campbell to Gov. Randolph (Dec. 5, 1787), in 4 *CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS FROM JAN. 1, 1785, TO JULY 2, 1789, PRESERVED IN THE CAPITOL AT RICHMOND* 363, 364 (William P. Palmer ed., Richmond, Rush U. Derr 1884) [hereinafter *CALENDAR OF VIRGINIA STATE PAPERS*] (projecting a population of 100,000 for the Creeks, Cherokees, Chickasaws, and Choctaws combined). For additional background on Native demographics, see generally 1 *HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT* ch. Ag (Susan B. Carter et al. eds., millennial ed. 2006); RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: POPULATION HISTORY SINCE 1492*, at 60–90 (1987); Edward Countryman, *Indians, the Colonial Order, and the Social Significance of the American Revolution*, 53 *WM. & MARY Q.* 342, 347–48 (1996).

30. 1 *HISTORICAL STATISTICS*, *supra* note 29, at 1-26 tbl.Aa1–5. The population density is best understood visually. See *1790 Population Map*, U.S. CENSUS BUREAU, http://www.census.gov/history/www/reference/maps/1790_population_map.html (last visited Nov. 19, 2013).

31. The 1790 census recorded roughly 82,500 inhabitants in Georgia and 73,500 inhabitants in Kentucky—then part of Virginia and one of the only areas settled by Anglo-Americans west of the Appalachians. 1 *HISTORICAL STATISTICS*, *supra* note 29, at 1-244 tbl.Aa3644-3744, 1-217 tbl.Aa3097-3197. Given the very rapid growth rate of Georgia and Kentucky during this period, the states’ populations during the 1780s would have been considerably smaller. Note that Native American populations were not recorded in the census, and, although I refer to Anglo-American settlement, both Georgia and Kentucky contained large numbers of enslaved Africans. See *id.* (recording 29,662 and 12,544 black inhabitants in Georgia and Kentucky, respectively).

32. KATHRYN E. HOLLAND BRAUND, *DEERSKINS AND DUFFELS: THE CREEK INDIAN TRADE WITH ANGLO-AMERICA, 1685–1815*, at 164–88 (1993); WHITE, *supra* note 1, at 476–85.

33. Letter from George Washington to the U.S. Senate (Aug. 4, 1790), in 6 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 188, 189 (Mark A. Mastromarino et al. eds., 1996).

34. JOHN C. WEAVER, *THE GREAT LAND RUSH AND THE MAKING OF THE MODERN WORLD, 1650–1900*, at 96–116 (2003); see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 249–51 (1990).

companies mushroomed, buying and selling dubious claims to vast tracts of Native territory while drawing heavy investment from the new nation's political elite.³⁵ Indians, in short, possessed the most valuable commodity in early America.³⁶

Given the interests at stake, properly governing Indian affairs was critical. Yet the United States had inherited a divided legacy from the British Empire. On the one hand, individual colonies had long made treaties and regulated trade with tribes.³⁷ On the other hand, imperial officials, frustrated by colonies' uncoordinated actions, fitfully sought to impose a centralized regime.³⁸ These efforts became more serious after 1754, when the Albany Congress proposed a "Plan of Union" among the colonies that included a grand council with powers over Indian affairs, the military, and western settlement.³⁹ This Plan failed, but it signaled further centralizing reforms: the creation of two imperial superintendents responsible for managing relations with tribes,⁴⁰ the assertion of Britain's sole right of preemption of Indian lands,⁴¹ and, in the Proclamation of 1763, a settlement boundary reserving territory west of the Appalachian crest for Indian nations.⁴² These reforms angered colonists, who resented imperial interference in lucrative land speculations; they simply flouted the Proclamation and similar restrictions.⁴³

35. On the rise of the land companies, see STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 104–21 (2005); PATRICK GRIFFIN, *AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER* 46–71 (2007); HOLTON, *supra* note 15, at 3–38. See generally ALFRED P. JAMES, *THE OHIO COMPANY: ITS INNER HISTORY* (1959).

36. See, e.g., Countryman, *supra* note 29, at 357–60.

37. See generally 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20 (recording the diplomatic and legal relations of individual states with Indians).

38. Clinton, *supra* note 10, at 1066–79.

39. Albany Plan of Union, *supra* note 14, at 387–92. See generally SHANNON, *supra* note 14 (providing background on the Albany Congress and the Plan of Union).

40. See generally DANIEL K. RICHTER, *The Plan of 1764: Native Americans and the British Empire That Never Was*, in *TRADE, LAND, POWER: THE STRUGGLE FOR EASTERN NORTH AMERICA* 177 (2013); John R. Alden, *The Albany Congress and the Creation of the Indian Superintendencies*, 27 *MISS. VALLEY HIST. REV.* 193 (1940).

41. BANNER, *supra* note 35, at 104–05.

42. COLIN G. CALLOWAY, *THE SCRATCH OF A PEN: 1763 AND THE TRANSFORMATION OF NORTH AMERICA* 92–98 (2006); Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 *B.U. L. REV.* 329, 354–56 (1989).

43. See BANNER, *supra* note 35, at 98–104 (noting the prevalence of illegal settlement and purchase of lands guaranteed to the Indians by the Proclamation); HOLTON, *supra* note 15, at 30 ("The Proclamation of 1763 was anathema to every Virginia land speculator . . .").

After independence, centralized governance and its challenges became the responsibility of the Continental Congress. The first drafts of a plan for the new government largely recapitulated imperial Indian policy: no colony could engage in offensive war against Natives without congressional consent; the United States would enter into an alliance with the Six Nations; and the Continental Congress would retain the right of preemption of all Native land while guaranteeing Indian title to unpurchased territory.⁴⁴ But these provisions largely evaporated in subsequent drafts.⁴⁵

The most contentious remaining provision was the proposal in the Articles' second draft that Congress be granted "sole and exclusive right and power of . . . Regulating the Trade, and managing all Affairs with the Indians."⁴⁶ Most delegates supported this addition.⁴⁷ James Wilson of Pennsylvania argued that "[n]o lasting peace will be [made] with the Indians, unless made by some one body," and insisted that the United States should have the sole power to make treaties with the Indians.⁴⁸ But Virginia's delegates wanted authority over Indians within state borders, and the South Carolina delegation "very passionately" opposed the measure, stressing the importance of its Indian trade.⁴⁹ The next draft compromised, granting the national government "sole and exclusive" power only over affairs with Indians "not members of any of the States."⁵⁰ Some evidently thought this was inadequate; a year later Congress added

44. See 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 195-98 (Worthington Chauncey Ford ed., 1905).

45. See 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 679-89 (Worthington Chauncey Ford ed., 1906). The exclusive war power remained, but was qualified in the event a state faced imminent Indian attack. See ARTICLES OF CONFEDERATION of 1781, art. VI, para. 5 ("No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted . . .").

46. 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 45, at 681-82.

47. 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1077-79 (Worthington Chauncey Ford ed., 1906). Delegates from Pennsylvania, Connecticut, Georgia, and Maryland spoke in favor of the provision, while delegates from Virginia conditionally endorsed it; only delegates from South Carolina were strongly opposed.

48. *Id.* at 1078-79 (alteration in original).

49. *Id.*

50. 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 45, at 681-82.

language further protecting states' rights.⁵¹ As finally ratified, Article IX of the Articles granted Congress the "sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."⁵²

This compromise undoubtedly deserved James Madison's later criticism as "obscure and contradictory."⁵³ But its inconsistencies were not a product of infelicitous drafting. Article IX attempted to reconcile centralized authority over Indian affairs with the competing legacy of state preeminence, an impulse heightened by hostility to earlier imperial policy. States with sufficient clout to write qualifying language into the Articles would not acquiesce to congressional supremacy, no matter how phrased. As delegate Thomas Stone of Maryland put it during the debates over Article IX, "What is the meaning of this superintendency [over Indian affairs]? Colonies will claim the right first. . . . Disputes will arise when Congress shall interpose."⁵⁴ Subsequent events proved Stone's prescience.

B. The Creation of Congressional Indian Policy

The Revolution bequeathed another legacy to the United States: Indian hating. Deeply divided Native nations had sought to maintain neutrality during the war, but factions from many tribes sided with the British. The result was brutal and chaotic violence. Anglo-Americans—long accustomed to viewing Natives, in the words of the Declaration of Independence, as "merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions"⁵⁵—pillaged Indian country, ravaging Native villages.⁵⁶ As attitudes toward Indians hardened, frontier

51. See 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 844–45 (Worthington Chauncey Ford ed., 1907) (adding "provided, that the legislative right of any State, within its own limits be not infringed or violated" to the congressional power over Indian affairs).

52. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

53. THE FEDERALIST NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961).

54. 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 47, at 1079.

55. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776); see also John R. Wunder, "Merciless Indian Savages" and the Declaration of Independence: Native Americans Translate the Ecuinnaunuxulgee Document, 25 AM. INDIAN L. REV. 65, 65–73 (2000) (discussing Indians' likely responses to the Declaration of Independence).

56. For background on the fierce struggles between Anglo-American colonists and Native nations during the Revolution, and the virulent hatred of Indians this fighting engendered

settlers increasingly spoke of “extirpating” Natives.⁵⁷ “The Country taulks of Nothing but killing Indians, & taking posession of thier lands,” reported one visitor to western Pennsylvania.⁵⁸ The full depths of frontier fury against Indians were revealed in 1782, when Pennsylvania militia indiscriminately slaughtered nearly one hundred pacifist Christianized Natives upon suspicion they had aided attacks by British-allied Indians.⁵⁹

The year after the butchery known as the Gnadenhütten massacre, the United States reached a peace agreement with Great Britain. The resulting Treaty of Paris of 1783 acknowledged American independence and ceded the nation all British territory east of the Mississippi River, a tremendous swath far larger than existing Anglo-American settlements.⁶⁰ But Native nations, excluded from the treaty and still at war with the United States, owned this land.⁶¹ Indian affairs and western expansion were thus intimately intertwined: as George Washington wrote, “[T]he settlem[en]t of the Western Country, and making a Peace with the Indians, are so analogous, that there can be no definition of the one, without involving considerations of the other.”⁶²

The peace that the congressional Committee on Indian Affairs proposed reflected the anger against Indians born of years of violence. According to the Committee’s report, the Indians were the “aggressors in the war, without even a pretence of provocation,” and had “wantonly desolated our villages and settlements, and destroyed

among white settlers, see CALLOWAY, *supra* note 1, at 25–31, 292–301; RICHTER, *supra* note 1, at 218–23; SILVER, *supra* note 13, at 230–92.

57. See, e.g., CALLOWAY, *supra* note 1, at 132–33, 292–301 (quoting a Seneca leader’s statement that the Americans “wish for nothing more, than to extirpate us from the Earth, that they may possess our Lands”); SILVER, *supra* note 13, at 263–83 (noting the prevalence of the “language of exterminatory anti-Indianism” during and after the Revolution, and citing several instances when Anglo-Americans demanded Indians’ “extirpation”); Merrell, *supra* note 29, at 199 (reporting one English visitor’s comment that “[t]he white American have the most rancorous antipathy to the whole race of Indians and nothing is more common than to hear them talk of extirpating them from the face of the earth, men, women, and children”).

58. SILVER, *supra* note 13, at 276.

59. *Id.* at 267–76; Rob Harper, *Looking the Other Way: The Gnadenhütten Massacre and the Contextual Interpretation of Violence*, 64 WM. & MARY Q. 621 (2007).

60. Definitive Treaty of Peace, U.S.-Gr. Brit., art. 2, Sept. 3, 1783, 8 Stat. 80, 81–82.

61. CALLOWAY, *supra* note 1, at 275–91.

62. Letter from George Washington to James Duane (Sept. 7, 1783), in 10 THE WRITINGS OF GEORGE WASHINGTON 303, 311 (Worthington Chauncey Ford ed., N.Y., G.P. Putnam’s Sons 1891).

our citizens.”⁶³ Now purportedly conquered,⁶⁴ Native nations should “make atonement for . . . their wanton barbarity” with the only means available to them: their land.⁶⁵ The United States, the Committee urged, should hold treaty sessions with the hostile tribes, forgo the long-standing diplomatic custom of purchasing Native title, and inform the Indians that “Great Britain has . . . relinquished to the United States all claim to the country.”⁶⁶ Then the United States should take nearly all of present-day Ohio, none of which had been previously purchased.⁶⁷

The Committee’s bluster concealed Congress’s fundamental weakness. Congress had to claim Indian land by conquest because it lacked the funds to purchase it.⁶⁸ An empty purse also meant the United States desired peace as much as the Indians did: the country could not afford to keep fighting, which, the Committee acknowledged, would be both expensive and ineffective.⁶⁹ The national government needed western land still more desperately. The country was saddled with an enormous war debt, and, with few sources of revenue available, many congressional delegates viewed western lands as “[t]he only adequate fund” for repayment.⁷⁰

63. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 683 (Gaillard Hunt ed., 1922).

64. See Letter from the Pennsylvania Delegates to the Pennsylvania Assembly (Sept. 25, 1783), in 20 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 710, 710 (Paul H. Smith ed., 1993) (“It is intended to insist as Part of the Terms of Peace that the Savages should without Compensation abandon Part of their Country to the United States who claim it by Conquest & as a Retribution for the Expence & Damages incurred by the hostile & cruel Conduct of the Savages contrary to the Advice & Injunctions of the United States.”).

65. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 63, at 683–94.

66. *Id.* at 684; see also SILVER, *supra* note 13, at 288–89 (describing the Committee on Indian Affairs report in the context of revolutionary-era anti-Indian rhetoric).

67. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 63, at 686.

68. See *id.* at 682 (“[T]he public finances do not admit of any considerable expenditure to extinguish the Indian claims upon such [western] lands.”).

69. *Id.*

70. Letter from Arthur Lee to John Adams (May 11, 1784), in 21 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 607, 607–08 (Paul H. Smith ed., 1994); see Letter from William Ellery to Francis Dana (Dec. 3, 1783), in 21 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra*, at 173, 177 (noting that the value of a land cession may be “sufficient to discharge our whole public debt”); Letter from David Howell to Jabez Bown (Mar. 23, 1784), in 21 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra*, at 453, 454 (“The Western Country is considered by the present Congress as a capital resource for the payment of our debts—the more it is explored the more it rises in our estimation.”).

Congress had already begun granting as-yet unceded land to veterans of the Continental Army that Congress was too poor to pay.⁷¹

But the United States was not the only claimant of lands Indians owned. Many states inherited colonial charters that purportedly extended their boundaries to the Pacific.⁷² These vague grants frequently overlapped, leading to internecine jurisdictional conflicts.⁷³ Some states in turn sold these expansive but nominal claims to competing speculators;⁷⁴ other states used the land to pay their own revolutionary veterans.⁷⁵ Congress ostensibly had the power under the Articles to reconcile these interests through a convoluted quasi-judicial process,⁷⁶ yet it rarely exercised this role.⁷⁷ Congress instead urged states to cede their claims to the national government, but such suasion often went unheeded, as states zealously pursued self-interest.⁷⁸

State competition made the work of the Committee on Indian Affairs, in the words of one delegate, a "delicate Business," since any resolution would affect state claims.⁷⁹ Even the selection of congressional commissioners to negotiate the proposed treaties erupted into a fierce struggle between Massachusetts, New York, Maryland, and Rhode Island, which congressional president Charles Thomson likened to "the fable of the hunters quarreling about the bear skin, before they had killed the bear."⁸⁰ "The whole scene," he wrote, "was to me another strong symptom of the approaching

71. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 63, at 681-94.

72. ONUF, *supra* note 18, at 3-20.

73. *Id.*

74. *Id.*; see also Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. 353, 370-73 (1977) (describing the struggles over various company claims to western lands).

75. See, e.g., J. David Lehman, *The End of the Iroquois Mystique: The Oneida Land Cession Treaties of the 1780s*, 47 WM. & MARY Q. 523, 533 (1990) (describing New York's policy of granting Indian territory as bounty lands).

76. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2.

77. See ONUF, *supra* note 18, at 19-20 (noting the cumbersome nature of Article IX and stressing that "Congress's record as an active agent in interstate conflict resolution was not distinguished").

78. See Onuf, *supra* note 74, at 369-71 (describing states' resistance of congressional calls for cession).

79. Letter from Samuel Osgood to John Adams (Jan. 14, 1784), in 21 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 70, at 276, 278.

80. Letter from Charles Thomson to Hannah Thomson (Oct. 21, 1783), in 21 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 70, at 86, 87.

dissolution of the Union.”⁸¹ The Committee had no desire to entangle itself in these disputes; it ducked the entire question by resolving that its actions “shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their limits.”⁸² These concessions did not alter congressional policy, but would, the Committee hoped, placate the states.

Western land hunger had also infected swarms of Anglo-American settlers.⁸³ They cared little for jurisdictional niceties and squatted on lands regardless of formal title.⁸⁴ Their hatred of Indians, born of wartime suffering, led them to reject Native land ownership, and so they had no compunction occupying territory guaranteed to Indian nations under successive treaties.⁸⁵

Policymakers disdained these squatters as “Lawless Banditti,”⁸⁶ and feared that their influx would create “fresh discontent and hostilities” among the Indians,⁸⁷ resulting in “a great deal of bloodshed.”⁸⁸ The Committee on Indian Affairs urged that congressional commissioners “signify to them the displeasure of Congress.”⁸⁹ Citing Article IX, Congress subsequently prohibited all settlement on Indian land and required congressional approval for all sales outside state territory.⁹⁰

In short, as the Committee on Indian Affairs’ report reveals, any consideration of Indian affairs implicated a labyrinth of competing interests: the Committee had to make peace with Natives, restrain illegal settlement, and conciliate state assertions of sovereignty, all with limited funds and while seizing the land necessary to repay the national debt.⁹¹ The Committee’s proposed solutions demonstrated an

81. *Id.* at 87–88.

82. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 63, at 693.

83. *See* GRIFFIN, *supra* note 35, at 3–16, 181–211.

84. *Id.*

85. *Id.* at 181–211. *See generally* SILVER, *supra* note 13.

86. Letter from James Manning to Hezekiah Smith (May 17, 1786), in 23 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 293, 294 (Paul H. Smith ed., 1995).

87. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 63, at 682.

88. Letter from George Washington to James Duane, *supra* note 62, at 304.

89. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 63, at 689.

90. *Id.* at 602.

91. *Cf.* Peter S. Onuf, *Liberty, Development, and Union: Visions of the West in the 1780s*, 43 WM. & MARY Q. 179, 181 (1986) (“The challenge [facing Congress] was to regulate the westward thrust of settlement in ways that would strengthen the union, preserve peace with the Indians and neighboring imperial powers, and pay the public debt while permitting enterprising settlers to pursue their own goals.”).

extraordinary faith in the power of its formal authority to restrain competing actors. Indians would yield their land because the Treaty of Paris granted it to the United States. States' jurisdictional concerns would be mollified by reiterating the qualifying language of Article IX. And swarms of illegal squatters would defer to congressional proclamations of authority over Indian affairs.

As a question of law, Congress's interpretation of its powers under the Articles was persuasive.⁹² But there were few institutions to compel compliance. Congress evidently expected that documents could control reality. Squatter defiance, Indian independence, and state intractability quickly shattered this illusion and revealed the inadequacy of the federal government's paper authority.

C. *The Failure of Congressional Indian Policy*

It did not take long for Congress to discover the limits of its power. Expressions of "the displeasure of Congress," for instance, had little effect on Anglo-American settlers illegally squatting on Indian land.⁹³ When George Washington visited territory north of the Ohio in 1784, he found the "rage" for land speculation unabated. "In defiance of the proclamation of Congress," he lamented, "[speculators] roam over the Country on the Indian side of the Ohio—mark out Lands—Survey—and even settle them. This gives great discontent to the Indians, and will unless measures are taken in time to prevent it, inevitably produce a war with the western Tribes."⁹⁴ Washington proposed that Congress make illegal settlement a felony "if there is power for the purpose."⁹⁵ Congress instead instructed the commander of the makeshift national army, Josiah Harmar, to expel the settlers.⁹⁶ Harmar had little success. He

92. By contrast, Congress's aggressive reading of the Treaty of Paris had considerably less grounding in the law of the time. Its decision to reject Native title and adopt a theory of conquest represented a dramatic break from earlier practice and legal theory, and was soon retracted. BANNER, *supra* note 35, at 112–49; Merrell, *supra* note 29, at 200–05.

93. See *supra* notes 89–90 and accompanying text; see also 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 63, at 689.

94. Letter from George Washington to Jacob Read (Nov. 3, 1784), in 2 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES, 118, 119–20 (W.W. Abbot & Dorothy Twohig eds., 1992).

95. Letter from George Washington to James Duane, *supra* note 62, at 307.

96. See 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 472 (John C. Fitzpatrick ed., 1933).

discovered the settlers either did not know their actions were illegal,⁹⁷ or disagreed: one group in 1785 argued that, under the Articles, “Congress is not empowered to forbid” their settlement and sought to create their own government.⁹⁸ Harmar repeatedly removed small handfuls of the “immense” number of settlers, but many more returned.⁹⁹ It would be “impossible” to prevent such encroachment without more forceful measures, Harmar concluded.¹⁰⁰

Harmar’s struggles mirrored difficulties elsewhere. As the Continental Congress quickly learned, neither states nor Natives had any more respect for Congress’s claims to authority than the unruly squatters. Two sets of borderland negotiations—on the northwestern and southern frontiers, respectively—underscore this point.

1. *The North.* Iroquoia and the Ohio Country—present-day upstate New York and Ohio, respectively—were the most fought-over ground in eighteenth-century North America. The French and British had battled to control the region for decades, a struggle that precipitated the global conflict known as the Seven Years War.¹⁰¹ The outcome of these imperial wars hinged on the allegiances of Native nations, foremost among them the Six Nations, “the Fiercest and most Formidable People in North America,”¹⁰² who had long been the focus of diplomacy in Indian country.¹⁰³

97. See, e.g., Letter from Brigadier-Gen. Harmar to Henry Knox, Sec’y of War (Aug. 7, 1787), in 2 THE ST. CLAIR PAPERS 26, 28 (William Henry Smith ed., Cincinnati, Robert Clarke & Co. 1882) (describing how the posting of the congressional proclamation ordering removal “amazed the inhabitants [of the western territories] exceedingly, particularly those who style themselves Americans”).

98. Letter from Colonel Harmar to the President of Congress (May 1, 1785), in 2 THE ST. CLAIR PAPERS, *supra* note 97, at 3, 5.

99. Letter from Colonel Harmar to Henry Knox, Sec’y of War (June 1, 1785), in 2 THE ST. CLAIR PAPERS, *supra* note 97, at 6, 6; see Letter from Colonel Harmar to Henry Knox, Sec’y of War (July 12, 1786), in 2 THE ST. CLAIR PAPERS, *supra* note 97, at 14, 14.

100. Letter from Colonel Harmar to Henry Knox, Sec’y of War (June 1, 1785), *supra* note 99, at 6.

101. FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS’ WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754–1766, at xviii, 11–32, 36–38 (2000).

102. CADWALLADER COLDEN, THE HISTORY OF THE FIVE INDIAN NATIONS xxi (Cornell Univ. Press ed. 1958) (1727).

103. See generally 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 (1984); DANIEL K. RICHTER, THE ORDEAL OF THE LONGHOUSE: THE PEOPLES OF THE IROQUOIS LEAGUE IN THE ERA OF EUROPEAN COLONIZATION (1992). I use the term Iroquois rather than Haudenosaunee, which many tribe members use, to assist nonspecialist readers. See COLIN G. CALLOWAY, PEN AND INK

The Revolution engulfed the region in war yet again. The Six Nations had struggled to maintain neutrality, but ultimately divided—the Mohawks, Senecas, Onondagas, and Cayugas sided with the British, while the Oneidas and Tuscaroras allied with the Americans.¹⁰⁴ The ensuing violence devastated Iroquois communities on both sides.¹⁰⁵

New York, anxious to extend its jurisdiction over Iroquois lands also claimed by Massachusetts, saw Iroquois “defeat” as an opportunity to obtain Indian title.¹⁰⁶ To fend off potential congressional interference, New Yorkers argued that the Six Nations were members of the state within their jurisdiction, “the Management of whom Congress have no concern.”¹⁰⁷ The New York legislature even considered a resolution that would have prohibited congressional commissioners from negotiating with the Iroquois without the legislature’s “express permission.”¹⁰⁸ These actions led Washington to fear the state would expel the Six Nations altogether, which he predicted “will end in another Indian War.”¹⁰⁹

Washington’s anxiety stemmed from his recognition that Indians “will not suffer their Country . . . to be wrested from them,”¹¹⁰ for they were not the prostrate peoples Congress portrayed.¹¹¹ The Six Nations and other tribes did not regard themselves as conquered and refused to “submit to be treated as Dependents.”¹¹² They instead insisted upon the sanctity of earlier boundary lines, leading Anglo-Americans to lament that the tribes, instead of showing “Contrition for their perfidious Behaviour, seem ever to consider themselves as the Party courted and solicited for Reconciliation and Favour.”¹¹³ Such

WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY xii (2013) (discussing this question of terminology).

104. See BARBARA GRAYMONT, *THE IROQUOIS IN THE AMERICAN REVOLUTION* 100–01 (1972).

105. See generally CALLOWAY, *supra* note 1, at 108–57; GRAYMONT, *supra* note 104, at 129–56.

106. See Lehman, *supra* note 75, at 533.

107. James Duane’s Views on Indian Negotiations (July/Aug. 1784), in 18 *EARLY AMERICAN INDIAN DOCUMENTS*, *supra* note 20, at 299, 299.

108. Lehman, *supra* note 75, at 533.

109. Letter from George Washington to James Duane, *supra* note 62, at 306.

110. *Id.*

111. See Merrell, *supra* note 29, at 203 (“The Indian nations insisted that they were sovereign, that American independence did not mean native American dependence, and the United States was unable to make them change their minds.”).

112. Duane, *supra* note 107, at 299.

113. *Id.*

defiance found support in the British: threatened by the Iroquois with war if they abandoned their forts on the Great Lakes, the British opted to violate the Treaty of Paris and remain, supplying arms and tacit encouragement to Native resisters.¹¹⁴

Washington recommended negotiation with the Six Nations for the cession of only a small part of their land.¹¹⁵ Congress adopted this suggestion,¹¹⁶ but New York wanted more, and discouraged any treaty that would recognize any Iroquois title within the state. New York Governor George Clinton told the congressional commissioners appointed to secure the treaty that he would regard any agreement with Indians "residing within the Jurisdiction of this State" as an infringement of New York's sovereign rights.¹¹⁷ As outraged congressional delegate Jacob Read reported to Washington, Clinton then held "a treaty of [his] own Authority with the Six Nations in defiance of our Resolves and the Clause of the Confederation restricting the Individual states."¹¹⁸ Read feared that Clinton's action would "be Attended with worse Consequences With respect to the Indians than almost any other that state Cou'd take If this Conduct is to be pursued our Commissioners are rendered useless."¹¹⁹

Read's despair was premature. The Iroquois, aware of the divisions between Congress and the state, refused to give Clinton any land, electing instead to wait for Congress.¹²⁰ Yet the subsequent treaty session at Fort Stanwix between congressional commissioners

114. See ALAN TAYLOR, *THE DIVIDED GROUND: INDIANS, SETTLERS, AND THE NORTHERN BORDERLAND OF THE AMERICAN REVOLUTION* 111–19 (2006) ("Far from intimidating the Indians, the British troops and their posts were hostages that enabled the Indians to compel concessions. . . . Interpenetrated and interdependent with the Six Nations, the British could not afford a rupture with their native allies."). See generally COLIN G. CALLOWAY, *CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783–1815* (1987).

115. Letter from George Washington to James Duane, *supra* note 62, at 306.

116. 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 63, at 686–87.

117. See Letter from Governor Clinton to the U.S. Indian Comm'rs (Aug. 13, 1784), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 301, 301 ("I . . . expect[] however and positively stipulat[e] that no long agreement . . . be entered into with Indians residing within the Jurisdiction of this State, with whom only I mean to treat, prejudicial to its rights.").

118. Letter from Jacob Read to George Washington (Aug. 13, 1784), in 21 LETTERS OF DELEGATES, *supra* note 70, at 768, 768–69.

119. *Id.* at 769.

120. See Extracts from the Proceedings of the Treaty of Fort Stanwix Between New York and the Six Nations, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 305, 307; see also HORSMAN, *supra* note 12, at 17 ("The Six Nations replied shrewdly to [New York's] offer. Joseph Brant, the well-educated, articulate Mohawk chief, attempted to draw the federal government into the negotiations.").

and representatives of the Six Nations only exacerbated the struggle for jurisdiction. The commissioners assured the Six Nations that they, not New York, had the “full authority” to negotiate, because “without the authority of Congress no business can be valid that may be attempted by particular people or States.”¹²¹ But Clinton disagreed. He secretly instructed an agent, Peter Schuyler, to observe the treaty negotiations and, if anything harmful to New York’s interests was discussed, to “use your most undivided influence to Counteract and frustrate” them.¹²² Schuyler plied the Indians with rum to forestall negotiations.¹²³ When the commissioners threatened to remove him, he presented his credentials as a state officer, revealing to the shocked commissioners that “the Governor and People of N[ew] York have, from sinister Views, done everything in their power to oppose us.”¹²⁴ The angered commissioners then had federal troops seize the disputed liquor, whereupon Schuyler had the county sheriff arrest the officers for theft.¹²⁵ Finally, the commissioners drove off the sheriff, Schuyler, and his agents, and continued the treaty negotiations.¹²⁶

Remarkably, even after this debacle, the United States managed to secure a favorable treaty with the Six Nations,¹²⁷ a reflection of the Iroquois’ constrained choices more than congressional strength.¹²⁸ But this did not comfort observers. Congressional delegate Richard Henry Lee thought the jurisdictional strife would encourage the

121. Proceedings of the United States and the Six Nations at Fort Stanwix, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 313, 313.

122. Instructions for Major Peter Schuyler (Sept. 10, 1784), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 312, 312.

123. HENRY S. MANLEY, THE TREATY OF FORT STANWIX: 1784, 82–86 (1932).

124. TAYLOR, *supra* note 114, at 159 (alteration in original); see Proceedings of the United States and the Six Nations at Fort Stanwix, *supra* note 121, at 315 (finding Schuyler responsible for “various direct and indirect means counteracting [the Commissioners’] negotiations” that were “highly injurious to the service of the United States”).

125. MANLEY, *supra* note 123, at 82–86.

126. *Id.*; see TAYLOR, *supra* note 114, at 158–59. A suit against the congressional commissioner Arthur Lee for confiscating the disputed liquor nonetheless proceeded, dragging on until September 1787. See Letter from Charles Thomson to Robert R. Livingston (Apr. 13, 1786), in 23 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 86, at 236, 236 & n.2.

127. Treaty of Fort Stanwix, U.S.-Six Nations, Oct. 22, 1784, 7 Stat. 15.

128. See SADOSKY, *supra* note 18, at 137–38.

country's opponents.¹²⁹ James Monroe, present for the treaty negotiations as part of an excursion throughout the Northwest, was alarmed by the impression that "the *variance* which had taken place between the *Indian Commissioners of the U. States*, & those of *New York* . . . hath made with the *Indians* & in the *Court of G. Britain* respecting us."¹³⁰ Writing to James Madison, who also had been at Fort Stanwix for the beginning of the treaty session, Monroe questioned whether the Six Nations could "even in the most qualified sense" be considered "members of a State" merely because they lived within its borders.¹³¹ Authority over such Indians, Monroe argued, "is committed by the confederation to the U.S. in Congress assembled," but he also concluded that, even if "the right of *Congress* hath been contraven'd," there was no effective remedy for the offense.¹³² Madison agreed with Monroe, strongly criticizing New York's construction of the Articles. If Article IX were "taken in its full latitude," he argued, it "must destroy the authority of Congress altogether, since no act of Congs. within the limits of a State can be conceived which will not in some way or other encroach upon the authority [of the] States."¹³³ But Madison, too, felt that "whatever may be the true boundary between the authority of Congs. & that of N. Y.," the best course of action was inaction.¹³⁴ Monroe and Madison understood that the national government was too weak to enforce its legal authority on recalcitrant states.¹³⁵

Such federal weakness turned Congress's qualified success in securing the Treaty of Fort Stanwix into failure. Unable to defeat the treaty, New York ignored it. The following year, Governor Clinton demanded a land cession from the Oneidas, one of the Six Nations, even though the treaty guaranteed their title.¹³⁶ The Oneidas refused, on the ground that "[t]he United States have informed Us that the soil of our Lands was our own," and declined to sell "until the

129. Letter from Richard Henry Lee to George Washington (Nov. 20, 1784), in 7 *LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS* 613, 613 (Edmund C. Burnett ed., Peter Smith reprinted 1963) (1934).

130. Letter from James Monroe to James Madison (Nov. 15, 1784), in 8 *THE PAPERS OF JAMES MADISON* 140, 140 (Robert A. Rutland & William M.E. Rachal eds., 1973).

131. *Id.*

132. *Id.*

133. Letter from James Madison to James Monroe (Nov. 27, 1784), in 8 *THE PAPERS OF JAMES MADISON*, *supra* note 130, at 156, 156 (alteration in original).

134. *Id.* at 157.

135. *Id.*

136. Lehman, *supra* note 75, at 537–38.

Commissioners of the United States express the same Sentiment."¹³⁷ But the tribe's appeals to the national government were unavailing,¹³⁸ and Clinton cajoled, threatened, and bribed the Oneidas into submission.¹³⁹ Clinton later repeated the process by tricking the Six Nations into a cession he misrepresented as a lease.¹⁴⁰

Congress's success at securing Iroquois land through bluster proved similarly short-lived. As word spread in Indian country that the Treaty of Paris contained nothing about Native title,¹⁴¹ discontent over the Treaty of Fort Stanwix grew: the Council of the Six Nations refused to ratify it, and several Iroquois representatives repudiated it.¹⁴²

Events further west proceeded similarly. At Fort McIntosh and Fort Finney, Congress dictated treaties of conquest claiming much of the Ohio Country to small delegations of the Shawnees, Delawares, Wyandots, Chippewas, and Ottawas.¹⁴³ Although lands north of the Ohio River were federal territory after 1784,¹⁴⁴ bands of Kentucky settlers defied congressional authority and raided the region, indiscriminately killing any Natives they encountered in revenge for

137. 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 20, at 332, 334–35.

138. The Oneidas twice sent delegations to Congress seeking support and protesting New York's seizure of land. TAYLOR, *supra* note 114, at 161. The Committee on Indian Affairs promised the Oneidas "that congress will preserve inviolate the Treaty of Fort Stanwix" and recommended sending an agent for this purpose, but nothing came of this recommendation. 29 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789*, at 806 (John C. Fitzpatrick ed., 1933). As historian Alan Taylor notes, "Hamstrung by the weak Articles of Confederation, Congress lacked the funds and the leadership to fulfill its treaty promises to the Oneidas." TAYLOR, *supra* note 114, at 161.

139. TAYLOR, *supra* note 114, at 162–66; Lehman, *supra* note 75, at 537–38.

140. Lehman, *supra* note 75, at 543–45.

141. See Letter from Colonel Harmer to Henry Knox, Sec'y of War (July 16, 1785), in 2 *THE ST. CLAIR PAPERS*, *supra* note 97, at 7, 7–8 & n.4.

142. 18 *EARLY AMERICAN INDIAN DOCUMENTS*, *supra* note 20, at 280; see NICHOLS, *supra* note 8, at 31–32; see also Letter from David Howell to William Greene (Aug. 23, 1785), in 22 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789*, at 586, 588 (Paul H. Smith ed., 1995) (noting that "several of the Sachems of the six nations" had requested "to take back the original instruments of the two late Treaties").

143. Treaty of Fort Finney, U.S.-Shawnee Nation, Jan. 31, 1786, 7 Stat. 26; Treaty of Fort McIntosh, U.S.-Wiandot, Delaware, Chippawa and Ottawa Nations, Jan. 21, 1785, 7 Stat. 16; see CALLOWAY, *supra* note 103, at 102–03.

144. Virginia ceded its territorial claims north of the Ohio River to the federal government in 1784. Onuf, *supra* note 74, at 353. Kentucky remained part of Virginia. See *id.* at 372–73.

purported Indian attacks.¹⁴⁵ Federal treaties did little to stop the raids—Kentucky militia “shot down” a Shawnee chief brandishing a copy of the Treaty of Fort Finney and flying the American flag¹⁴⁶—leading the Indians to conclude that, if they made an agreement with the federal government, “the Kentuck poeple would brake it immediatly.”¹⁴⁷ But the treaties did have one concrete effect. As one American military commander reported in alarm of the Treaty of Fort McIntosh, “This treaty, and the one at Fort Stanwix . . . have had the effect to unite the Indians, and induce them to make a common cause of what they suppose their present grievances.”¹⁴⁸

Soon, rumors trickled in that the Indians were constructing a confederacy of their own and threatening war.¹⁴⁹ “On my arrival [in October 1786],” Massachusetts delegate Rufus King wrote, “I found congress deeply impressed with the Danger arising from a very extensive combination of savages.”¹⁵⁰ Events soon confirmed these fears. Congress received an ultimatum from the “United Indian

145. See, e.g., EBENEZER DENNY, *MILITARY JOURNAL OF MAJOR EBENEZER DENNY, AN OFFICER IN THE REVOLUTIONARY AND INDIAN WARS* 93–94 (Philadelphia, J.B. Lippincott & Co. 1859) (describing a raid by Kentucky militia that “found none but old men, women and children in the [Indian] towns; they made no resistance; the men were literally murdered”). For background on the raids and counterraids that turned the Ohio River Valley into a “dark and bloody ground” in the 1780s, see STEPHEN ARON, *HOW THE WEST WAS LOST: THE TRANSFORMATION OF KENTUCKY FROM DANIEL BOONE TO HENRY CLAY* 29–57 (1996); GRIFFIN, *supra* note 35, at 153–211; NICHOLS, *supra* note 8, at 37–44, 57–68. On the political debates in Congress over the violence in Kentucky, see Clinton, *supra* note 10, at 1124–27. One particularly telling incident occurred when Major John Hamtramck, commanding federal forces along the Ohio River, proclaimed to an invading Kentucky militia leader that Congress alone could “order a war with the Indians; in co[n]sequence of which I ordered him in the name of *the United States* to depart immediatly, and told him I should report him.” Letter from John Hamtramck to Josiah Harmar (Aug. 31, 1788), in *OUTPOST ON THE WABASH, 1787–1791*, at 114, 114–15 (Gayle Thornbrough ed., 1957) (alteration in original). The Kentuckians, insisting on their own independent authority, defied Hamtramck, stole his canoes, and then killed friendly Indians serving the U.S. Army and took their horses. *Id.* at 115–16. “Never was my feeling so much wonded before,” the “humiliat[ed]” Hamtramck reported, “But what could I do? I had but nine men fit for duty.” *Id.* Although this contretemps occurred in 1788, it is indicative of the broader struggle for authority in the region prior to June 1787.

146. Letter from Colonel Harmar to Henry Knox, Sec’y of War (Nov. 15, 1786), in 2 *THE ST. CLAIR PAPERS*, *supra* note 97, at 18, 19.

147. Letter from John Hamtramck to Josiah Harmar, *supra* note 145, at 119.

148. Letter from Captain John Doughty to Henry Knox, Sec’y of War (Oct. 21, 1785), in 2 *THE ST. CLAIR PAPERS*, *supra* note 97, at 9, 9–10.

149. See, e.g., *id.*; see also Letter from James Manning to Nicholas Brown (July 15, 1786), in 23 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789*, *supra* note 86, at 399, 401 (“The Alarms of an Indian War are growing more & more serious . . .”).

150. Letter from Rufus King to James Bowdoin (Oct. 20, 1786), in 23 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789*, *supra* note 86, at 606, 606.

Nations," consisting of the Iroquois, Cherokees, and numerous Ohio Country tribes.¹⁵¹ Blaming Congress for the "mischief and confusion" in the borderlands, the nations demanded Congress treat with the entire Indian confederacy.¹⁵² The Natives insisted they would hold "all partial treaties as void and of no effect,"¹⁵³ and, should "fresh ruptures ensue . . . [we] shall most assuredly, with our united force, be obliged to defend those rights and privileges which have been transmitted to us by our ancestors."¹⁵⁴

This pan-Indian union to defend Native land and sovereignty profoundly threatened the United States.¹⁵⁵ Not only were their numbers "very formidable,"¹⁵⁶ but the prospect of war came as the public purse was "intirely empty"; Congress was so impoverished it had to borrow sixteen dollars to reimburse a delegation of Indians.¹⁵⁷ "With an exhausted Treasury," one delegate despaired, Indian war would be "a calamitous event."¹⁵⁸ Secretary at War Henry Knox put it more diplomatically. Reporting to Congress in July 1787, he observed "that the finances of the United States . . . render them utterly unable to maintain an Indian war with any dignity or prospect of success."¹⁵⁹ The only option, Knox advised, was to return to the customary practice of paying for Indian lands.¹⁶⁰ Congress acquiesced: "[I]nstead of a language of superiority and command; may it not be politic and Just to treat with the Indians more on a footing of equality . . . ?" the

151. Speech of the United Indian Nations to Congress (Dec. 18, 1786), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 356, 356–58.

152. *Id.*

153. *Id.* at 357.

154. *Id.* at 358.

155. See GREGORY EVANS DOWD, A SPIRITED RESISTANCE: THE NORTH AMERICAN INDIAN STRUGGLE FOR UNITY, 1745–1815, at 90–94 (1992).

156. Letter from Captain John Doughty to Henry Knox, Sec'y of War, *supra* note 148, at 10.

157. Letter from James Manning to Nicholas Brown (June 9, 1786), in 23 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 86, at 345, 345–46.

158. Letter from James Manning to Nicholas Brown, *supra* note 149, at 401. For other comments by delegates that Congress was ill-prepared to fight the looming Indian war, see Letter from William Grayson to Beverley Randolph (June 25, 1787), in 24 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 341, 341 (Paul H. Smith ed., 1996); Letter from James Manning to Jabez Bowen (June 9, 1786), in 23 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 86, at 343, 344; Letter from James Manning to Hezekiah Smith, *supra* note 86, at 294.

159. 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 388 (Roscoe R. Hill ed., 1936).

160. *Id.* at 388–89.

Committee on Indian Affairs inquired as it recommended “fairly purchasing” Native land.¹⁶¹

Congress’s newfound commitment to diplomacy reflected the hard lessons of congressional weakness. Unable to restrain New York’s land hunger or overawe the Indian confederacy, Congress had to placate Natives to avoid a war it could not afford. This shift came too late; the arrogance of congressional policy had caused irrevocable damage. But in the summer of 1787, the delegates were distracted not only by the Convention, but by another Indian war on the southern frontier, where federal Indian policy failed even more dramatically.

2. *The South.* With its focus on the Six Nations, Congress’s aims for southern Indian affairs were more modest: treaties would draw a clear boundary between the United States and the Creeks, Cherokees, Chickasaws, and other southern Indian nations, based largely on existing claims.¹⁶² State purchases would be considered valid only if they were “perfectly consistent with the design of the Treaties now proposed to be held.”¹⁶³

The clear property line Congress envisioned was all but unattainable in the postrevolutionary southern borderlands, where states were eagerly engrossing Native land. The Creek word for Georgians summed up the situation: they called them “Ecunnaunuxulgee”—“People greedily grasping after the lands of the red people.”¹⁶⁴ Georgia quickly sought to conclude treaties with handfuls of Creeks and Cherokees to cede the state huge chunks of Native territory.¹⁶⁵ When suasion or bribes failed to sway these nominal Native leaders, the Georgians reportedly resorted to death threats to compel agreement.¹⁶⁶ Equally avaricious for Indian land, North Carolina dispensed with diplomacy altogether; its legislature

161. *Id.* at 479–80; see Merrell, *supra* note 29, at 204.

162. See 27 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 453–64 (Gaillard Hunt ed., 1928) (describing congressional plans to “establish a boundary line between us and [the Indians]” while taking care “neither to yield nor require too much”); see also HORSMAN, *supra* note 12, at 27 (“Congress would be content with peace and the *status quo* in the South . . .”).

163. 27 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 162, at 459.

164. Merrell, *supra* note 29, at 200 (quotation marks omitted).

165. E.g., Treaty of Augusta with the Cherokees (May 31, 1783), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 368, 368–69; Treaty of Augusta with the Creeks (Nov. 1, 1783), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 372, 372–73.

166. Letter from Alexander McGillivray to Governor Estevan Miró (May 1, 1786), in JOHN WALTON CAUGHEY, MCGILLIVRAY OF THE CREEKS 106, 106–07 (1938).

confiscated most of the Indian lands within state borders by statute.¹⁶⁷ The little land the state reserved for the Cherokees was in turn claimed by western North Carolinians, who concluded highly dubious Indian treaties of their own on behalf of their would-be secessionist state of Franklin.¹⁶⁸

The states' arrogant demands for Indian lands dramatically overreached. Like the Six Nations, the Creeks, Cherokees, and Choctaws were not defeated nations.¹⁶⁹ And like the northern tribes, southern Natives exploited their location—in their case, bordering the Spanish-held Gulf Coast—to secure European patronage. Alexander McGillivray, the Charleston-educated son of a Scottish trader and Creek mother well-versed in the niceties of European diplomacy, solicited Spanish protection for the Creek nation he claimed to represent.¹⁷⁰ McGillivray successfully concluded formal treaties with the Spanish that guaranteed Creek territories against incursions;¹⁷¹ other Indian nations threatened to do the same.¹⁷² Bolstered by Spanish arms and support, the Native nations of the Southeast refused to tolerate Anglo-American infringement of their territory and vowed to remove offending squatters themselves.¹⁷³

167. Act of Apr. 18, 1783, ch. 2, 1783 N.C. Sess. Laws 322, 322–25. The law set aside a small parcel for the Cherokees. *Id.*

168. See, e.g., Treaty of Dumplin Creek (June 10, 1785), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 386, 386–87. Franklin, located in present-day eastern Tennessee, was created in 1784 when white settlers seceded from North Carolina after it revoked its cession of western lands to the federal government. Franklin tried, and failed, to secure entry as a state from the Continental Congress, and the short-lived separatist movement petered out by 1788, shortly before the region became part of the newly created Southwest Territory under federal control. See generally KEVIN T. BARKSDALE, *THE LOST STATE OF FRANKLIN: AMERICA'S FIRST SECESSION* (2009).

169. See, e.g., Letter from Alexander McGillivray to Andrew Pickens (Sept. 5, 1785), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 387, 388 (rejecting Georgians' assertions of the Creeks' "supposed distressed situation" and insisting that "we know our own limits, . . . and, as a free nation . . . we shall pay no regard to any limits that may prejudice our claims, that were drawn by an American, and confirmed by a British negotiator").

170. For background on McGillivray, see generally CAUGHEY, *supra* note 166, at 3–53; CLAUDIO SAUNT, *A NEW ORDER OF THINGS: PROPERTY, POWER, AND THE TRANSFORMATION OF THE CREEK INDIANS, 1733–1816*, at 67–89 (1999).

171. Letter from Alexander McGillivray to Andrew Pickens, *supra* note 169, at 388.

172. See Talk from Chickasaw Chiefs to the President of Congress (July 28, 1783), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 370, 370 ("The Spaniards are sending talks among us and inviting our young men to Trade with them.").

173. See Letter from Alexander McGillivray to Andrew Pickens, *supra* note 169, at 388 (reporting Creek determination to "remove [infringing] people and effects from off the lands in question, in the most peaceable manner possible").

Southern Indian policy accordingly forced the United States to navigate between aggressively expansionist states and assertive, powerful Native nations. Congressional commissioners attempted to conciliate both sides at Hopewell in 1785, where they concluded treaties with the Cherokees, Choctaws, and Chickasaws.¹⁷⁴ The treaties assuaged Indian complaints of encroachments on their lands by creating a boundary between tribes and Anglo-American settlement.¹⁷⁵ Infringing squatters would be removed within six months, the commissioners promised, or else they would “forfeit the protection of the United States” and be left for the Indians to punish “as they please.”¹⁷⁶

Yet these concessions enraged the states, particularly because the treaties did not recognize their purported purchases. Before the treaties were signed, the North Carolinians and Georgians in attendance protested federal interference in their land policy.¹⁷⁷ William Blount, a North Carolina delegate to Congress, subsequently mailed the commissioners the state’s constitution outlining its borders—which, he pointed out, predated the Articles—and informed them that the state regarded the treaty with the Cherokees as “a violation and infringement upon her legislative rights.”¹⁷⁸ The state’s governor told Congress that the treaties “are so repugnant to our Bill of Rights and Constitution, and so great an infringement on the Rights of the Legislature of this State that it becomes my duty to require that you do not by any means consent to the Ratification.”¹⁷⁹ Georgia’s assembly went further. Infuriated by this “manifest and

174. HORSMAN, *supra* note 12, at 29–30. Too few Creeks attended to secure an agreement. Letter from Benjamin Hawkins, Andrew Pickens, Joseph Martin & Lachlan McIntosh, U.S. Indian Comm’rs, to Congress (Nov. 17, 1785), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 392, 392. For further background on the Treaties of Hopewell, see CALLOWAY, *supra* note 103, at 103–05; NICHOLS, *supra* note 8, at 46–54. See generally Greg O’Brien, *The Conqueror Meets the Unconquered: Negotiating Cultural Boundaries on the Post-Revolutionary Southern Frontier*, 67 J. S. HIST. 39 (2001).

175. Proceedings of the Treaty of Hopewell with the Cherokees, in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 393, 395–99.

176. Treaty of Hopewell, U.S.-Chickasaws, art. IV, Jan. 10, 1786, 7 Stat. 24, 25; Treaty of Hopewell, U.S.-Choctaws, art. IV, Jan. 3, 1786, 7 Stat. 21, 22; Treaty of Hopewell, U.S.-Cherokees, art. V, Nov. 28, 1785, 7 Stat. 18, 19.

177. Proceedings of the Treaty of Hopewell with the Cherokees, *supra* note 175, at 401.

178. Letter from William Blount to Benjamin Hawkins, Andrew Pickens, Joseph Martin & Lachlan McIntosh, U.S. Indian Comm’rs (Nov. 28, 1785), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 402, 403.

179. Governor Richard Caswell to the Delegates in Congress (Apr. 3, 1786), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 428, 428.

direct attempt to violate the retained sovereignty and legislative right of this State," it legislated "[t]hat all and every act and thing done, or intended to be done, within the limits and jurisdiction of this State, by the said commissioners . . . shall be . . . null and void."¹⁸⁰ Congress accepted the treaties anyway.¹⁸¹

These internecine squabbles destroyed Congress's credibility among Natives. McGillivray's informants told him that at the negotiations with the Creeks, "the Commissioners & Gov. of Georgia quarrell'd & thereby rendered themselves Completely ridiculous, in the eyes of the Indians."¹⁸² Moreover, because enforcement of the treaties depended on state cooperation, states' hostility would, as the commissioners wrote, "render [them] ineffectual."¹⁸³

Their fear was soon realized. The predictable failure to remove squatters eroded Indian confidence in Congress. "We have held several treaties with the Americans," Chief Tassel of the Cherokees lamented, "when Bounds was always fixt and fair promises always made that the white people Should not come over, but we always find that after a treaty they Settle much faster than before."¹⁸⁴ Earlier, "when we treated with Congress we made no doubt but we should have Justice"; now the Cherokees began to credit rumors "that the Americans only ment to deceive us" and buy time "till all our lands is

180. Extract from the Minutes of the Georgia General Assembly (Feb. 11, 1786), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 427, 428.

181. 30 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187-95 (John C. Fitzpatrick ed., 1934). The Articles made no provision for treaties' ratification, but a congressional motion by North Carolina's delegates to disavow the Treaty of Hopewell with the Cherokees was tabled and evidently never voted on. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 237-38 (Roscoe R. Hill ed., 1936).

182. Letter from Alexander McGillivray to Governor Arturo O'Neill (Feb. 10, 1786), in CAUGHEY, *supra* note 166, at 102, 103.

183. See Letter from Benjamin Hawkins, Andrew Pickens, Joseph Martin & Lachlan McIntosh, U.S. Indian Comm'rs, to Congress (Dec. 2, 1785), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 408, 409.

184. Talks from Cherokees to Colonel Martin (Mar. 24, 1787), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 444, 444; see also Talk from William Elders to General Joseph Martin (Oct. 1788), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 475, 475 ("We well remember, whenever we are invited into a treaty, as observed by us at that time, and bounds are fixed, that the white people settle much faster on our lands than they did before.").

Settled.”¹⁸⁵ These suspicions of congressional duplicity rapidly became “universal through the Indians.”¹⁸⁶

Despairing of Congress, the Natives turned to self-help. Refusing to negotiate with Georgia, the Creeks drove Anglo-American settlers off their territory.¹⁸⁷ Bloodshed ensued. As both sides prepared for war, Congress appointed James White as a congressional agent to conciliate the parties.¹⁸⁸ But the ineffective White “might as well have not Come into our Nation,” said Creeks disillusioned by his powerlessness.¹⁸⁹ Violence resumed, for which Georgia blamed Congress: it had “interfere[d] with treaties of the State” and conveyed to the Indians “that in a war with the State, they should not have the strength of the Union to fear.”¹⁹⁰ In fact, the Indians did not believe that there was much to fear from the United States, because White’s efforts had persuaded them “that the [A]mericans were afraid.”¹⁹¹

Secretary at War Henry Knox watched these developments with alarm. Reporting to Congress in July 1787, Knox blamed the violence on states’ “flagrant[] . . . usurpation of the lands” guaranteed by the treaties.¹⁹² Yet state power precluded “all effectual interference of the United States” in the resulting disputes.¹⁹³ “[I]t is apparent from every representation,” Knox lamented, “that unless the United States do in reality possess the power ‘to manage all affairs with the independent

185. Talks from Cherokees to Colonel Martin, *supra* note 184, at 444, 444.

186. Letter from Alexander McGillivray to Generals Richard Winn, Andrew Pickens & George Mathews, U.S. Indian Comm’rs (Sept. 15, 1788), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 20, at 471, 471.

187. Letter from Alexander McGillivray to John Habersham (Sept. 18, 1786), in CAUGHEY, *supra* note 166, at 130, 130–31.

188. 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 747 (John C. Fitzpatrick ed., 1934).

189. Letter from Alexander McGillivray to Governor Arturo O’Neill (Apr. 18, 1787), in CAUGHEY, *supra* note 166, at 149, 149.

190. 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 24 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1832).

191. Letter from McGillivray to Governor Arturo O’Neill, *supra* note 189, at 149. White’s speech urged the Creeks to reject British and Spanish overtures, 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 190, at 22, persuading the Creek chiefs that the possibility they might ally with “some power” was the source of the Anglo-Americans’ fear, Letter from McGillivray to Governor Arturo O’Neill, *supra* note 189, at 149.

192. Report of the Secretary of War on the Southern Indians, *supra* note 20, at 450.

193. See *id.* at 449.

tribes of indians' to observe and enforce all treaties made by the authority of the union that a general indian war may be expected."¹⁹⁴

A month later, Congress's Committee on Southern Indians similarly blamed the "confusion, disputes and embarrassments" in Indian affairs on Georgia and North Carolina's interpretation of Article IX.¹⁹⁵ "The construction contended for by those States," the Committee noted, "leave[s] the federal powers, in this case, a mere nullity . . . [yet] [t]he States . . . have actually pursued measures in conformity to it. North Carolina has undertaken to assign land to the Cherokees, and Georgia has proceeded to treat with the Creeks concerning peace[] [and] lands."¹⁹⁶ The Committee, however, maintained that before the Revolution the power over Indian affairs—to make treaties, purchase Indian lands, and evict illegal settlers—had been "possessed by the King, and exercised by him nor did they interfere with the legislative right of the colony within its limits."¹⁹⁷ Regarding these powers as "indivisible," the Committee members reasoned that the parties to the confederation "must have intended to give them entire to the Union."¹⁹⁸

The report concluded by stressing that Congress would not fight unless it would have "the sole direction" over the war and any peace terms.¹⁹⁹ But the Committee on Southern Indians' resolutions never got a vote. Even though fifteen of the twenty delegates present supported the proposals, Georgia was able to use the Articles' convoluted voting procedures to defeat this supermajority and scuttle the report.²⁰⁰

By the summer of 1787, then, Congress confronted failure on the southern as well as the northern borderlands. On both frontiers, the

194. *Id.* at 450. Secretary Knox appears to have been quoting, albeit inaccurately, Article IX, paragraph 4 of the Articles of Confederation.

195. 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 159, at 457–58.

196. *Id.* at 457.

197. *Id.* at 458.

198. *Id.*

199. *Id.* at 462.

200. Because Georgia made a preemptive motion, a motion to postpone was required in order to take up the Committee on Southern Indians' report. *Id.* at 463. This motion needed seven state votes to pass. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 6. In practice however, because only seven states were present and able to vote, the motion had to pass unanimously. The motion failed when the Virginia and North Carolina delegations divided. 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 159, at 463. Georgia itself could not vote because it lacked the required two delegates. *See id.*; *cf.* ARTICLES OF CONFEDERATION of 1781, art. V, para. 2.

states, anxious to seize Indian land, first fought and then ignored congressional treaties. Disillusioned tribes turned away from the United States, first toward Britain and Spain, and then toward violence as the only effective check on Anglo-American expansion. As the Convention gathered in Philadelphia, the nation confronted two Indian wars of its own making it could ill-afford. "[A] protracted Indian war," Knox feared, "would be destruction to the republic, under its present circumstance."²⁰¹

D. *Lessons of Failure*

In April 1787, James Madison catalogued the "Vices of the Political System of the U[nited] States."²⁰² It was a lengthy list: states' reckless printing of paper money, Daniel Shays's uprising of indebted farmers in Massachusetts, and violations of the Treaty of Paris with Great Britain all pointed to the inadequacy of the current regime.²⁰³ In this context, the failure of national Indian policy and the prospect of "war with the savages" represented "an additional evil to our many evils."²⁰⁴

But there were two reasons the Articles' shortcomings in Indian affairs were particularly glaring. First, like earlier efforts at confederation, the Articles reflected the view that external affairs were the basic purpose and responsibility of a national government: Article III stressed that the purpose of this "firm league of friendship" was to protect each other from external attacks,²⁰⁵ and Article IX granted Congress "sole and exclusive right and power" over war and peace, ambassadors, military officers, and the resolution of territorial disputes, as well as Indian affairs.²⁰⁶ And nearly all the nation's external affairs—relations with Britain and Spain, issues of war and peace, even national credit—hinged on western expansion.

201. Letter from Henry Knox, Sec'y of War, to Governor Arthur St. Clair (Dec. 8, 1788), in 2 THE TERRITORIAL PAPERS OF THE UNITED STATES 165, 166 (Clarence Edwin Carter ed., 1934). Although Knox wrote in 1788, the situation that led to his dire warning was little altered from the previous year. See HORSMAN, *supra* note 12, at 47–52 (observing that the "breakdown of American Indian policy northwest of the Ohio River" continued into 1788–89, and that "Indian affairs in the South were also in a state of chaos from 1787 to 1789").

202. James Madison, Vices of the Political System of the United States, in 9 THE PAPERS OF JAMES MADISON 345, 348 (Robert A. Rutland & William M.E. Rachal eds., 1975).

203. *Id.* at 348–57.

204. Letter from Henry Lee to James Madison (Feb. 16, 1786), in 8 THE PAPERS OF JAMES MADISON, *supra* note 130, at 493, 493.

205. ARTICLES OF CONFEDERATION of 1781, art. III, para. 1.

206. *Id.* art. IX, para. 1.

By 1787, the states had largely acknowledged the federal government's paramount role in the West: all except North Carolina and Georgia had ceded the national government their extravagant land claims.²⁰⁷ Congress subsequently created a template for orderly, regulated western settlement through successive land ordinances.²⁰⁸ But this success was hollow as long as Indians controlled the lands in question.²⁰⁹ Surveyors' attempts to draw the tidy property lines envisioned by Congress consistently met Native resistance.²¹⁰ In short, as George Washington had earlier acknowledged,²¹¹ the West could not be settled without addressing Indian affairs.

Second, the cause for the failure of national Indian policy differed from many of the nation's other challenges. Many ills stemmed from the Articles' silences, for the document included nothing about state commercial regulations or internal rebellions.²¹² But, with justification, Congress believed it possessed expansive powers to control relations with Natives. As western Virginian Robert Rutherford would later write to Madison, the Continental Congress was "really fully impowered" to address "three subjects of the first & last importance[:] Mony, Indian affairs and settling new

207. ONUF, *supra* note 18, at 149–72. Under its cession, Virginia retained control over lands south of the Ohio River known at the time as the "Kentucky District." *Id.* at 161.

208. See PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 21–66* (1987) (discussing the Land Ordinance of 1785); see also Land Ordinance of 1785, reprinted in 28 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 96, at 375, 375–81.

209. See, e.g., Report of the Secretary at War to Congress (July 10, 1787), in 2 *THE TERRITORIAL PAPERS OF THE UNITED STATES*, *supra* note 201, at 31, 32 ("[T]he whole western territory, is liable to be wrested out of the hands of the Union, by lawless adventurers, or by the savages . . .")

210. See, e.g., Letter from William Grayson to George Washington (May 27, 1786), in 4 *THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES* 81, 82 (W.W. Abbot & Dorothy Twohig eds., 1995) ("[T]he Geographer & surveyers have directions to proceed without delay to carry the Ordinance into execution, which I presume they will execute provided the Indians will permit them, of which however I have very great doubts."); Letter from Colonel Harmar to Henry Knox, Sec'y of War (Oct. 10, 1786), in 2 *THE ST. CLAIR PAPERS*, *supra* note 97, at 18, 18 (describing the retreat of surveyors because of the "very just apprehensions of danger" of Indian attack); see also GRIFFIN, *supra* note 35, at 191 (describing the effects of Indian attacks on surveyors).

211. See *supra* note 62 and accompanying text.

212. See, e.g., Madison, *supra* note 202, at 350 (noting that "the confederation is silent" on the issue of internal state violence).

states.”²¹³ Nonetheless, “in all [these] Very great Concerns,” Congress had failed, “wanting in Common prudence & attention.”²¹⁴

Indian affairs thus forced nationalists to confront the Continental Congress’s shortcomings notwithstanding the grant of authority under the Articles. They blamed Congress’s failure on the weakness of the national state, particularly, as Madison put it, “[the] want . . . of coercion in the Government of the Confederacy.”²¹⁵ But they had different views about who, exactly, needed to be coerced. While many blamed the inability of the federal government to enforce treaties and restrain states and squatters, others argued the fundamental problem was the national government’s military impotence, which allowed Natives to challenge it with impunity.

1. *The Madisonian Reading.* Near the top of Madison’s list of the Articles’ deficiencies were state encroachments on federal authority, the first example of which was “the wars and Treaties of Georgia with the Indians.”²¹⁶ This was a common view among nationalists in 1787. Like Secretary at War Henry Knox and the congressional Committee on Indian Affairs, they attributed the disastrous course of Indian affairs to state and squatter interference with federal policy.²¹⁷ Indians, they believed, were generally “well behaved” and could be placated through sensible treaties, which many Indians “faithfully Observed.”²¹⁸ But states and squatters did not share this commitment, and their repeated violations of national treaties destroyed federal credibility. “When treaties are made and promises given without seeing them fullfilld,” one prominent western Virginian wrote, “[i]t naturally gives the Savages an unfavourable Opinion of us and our Government.”²¹⁹ In the absence of promised federal protection, state

213. Letter from Robert Rutherford to James Madison (Aug. 22, 1789), in 12 THE PAPERS OF JAMES MADISON 350, 351 (Charles F. Hobson & Robert A. Rutland eds., 1979). By “Mony,” Rutherford presumably meant the “sole and exclusive right and power” granted Congress in Article IX of the Articles to “regulat[e] the alloy and value of coin struck by their own authority, or by that of the respective States.” ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

214. Letter from Robert Rutherford to James Madison, *supra* note 213, at 351.

215. Madison, *supra* note 202, at 351.

216. *Id.* at 348.

217. See *supra* notes 192–201 and accompanying text.

218. Letter from Adam Stephen to James Madison (Nov. 25, 1787), in 10 THE PAPERS OF JAMES MADISON 271, 271 (Robert A. Rutland & Charles F. Hobson eds., 1977). Although this letter postdates the Convention by two months, it nicely summarizes the views of the Madisonians, which had deeper roots.

219. *Id.*

and squatter incursions "force[d]" the Indians to fight.²²⁰ The prime example, as the nationalists read it, was Georgia: the state's "bloody War" was a "consequence of their own violations of the Treaties held by the Commissioners of the United States with the Indians."²²¹

State interference in Indian affairs had several causes. One was the ambiguous compromise on Indian affairs in Article IX: as the nationalists lamented, the clause's concessions to state sovereignty allowed expansive readings that undermined congressional jurisdiction and federal treaties.²²² But the fundamental problem was not the text. Nationalists who had examined the provision had all concluded that the reading proposed by New York, North Carolina, and Georgia was "absurd" and would render the clause meaningless.²²³ And, as evidenced in congressional votes, nearly all the other states agreed.²²⁴ The more basic problem, as many commentators recognized,²²⁵ was that the Articles provided no means to resolve jurisdictional disputes of this sort. The only viable national institution was Congress, but its cramped rules and protections for state sovereignty foiled every attempt to coerce state cooperation on Indian affairs.

Even more important was the question of sanction. Unable to enforce federal Indian treaties directly, the national government was reduced to appeals to states to ensure a "due observance" of treaty provisions, even as interested states denied the treaties' legitimacy

220. *Id.*; see also Letter from John Jay to Thomas Jefferson (Dec. 14, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES 596, 599 (Julian P. Boyd ed., 1954) ("In my Opinion our Indian Affairs have been ill managed. . . . Indians have been murdered by our People in cold Blood and no satisfaction given, nor are they pleased with the avidity with which we seek to acquire their Lands." (footnote omitted)).

221. Letter from Virginia Delegates to Edmund Randolph (Dec. 11, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 218, at 319, 320.

222. See THE FEDERALIST NO. 42, *supra* note 53, at 264 (James Madison) ("[The] limitations in the articles of Confederation . . . render the provision [on Indian affairs] obscure and contradictory. . . . What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils."); Clinton, *supra* note 10, at 1139 ("Saddled with an ambiguous compromise in the Indian affairs clause of Article 9, the Continental Congress was never really able to assert the sole and exclusive power over all Indian affairs."); *supra* notes 195–198 and accompanying text.

223. See *supra* notes 131–135, 192–198 and accompanying text.

224. Clinton, *supra* note 10, at 1110, 1122–24; see *supra* notes 131–135, 192–198 and accompanying text.

225. See *supra* notes 131–135 and accompanying text; see also Report of the Secretary of War on the Southern Indians, *supra* note 20, at 449–50.

altogether.²²⁶ Nothing barred states' pursuit of their own treaties and Indian policy. And policing treaty boundaries through occasional expeditions of the nation's miniscule military had proved a temporary and ineffectual solution.²²⁷

Drawing on a lengthy tradition, the Madisonians believed centralization would resolve conflict over Indian affairs. Only a scrupulous adherence to treaty promises and their rigorous enforcement against states and squatters, they concluded, could avoid the costly wars that had resulted from national weakness under the Articles.

2. *The Hamiltonian Reading.* But there was a different interpretation of the causes of the failure of national Indian policy under the Articles. Diverging from Madison, many nationalists blamed the inability of the United States to overawe the Native nations that controlled the borderlands. In this view, Indian hostility was the product of British and Spanish intrigue, not encroachment on Native lands. "I have not the smallest doubt," wrote George Washington of the British, "but that every secret engine in their power is continually at work to inflame the Indian mind, with a view to keep it at variance with these States for the purpose of retarding our settlements to the Westward."²²⁸

The conclusion was clear: "[T]he Indians can only be restrained by fear."²²⁹ Treaties could not placate them, "for their Interest, and of consequence their friendship, is on the other side."²³⁰ Nor would mere assertions of conquest suffice, for, as one congressional delegate

226. Letter from Charles Thomson, Sec'y of Congress, to the States (Apr. 22, 1786), in 23 *LETTERS OF DELEGATES TO CONGRESS, 1774-1789*, *supra* note 86, at 250, 250.

227. Cf. Letter from Barthelemi Tardiveau to Josiah Harmar (Aug. 6, 1787), in *OUTPOST ON THE WABASH*, *supra* note 145, at 26, 30-32 ("[N]o treaty of peace, likely to be lasting, can be made with the Indians except you are invested with powers energetick enough to keep the whites under subjection & call them to a severe account if, by any misconduct of theirs, differences shou'd arise with the savages; and I think that you ought to lay this matter before Congress.").

228. Letter from George Washington to the Marquis de Lafayette (May 10, 1786), in 4 *THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES*, *supra* note 210, at 41, 43.

229. Letter from Caleb Wallace to James Madison (Nov. 12, 1787), in 10 *THE PAPERS OF JAMES MADISON*, *supra* note 218, at 249, 250; see also Letter from Arthur Lee to Thomas Mifflin (Nov. 19, 1784), available at <http://wardepartmentpapers.org/docimage.php?id=680&docColID=698&page=2> (reporting from the Fort Stanwix negotiations that "they [the Indians] are Animals that must be subdued [and] kept in awe or they will be mischievous, [and] fear alone will effect this submission").

230. Letter from Caleb Wallace to James Madison, *supra* note 229, at 250.

observed, "[T]he Indians will hardly be prevailed on, by seeing only paper & parchments, to believe that the U. States are in fact the Sovereigns of that Country."²³¹ And current military arrangements were inadequate to this end. "[T]he few continental troops" under the Articles, nationalists feared, had merely been "an object of contempt and not of terror to the inimicable Tribes, with which we are surrounded."²³² Overwhelming force alone seemed the solution to the problems of Indian affairs.

Privately, Alexander Hamilton did not share the views of this inchoate coalition of expansionist state officials, backcountry settlers, and local nabobs of frontier counties.²³³ Yet at the Convention and in *The Federalist*, he became the primary proponent for their diagnosis of the state of Indian affairs. Like the Madisonians' perspective, the position advocated by Hamilton insisted on the need for a stronger federal government. But in this vision, the strengthened national state would not restrain states and squatters. Rather, the key constitutional solution for Indian affairs was an expanded national military that would strike fear into tribes—the "natural enemies" of the United States, as Hamilton would later describe them.²³⁴

II. THE CONSTITUTIONAL CONVENTION

In Indian affairs, the Constitution was a wartime document. Meeting as Congress and Secretary at War Henry Knox were drafting their foreboding reports,²³⁵ the Convention's delegates speculated about the prospect of an all-out Indian war in anxious letters.²³⁶ "The

231. Letter from David Howell to William Greene, *supra* note 142, at 588.

232. Letter from Caleb Wallace to James Madison, *supra* note 229, at 250.

233. In the rare instances Hamilton discussed Indians in his correspondence, he largely embraced views similar to Madison's. See, e.g., Letter from Alexander Hamilton to George Clinton (Oct. 3, 1783), in 3 PAPERS OF ALEXANDER HAMILTON 464, 468 (Harold C. Syrett ed., 1962) ("[The] friendship [of the Indian nations] alone can keep our frontiers in peace. . . . The attempt at the total expulsion of so desultory a people is as chimerical as it would be pernicious.").

234. THE FEDERALIST NO. 24, *supra* note 53, at 157, 161 (Alexander Hamilton); see *infra* notes 374, 395 and accompanying text.

235. See *supra* notes 159–161 and accompanying text; see also HORSMAN, *supra* note 12, at 39 ("Congress was deluged with bad news regarding Indian affairs in July and August 1787 . . .").

236. See, e.g., Letter from William Blount to Richard Caswell (July 19, 1787), in 1 THE JOHN GRAY BLOUNT PAPERS 321, 323 (Alice Barnwell Keith ed., 1952); Letter from James Madison to Edmund Pendleton (Apr. 22, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 202, at 394, 396; Letter from Edmund Randolph to Virginia Delegates (Apr. 4, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 202, at 366, 366–67; cf. Letter from John Jay to Thomas

newspapers Every day were almost filled with . . . the Danger we were in from the Indians on our Borders,” the Anti-Federalist Abraham Yates, Jr. later cynically recorded of the Convention.²³⁷ “Matters were brought about by that Confusion . . . that now Everybody could see that it was become Necessary (no Matter how) that something should be done, that it was evident Congress had not sufficient powers”²³⁸ In some respects, war had already begun: Indians reportedly killed or captured as many as three thousand Anglo-Americans between 1783 and 1790—two-thirds as many as had died fighting in the Revolution.²³⁹

This Part examines the solutions the Constitution offered for this crisis. Parts II.A and II.B explore how the Madisonian and Hamiltonian assessments of the Articles’ failure in Indian affairs respectively translated into constitutional text.

A. *The Madisonian Convention*

Federal power over Indian affairs was not discussed until late in the Convention.²⁴⁰ In August 1787, James Madison first proposed

Jefferson (July 24, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES 618, 619 (Julian P. Boyd ed., 1955) (“The Convention is sitting, but their Proceedings are secret. Our Indian Affairs in the West still give us Uneasiness, and so I fear they will continue to do for Reasons which you will not be at a Loss to conjecture.”). A Cherokee chief actually visited Virginia Governor Edmund Randolph in Philadelphia as he was sitting as a delegate in the Convention. Letter from Edmund Randolph to Beverley Randolph, Lieutenant Governor (July 12, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 29, at 315, 315.

237. Staughton Lynd, *Abraham Yates’s History of the Movement for the United States Constitution*, 20 WM. & MARY Q. 223, 241 (1963) (footnote omitted). Full-text database searches support Yates’s assertion: early American newspapers in the Readex *American Historical Newspapers* database made 345 references to “savages” and 1,978 references to “Indians” during 1787. See *America’s Historical Newspapers*, READEX, <http://www.readex.com/content/americas-historical-newspapers> (last visited Nov. 19, 2013). Many of these references stemmed from dispatches from Kentucky, Tennessee, Georgia, and other western locations, reporting on Indian attacks.

238. Lynd, *supra* note 237, at 241.

239. 3 ANNALS OF CONG. 343–44 (1834). Four thousand thirty-five Anglo-American soldiers died in the Revolution. 5 HISTORICAL STATISTICS, *supra* note 29, at 5-350 tbl.Ed1-5.

240. The first mention of Indians came when Pennsylvania delegate James Wilson proposed on June 11, 1787, that representation in the lower house be based on the number of white and other free inhabitants, as well as “three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 193. Wilson adopted this language directly from a failed proposal to apportion revenue owed by each state under the Articles, which likely explains the reference to taxation. See 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 214–15 (Gaillard Hunt ed., 1922) (“[A]ll charges of war and all other expences that have been or shall be incurred for the common defence or general welfare, and allowed by the

what became the Indian Commerce Clause.²⁴¹ To abrogate the qualifiers of Article IX, he urged that Congress have the power to “regulate affairs with the Indians as well within as without the limits of the U[nited] States.”²⁴² This proposition went back to the Committee of Detail,²⁴³ which instead suggested adding “and with Indians, within the Limits of any State, not subject to the laws thereof”²⁴⁴ to the clause it had already drafted giving Congress the authority “[t]o regulate commerce with foreign nations, and among the several States.”²⁴⁵ This recommendation ended up with another

United States in Congress assembled, . . . shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the whole number of free inhabitants, and three-fifths of the number of all other inhabitants of every sex and condition, except Indians not paying taxes in each State” “[T]hree fifths of all other persons” referred to slaves and provoked heated arguments lasting over two months. For the most comprehensive recent treatments of this debate, see GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* 103–42 (2010); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 77–90 (2009); Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUMAN.* 413, 427–30 (2001). By contrast, the exclusion of “Indians not taxed” from representation was not discussed at all, appearing in each successive draft until becoming part of Article I, Section 2. The Committee of Style subsequently modified the language from Wilson’s proposal to read “excluding Indians not taxed, three fifths of all other persons.” 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 2, at 590; *see also* Savage, *supra* note 10, at 64–72 (providing a detailed drafting history of this provision).

241. Neither the Virginia nor New Jersey plans for the new federal government addressed relations with Indians; only the less prominent Pinckney plan granted the legislature the “exclusive power . . . of regulating Indian Affairs.” 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 2, at 607. In mid-July, the Committee of Detail, tasked with creating a constitutional draft from the Convention’s resolutions, enumerated congressional powers. In the Committee’s first draft, “Indian Affairs” was scrawled in the margin in the hand of John Rutledge, South Carolina delegate and chair of the Committee. *See* 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 2, at 143; *Committee of Detail Documents*, 135 *PA. MAG. HIST. & BIOGRAPHY* 239, 273 (2011). But the draft the Committee presented to the Convention at the beginning of August omitted this addition. *See* 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 2, at 181–82 (reporting the enumerated powers without Indian affairs).

242. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 2, at 321, 324. Madison included this proposal in a lengthy list of congressional powers he wished included in the Constitution. *Id.* at 324–25. By explicitly providing federal power *within* states, Madison’s language eliminated the Articles’ limitation of federal authority to Indians “not members of any of the States,” ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5, a qualification which had led to aggressive claims of state authority over Native nations within states’ nominal borders, *see supra* Part I.C.

243. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 2, at 325.

244. *Id.* at 367.

245. *Id.* at 181.

committee, the Committee on Postponed Parts,²⁴⁶ which simply added “and with the Indian tribes” at the end of the Commerce Clause.²⁴⁷ The Convention adopted the proposal²⁴⁸ and the Committee of Style included it in its September 12 draft.²⁴⁹ It remained unaltered when the Convention adjourned on September 17.²⁵⁰

The Indian Commerce Clause as adopted was an ambiguous success for Madison. It removed the confusing limitations of Article IX and avoided the Committee of Detail’s effort to reintroduce complex jurisdictional divisions. But, unlike Madison’s original proposal, it did not explicitly endorse federal supremacy over Indian relations. And neither Madison nor any other delegate seemed to consider the implications of the shift from “Indian affairs” to “Commerce,” a change that later interpreters would read as limiting federal authority.²⁵¹

Fixating on the phrasing of the Indian Commerce Clause, however, would miss the lesson of the Articles that formal legal authority, however phrased, would not constrain states. Other provisions of the Constitution that reflected this experience were considerably more important for Indian affairs.

This was particularly true of treaties, where the struggles under the Articles lurked in the background. Occasionally, these disputes erupted, as when, late in the Convention on September 8, the Committee of Eleven proposed exempting peace treaties from the requirement of two-thirds approval from the Senate. The Committee explained that it feared “that the exposed States, as S. Carolina or Georgia, would urge an improper war for the Western Territory.”²⁵² Georgia, North Carolina, and South Carolina united with several northern states to remove the provision.²⁵³ These three states then voted as a block for several provisions intended to make it harder to

246. See BEEMAN, *supra* note 8, at 297–305 (describing the membership and work of the Committee on Postponed Parts).

247. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 493, 497, 503.

248. *Id.* at 495.

249. *Id.* at 595.

250. *Id.* at 655, 665–66.

251. See e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565–71 (2013) (Thomas, J., concurring); *United States v. Bailey*, 24 F. Cas. 937, 939 (C.C.D. Tenn. 1834) (No. 14,495); Natelson, *supra* note 10, at 215; Prakash, *supra* note 10, at 1088–89.

252. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 548.

253. *Id.* at 546–50.

ratify treaties.²⁵⁴ But none of the heightened requirements passed; the three southern states were often their lone proponents.²⁵⁵

These votes were typical: the Madisonians were remarkably successful in strengthening the enforcement of federal treaties. Perhaps the most important addition was the inclusion of federal Indian treaties as the "supreme Law of the Land" in the Supremacy Clause.²⁵⁶ At Madison's urging, the Clause explicitly enumerated treaties "made . . . under the Authority of the United States" as well as future agreements²⁵⁷ to "obviate all doubt concerning the force of treaties pr  existing"—including the Treaties of Fort Stanwix and Hopewell.²⁵⁸ Moreover, under the Clause's provisions, states could not attempt to invalidate federal treaties,²⁵⁹ as New York, North Carolina, and Georgia had done by enacting contrary laws or claiming that the treaties violated state constitutions.²⁶⁰ Article VI further required that state executive, judicial, and legislative officers swear fidelity to this new constitutional order.²⁶¹

State power over Indian affairs was also limited by a slight change in terminology. Article VI of the Articles had prohibited the states from "enter[ing] into any conference, agreement, alliance or treaty with any King, Prince or State" without congressional consent.²⁶² But the Constitution omitted these restrictions, providing simply, "No State shall enter into any Treaty, Alliance, or Confederation"²⁶³ By eliminating the qualifiers in the Articles

254. Among these restrictions were requiring support from two-thirds of all Senators, not simply those present; requiring at least two-thirds of the Senate to be present; and mandating that no treaty be made "before all the members of the Senate are summoned & shall have time to attend." *Id.* at 544, 546. New York was absent, so it is impossible to determine whether the state would have also supported these proposals. *See id.* at 546.

255. *Id.*

256. U.S. CONST. art. VI, cl. 2.

257. *Id.*

258. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 417; *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations . . .").

259. U.S. CONST. art. VI, cl. 2 (making federal law supreme "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

260. *See supra* notes 107–108, 178–180 and accompanying text.

261. U.S. CONST. art. VI, cl. 3.

262. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

263. U.S. CONST. art. I, § 10, cl. 1.

that seemed to exclude Indian treaties from this restriction,²⁶⁴ the plain text of this provision prohibited the sort of state treaty-making that had been so problematic under the Articles.²⁶⁵

Other provisions expanded the federal government's institutional power to enforce treaties. Article I, Section 8 originally gave Congress the power to "call forth" state militias "to execute the Laws of the Union, [and] enforce treaties";²⁶⁶ "enforce treaties" was subsequently removed as "superfluous since treaties were to be 'laws,'" but the intended meaning did not change.²⁶⁷ Still more importantly, the new federal judiciary provided a forum both to resolve jurisdictional disputes between the state and federal governments²⁶⁸ and to ensure judicial enforcement of federal treaties: Article III empowered federal courts to hear cases "arising under . . . [the] Treaties made, or which shall be made" by the United

264. It is unlikely that the words "King, Prince or State" were understood to encompass Indian tribes. Although the precise diplomatic status of Native nations remained ambiguous, Anglo-Americans had abandoned the practice of referring to Native leaders as princes or kings, and few would have considered Native polities "states." Cf. GREGORY EVANS DOWD, *WAR UNDER HEAVEN: PONTIAC, THE INDIAN NATIONS, AND THE BRITISH EMPIRE 174-212* (2002) (arguing that colonists and British officials regarded Indians as "domestic, dependent nations" in the 1760s (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831))). Moreover, the drafting history suggests a European focus, as the phrasing originally referred to "the King or Kingdom of Great Britain, or any foreign Prince or State." 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 45, at 675.

265. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832) (McLean, J., concurring) ("Under the constitution, no state can enter into any treaty; and it is believed that, since its adoption, no state, under its own authority, has held a treaty with the Indians."); Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 769-72 (2009) (attributing the development of the Compact Clause to the difficulties occasioned by state treaty-making with Indian nations). An additional wrinkle is that the Articles gave Congress the sole and exclusive power of "entering into treaties and alliances," ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1, which would seem to overlap with the provision in Article VI. But as Professor Duncan Hollis notes, the creation of a separate Indian affairs power that reserved significant rights to states seemed to supplant this restriction with respect to Indian treaties. Hollis, *supra*, at 771 n.144. Unlike the equivalent constitutional provision, this clause was evidently never cited to bar state involvement with Indian affairs; on the contrary, even Madison conceded that states had the right to treat with Indians for land under the Articles. See Letter from James Madison to James Monroe, *supra* note 133, at 156-57.

266. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 182.

267. *Id.* at 389-90.

268. This is the central argument in ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010). As Professor LaCroix states: "[T]he combined efforts of the delegates at Philadelphia produced a judicial mode of organizing federalism that was altogether different from previous approaches to the problem of multiple authorities. . . . This judicially driven federalism was a new species of government, embracing multiplicity and giving it an institutional home in the judicial branches . . ." *Id.* at 173-74.

States.²⁶⁹ It also replaced the Articles' convoluted quasi-judicial process for resolving western land claims by providing original Supreme Court jurisdiction over state border controversies and competing state land grants.²⁷⁰

Outside of the provisions concerning treaties, the most important addition was the Property Clause. At the same time he proposed federal authority over Indian affairs, Madison urged that Congress have the power to "dispose" the western lands of the United States.²⁷¹ This ultimately became a provision granting Congress the power to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States."²⁷² The Property Clause ensured that Congress would have exclusive jurisdiction over most of the West until it admitted the territories as new states.²⁷³ It also enabled Congress finally to criminalize illegal settlement on Indian lands²⁷⁴ and, under Article III, to prosecute violators in new federal courts far from sympathetic local juries.²⁷⁵

The delegates well understood the implications of this grant: one of the Property Clause's key purposes was to provide explicit authority for the legally dubious Northwest Ordinance,²⁷⁶ which the Continental Congress had enacted the previous month to govern all national territory north of the Ohio River.²⁷⁷ A "compact" that would "forever remain unalterable," the quasi-constitutional Ordinance coincided with the Convention and established fundamental

269. U.S. CONST. art. III, § 2, cl. 1.

270. Compare U.S. CONST. art. III, § 2, with ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2.

271. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 321.

272. U.S. CONST. art. IV, § 3, cl. 2.

273. I am indebted to Peter Onuf for drawing my attention to this point.

274. Washington had earlier questioned whether Congress possessed this power under the Articles. See *supra* note 95 and accompanying text.

275. U.S. CONST. art. III, § 2, cl. 3. Violators could be tried "at such Place or Places as the Congress may by Law have directed." *Id.*

276. See THE FEDERALIST NO. 38, *supra* note 53, at 239 (James Madison) (describing the Northwest Ordinance as being enacted "without the least color of constitutional authority"). The First Congress subsequently reenacted the Ordinance. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50; see also *Strader v. Graham*, 51 U.S. (10 How.) 82, 96 (1850) (noting that the provisions of the Northwest Ordinance owed "their legal validity and force, after the Constitution was adopted and while the territorial government continued, to the act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787").

277. See 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 181, at 334.

structures and principles of territorial governance.²⁷⁸ Many of the rights the Ordinance guaranteed prefigured protections written into the Constitution and the Bill of Rights.²⁷⁹

The Northwest Ordinance strongly reflected the Madisonian vision for the West, securing “peace and good order” through the rule of law.²⁸⁰ Article III dictated the “fundamental principles” of the territory’s Indian policy, providing:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and, in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.²⁸¹

This provision of the Northwest Ordinance epitomized the paternalist solution for Indian affairs. But its emphasis on federal control and restraint of western land hunger were also implicit in the Constitution. The Indian Commerce Clause removed the ambiguous qualifiers that existed in the Articles. Declaring and enforcing federal treaties as the supreme law of the land remade federalism. And the Property Clause ensured that Congress, not the states, would govern westward expansion through statutes such as the Northwest Ordinance. For those who claimed the national government’s failure to restrain states and squatters had produced the calamities of federal Indian policy, the Constitution provided much cause for optimism.

278. *Id.* at 339–40; *see also* ONUF, *supra* note 208, at xiii–xxi (“[T]he Ordinance was treated as a constitutional document.”); *cf.* AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 258–61 (2012) (describing the Ordinance as part of the “symbolic constitution”).

279. *See* 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 181, at 340–43 (providing for, among other protections, the writ of habeas corpus, freedom of worship, jury trial, and the prohibition of “cruel or unusual punishments”). *See generally* Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820 (2010) (discussing the Ordinance’s effect on subsequent constitutional law, particularly the Fourteenth Amendment).

280. *See* 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 181, at 340–43.

281. *Id.* at 340–41.

B. The Hamiltonian Convention

Yet if Madison's goal was to create a federal government that could pursue national interests free from state parochialism, he achieved imperfect success. Despite frequent talk of abolishing states altogether during the Convention,²⁸² the thirteen states retained independence and sovereignty under the Constitution. And through the creation of the Senate, the supermajority requirement for treaties, and the Electoral College, the states could exert considerable influence over federal policy even when the Constitution explicitly limited state authority.

This was certainly true in Indian affairs, where, despite the Madisonians' reforms, states retained significant control. Although the Constitution sharply restricted states' treaty powers, it did little to constrain states' authority over lands within their borders. And those borders remained capacious. Toward the end of the Convention, delegates from states without claims to western territory demanded that the Constitution guarantee national ownership of western lands, requiring that North Carolina and Georgia cede their claims.²⁸³ North Carolina's delegation objected that "attempts at compulsion was not the policy of the U.S.," and Abraham Baldwin of Georgia argued in favor of adding explicit language to protect state claims.²⁸⁴ In the end, the delegates agreed to a proviso to the Property Clause specifying, "[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."²⁸⁵ The Constitution also barred the dismemberment of these gargantuan states by prohibiting the formation of a new state within the jurisdiction of an existing state without legislative consent.²⁸⁶ In short, the territory of Georgia and North Carolina, still extending to the Mississippi River, was now constitutionally guaranteed, and the federal government's Property Clause power could not reach south of the Ohio River until cession occurred. The most important Native

282. *E.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 24, 136–37, 152–53, 202, 323, 337, 340, 355–57.

283. 2 *id.* at 462.

284. *Id.* at 462–65.

285. U.S. CONST. art. IV, § 3, cl. 2.

286. *Id.* art. IV, § 3, cl. 1; *see also* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 332–95 (2002) (discussing the text and history of Article IV, Section 3).

nations remained within states' external borders and arguably under state jurisdiction.

The expansionist states won another significant concession in the Guarantee Clause, which promised that the "United States . . . shall protect each [state] against Invasion."²⁸⁷ More definitive than its predecessor in the Articles,²⁸⁸ the Guarantee Clause mandated, in the later words of treatise writer St. George Tucker, that "every state which may be invaded must be protected by the united force of the confederacy."²⁸⁹ The Clause had initially specified that the invasion must be "foreign," but the Convention subsequently removed this qualifier.²⁹⁰ This constitutional commitment abrogated the Continental Congress's earlier refusal to intervene in Georgia's military struggles.²⁹¹ The language of the provision instead required federal military intercession if Indians attacked, even when the state had instigated the conflict.

But the greatest success for land-hungry states and speculators was the pervasive assumption throughout the Convention that the country would expand inexorably westward. The delegates regarded this prospect with attitudes ranging from anticipation to alarm. The southern states consistently favored admitting new western states on principles of equality.²⁹² By contrast, some of the northern states

287. U.S. CONST. art. IV, § 4.

288. ARTICLES OF CONFEDERATION of 1781, art. III ("The said States . . . bind[] themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.").

289. St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. note D, 140, 367 (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803).

290. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 459, 466. Although this language was omitted because it was "superfluous," *id.* at 466, its removal also eliminated any doubt whether the clause required intervention in Indian wars, as it was an open question whether an attack by Indians would have been a "foreign" invasion, *cf.* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19–20 (1831) (holding that the Cherokee Nation was not a "foreign" nation for the purposes of Article III's case or controversy requirement).

291. See 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 159, at 455–62; *see also supra* note 200 and accompanying text.

292. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 584 (reporting Madison's statement that "[w]ith regard to the Western States, he was clear & firm in opinion that no unfavorable distinctions were admissible either in point of justice or policy"); *cf. id.* at 372 (quoting North Carolina delegate Hugh Williamson arguing that the "new States to the Westward" should not be required "to pay the expences of men who would be employed in thwarting their measures & interests").

viewed the “rage for emigration . . . to the Western Country” with trepidation.²⁹³ Western expansion, they believed, would be “suicide on the old States,”²⁹⁴ and they proposed various methods to restrain the West’s political and economic power in the Union.²⁹⁵ None passed. But even the Convention’s most outspoken proponent of limiting western power, Pennsylvania delegate Gouverneur Morris,²⁹⁶ did not intend to repeat the Proclamation of 1763 and attempt to halt western expansion altogether.²⁹⁷ At the Convention, Morris acknowledged that such a move would be “impossible.”²⁹⁸ He subsequently reminisced: “I knew as well then, as I do now, that all North America must at length be annexed to us.”²⁹⁹

In part, the Constitution’s commitment to expansion stemmed from its republican nature: the inclusion of democratic elements as well as the process of ratification required negotiating with the views of the “people out of doors”³⁰⁰ who were infected with “lust of dominion.”³⁰¹ “It would, therefore, have been perfectly Utopian,” Morris later explained, “to oppose a paper restriction [on settlement] to the violence of popular sentiment in a popular government.”³⁰² But

293. 2 *id.* at 3.

294. *Id.* at 442.

295. See, e.g., 1 *id.* at 570–71 (proposing that the legislature ought to control the power of apportionment to avoid shifting power to the future western states); *id.* at 582–84 (proposing that, to diminish western influence, representation be based on property as well as population); 2 *id.* at 3 (proposing to limit the number of new states to the number of existing “Atlantic States”).

296. See, e.g., *id.* at 583 (“[T]he Western Country . . . would not be able to furnish men equally enlightened, to share in the administration of our common interests. . . . If the Western people get the power into their hands they will ruin the Atlantic interests. The Back members are always most averse to the best measures.”).

297. See Letter from Gouverneur Morris to Henry W. Livingston (Nov. 25, 1803), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, app. A at 401 (“I am very certain that I had it not in contemplation to insert a decree *de coerendo imperio* [restraining settlement] in the Constitution of America.”).

298. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 454.

299. Letter from Gouverneur Morris to Henry W. Livingston, *supra* note 297, at 401. Morris had contemplated excluding Louisiana and subsequently gained territories from statehood, governing them as imperial provinces instead. See Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, app. A at 404 [hereinafter Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803)].

300. Alfred F. Young, *The Framers of the Constitution and the “Genius” of the People*, 42 RADICAL HIST. REV. 7, 7–47 (1988); see WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 200–12 (2007).

301. Letter from Gouverneur Morris to Henry W. Livingston, *supra* note 297, at 401.

302. *Id.*

the Constitution did not merely acquiesce in expansion, for, unlike Morris, most delegates celebrated westward growth.³⁰³ Many agreed with South Carolina delegate Charles Pinckney's comment at the Convention that there would be "more equality of rank and fortune in America than in any other country under the sun . . . as long as the unappropriated western lands remain unsettled."³⁰⁴ Others had more personal reasons to support expansion. North Carolina delegate Hugh Williamson later wrote, "[H]aving claims to a considerable Quantity of Land in the Western Country I am fully persuaded that the Value of those Lands must be increased by an efficient federal Govt."³⁰⁵ Though few would have put it so baldly, many other delegates also had substantial western investments.³⁰⁶

For most delegates, then, securing westward expansion, far from a source of anxiety, was one of the most important purposes of a strengthened federal government.³⁰⁷ This faith in inevitable expansion made no mention of the Native nations who owned and governed this vast territory. Only the Northwest Ordinance, consistent with its paternalist approach, acknowledged that "from time to time . . . [I]ndian titles shall have been extinguished."³⁰⁸ But the Convention's vision of continental supremacy entailed an unspoken commitment to colonizing and dispossessing Native peoples.³⁰⁹

Williamson's hope for an "efficient" government hinted at how this would be accomplished. The Constitution provided the United States with powerful new tools for dominating the borderlands that reflected the document's wartime context. It authorized Congress to create a standing national army³¹⁰ and to organize, arm, and command

303. Indeed, Morris stated that, had he expressed his views on expansion more "pointedly," "a strong opposition would have been made." Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *supra* note 299, at 404.

304. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 410.

305. Letter from Hugh Williamson to James Madison (June 2, 1788), in 11 THE PAPERS OF JAMES MADISON 71, 71–72 (Robert A. Rutland & Charles F. Hobson eds., 1977).

306. CHARLES AUSTIN BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 23, 49–50, 176 (1925).

307. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 199 (reporting Connecticut delegate Roger Sherman's statement that frequent legislative meetings would be required because "[t]he Western Country . . . will supply objects" requiring legislation).

308. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 181, at 337.

309. On the continental vision of the Constitution's drafters and advocates, see generally JAMES D. DRAKE, THE NATION'S NATURE: HOW CONTINENTAL PRESUMPTIONS GAVE RISE TO THE UNITED STATES OF AMERICA 260–316 (2011).

310. U.S. CONST. art. I, § 8, cls. 13–14.

the state militias.³¹¹ It also created an executive with substantial power over military and diplomatic affairs, including as commander in chief over the national military and state militias.³¹² Even more importantly, given the constant lack of funds under the Articles, Congress could now tax directly to "provide for the common Defence."³¹³

These provisions remedied the weaknesses that had plagued the United States in its earlier dealings with Natives. The federal government could purchase Indian lands if necessary, and could supply tribes with "presents" that might wean them from British and Spanish influence. Most significantly, the government could now support the high-handed demands and threats it made to Native nations. Rather than constantly placating Indians to avoid wars it could not afford, the United States could turn to arms if necessary. The new national government would be a much strengthened fiscal-military state³¹⁴ capable of instilling the "fear" and "terror" necessary to control the borderlands.³¹⁵

In short, the Constitution created a national state that was simultaneously weak and strong—too dependent on the states and the people to resist "the violence of popular sentiment"³¹⁶ but capable of organizing and sustaining a military far more daunting than any state militia. This was precisely what the expansionist states and Anglo-American settlers wanted. Their libertarian streak ran only as far as self-interest, for they welcomed a strengthened federal state as long as it was an imperialist one, focused on projecting power against the Indians rather than against its citizens.³¹⁷ The Hamiltonians would solve the problem of Indian affairs by committing the federal state to empowering, not restraining, the inexorable westward tide.

III. THE RATIFICATION DEBATES

The Constitution submitted to the states for ratification proposed two distinct solutions for Indian affairs. The Madisonian

311. *Id.* cl. 16.

312. *Id.* art. II, § 2, cl. 1.

313. *Id.* art. I, § 8, cl. 1.

314. EDLING, *supra* note 23, at 47–49, 227–29.

315. *See supra* notes 229–232 and accompanying text.

316. *See supra* note 302 and accompanying text.

317. *Cf.* HULSEBOSCH, *supra* note 8, at 219–20 ("An important manifestation of popular constitutionalism was . . . migration beyond existing jurisdictions and into Indian country. . . . Before, during, and after the ratification campaign, settlers voted with their feet. . . . [T]he hard fact of mobility conditioned the making of the Constitution.").

perspective restrained states by ensuring the supremacy of federal diplomacy. The Hamiltonian approach embraced expansion and considered the federal military a powerful tool to defeat Native nations. This Part traces the course of these discourses during the nation's hard-fought ratification contests, "the first national election" that engaged the public in debating the Constitution through a torrent of print and popular politics.³¹⁸ Unlike at the Convention, discussions of the Constitution's likely effect on Indian affairs figured prominently in ratification, appearing in newspaper articles, pamphlets, letters, speeches, and even public toasts.³¹⁹

In this wide-ranging debate, the two constitutional perspectives fared differently. As Part III.A traces, James Madison and other Federalists occasionally argued in favor of the centralization of Indian affairs, but their arguments served primarily as fodder for Anti-Federalist critiques of constitutional overreach. By contrast, as detailed in Part III.B, the invocation of federal military power as a check on the "savages" became a standard part of Federalist rhetoric. This proved successful: in Georgia, Part III.C suggests, the prospect of federal military aid against the Creeks secured ratification. But this process also ensured that the Hamiltonian construction would become the dominant understanding of the Constitution in the ensuing years, as Part III.D explores.

318. For background on the ratification debates, see generally MAIER, *supra* note 8; RATIFYING THE CONSTITUTION (Michael Allen Gillespie & Michael Lienesch eds., 1989); Critical Forum, *Maier*, Ratification: The People Debate the Constitution, 1787–1788, 69 WM. & MARY Q. 361 (2012). Until recently, ratification was an afterthought in most constitutional histories. See MAIER, *supra* note 8, at ix–xi (noting the overwhelming body of work on the Convention, whereas ratification is neglected or relegated to "a chapter or two that give a quick summary of the ratification process"); Forrest McDonald, *Foreword* to RATIFYING THE CONSTITUTION, *supra*, at ix, ix (noting "the paucity of historical accounts of ratification"). The exception to this generalization is *The Federalist*, which has spawned a "small industry" of interpretation. MAIER, *supra* note 8, at ix–xi. As Professor Pauline Maier notes, *The Federalist* is usually examined outside of its ratification context as "a dispassionate, objective analysis of the Constitution" rather than as the "partisan statement written in the midst of a desperate fight in a critical state" that it was. *Id.* at xi; see also McDonald, *supra*, at ix (noting that the "*The Federalist* . . . though written as propaganda in support of ratification in New York, is rarely dealt with as such"). This narrow focus obscures the tremendous outpouring of public statements on the Constitution. See KRAMER, *supra* note 26, at 78 ("Thoughts expressed by the Framers behind closed doors in Philadelphia are ultimately of less interest than the public debate that took place over ratification. . . . Understandings expressed during the discussions about whether to ratify . . . are what matter most."); MAIER, *supra* note 8, at ix–xvi ("Debate over the Constitution raged in newspapers, taverns, coffeehouses, and over dinner tables as well as in the Confederation Congress, state legislatures, and state ratifying conventions.").

319. See *infra* Parts III.A–B.

A. *Madisonian Ratification*

For many Federalists, the “mighty difference” between the Articles and the Constitution lay not in Congress’s constitutionally enumerated powers, many of which mirrored those in the Articles, but in the means granted to accomplish those ends.³²⁰ As Madison wrote in *Federalist No. 45*, “If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union than in the invigoration of its ORIGINAL POWERS.”³²¹

One of the powers the Articles had granted Congress was “that they shall regulate Indian affairs.”³²² But experience had underscored that this authority alone was insufficient, “there being no sanctions to it.”³²³ States had routinely flouted federal jurisdiction, with disastrous results. “Not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is,” John Jay argued in *Federalist No. 3*.³²⁴ “[B]ut there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants.”³²⁵

Federalist No. 42 presented Madison’s solution. There, he examined constitutional provisions intended to “provide for the harmony and proper intercourse among the States,”³²⁶ one of which was the Indian Commerce Clause. The Clause, he argued, was “very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory.”³²⁷ First, the Clause was no longer limited to Indians “not members of any of the States,” a vague restriction whose scope

320. Editorial, CUMBERLAND GAZETTE (Mass.), Nov. 15, 1787, reprinted in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: MASSACHUSETTS 245, 246 (John P. Kaminski & Gaspare J. Saladino eds., 1997).

321. THE FEDERALIST NO. 45, *supra* note 53, at 293 (James Madison); see also Editorial, *supra* note 320, at 245 (“The Confederation points out what positive powers the Congress ought to have: the federal Constitution points out what positive powers the Congress actually shall have.”).

322. Editorial, *supra* note 320, at 246.

323. *Id.* at 245.

324. THE FEDERALIST NO. 3, *supra* note 53, at 44 (John Jay).

325. *Id.*

326. *Id.* NO. 42 at 267 (James Madison).

327. *Id.* at 268.

had “been a question of frequent perplexity and contention in the federal councils.”³²⁸ Second, the Clause contained no language reserving states’ legislative rights. “[H]ow the trade with Indians,” Madison wrote, “though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible”—a glaring instance, to Madison, of how the Articles had sought “to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States.”³²⁹ *Federalist No. 42* thus read Madison’s qualified success in recasting the Indian Commerce Clause as a clear endorsement of federal supremacy.

A far more negative assessment of federal power over Indian affairs appeared in a *New York Journal* article by Anti-Federalist Abraham Yates, Jr. under the pseudonym Sydney.³³⁰ Yates argued ratification would “render[] nugatory” much of New York’s constitution, including provisions granting it authority over Indian affairs.³³¹ Yates condemned “the whole history of . . . the measures taken by Congress respecting the Indian affairs in this state” as “a series of violations” of the state’s constitution and the restrictions of the Articles.³³² He particularly attacked the Treaty of Fort Stanwix, including the commissioners’ “defiance [of] the civil authority of the county of Montgomery.”³³³ Yates continued:

If this was the conduct of Congress and their officers, when possessed of powers which were declared by them to be insufficient for the purposes of government, what have we reasonably to expect will be their conduct when possessed of the powers “to regulate

328. *Id.* at 268–69.

329. *Id.* at 269.

330. Sydney, *To the Citizens of the State of New York*, N.Y.J., June 13–14, 1788, reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK 1153 (John P. Kaminski et al. eds., 2004). Although earlier scholarship attributed the “Sydney” essays to Robert Yates, the most thorough histories of ratification cite evidence overwhelmingly suggesting that Abraham Yates, Jr. authored the pieces. See *id.* (citing Abraham Yates’s personal correspondence); Sidney, Essay, N.Y.J., Oct. 18, 1787, reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK 115, 115 (John P. Kaminski et al. eds., 2003) (citing draft essays in Abraham Yates’s hand, contemporary correspondence, and Yates’s own claim of authorship); see also MAIER, *supra* note 8, at 343 (attributing the Sydney essays to Abraham Yates).

331. *Id.* at 1156.

332. *Id.*

333. *Id.* at 1157; see also *supra* notes 121–127 and accompanying text.

commerce with foreign nations, and among the several states, and with the Indian tribes," when they are armed with legislative, executive and judicial powers, and their laws the supreme laws of the land . . . and all such laws subject to the revision and controul of Congress.

It is therefore evident that this state, by adopting the new government, will enervate their legislative rights, and totally surrender into the hands of Congress the management and regulation of the Indian affairs³³⁴

Yates and Madison agreed that ratification would result in federal supremacy over Indian affairs. Yates also understood, perhaps better than Madison, the broad panoply of powers given the new government, particularly the Supremacy Clause, that would yield this result. But Yates, an "extreme" Anti-Federalist,³³⁵ construed Madison's centralizing scheme for Indian affairs as a fundamental attack on New York's autonomy. And he evidently believed other New Yorkers would feel similarly.

But neither Madison's nor Yates's discussion of federal supremacy and Indian affairs was representative. They were the only two authors to mention the Indian Commerce Clause or seriously consider the broader issue of federal authority over relations with the Indians. Part of this silence stemmed from the agreement by at least some Anti-Federalists that the new federal government should have power over external matters, including Indian affairs.³³⁶ But it also reflected the fact that, as at the Convention, ratification debates over Indians focused on the question of treaties.

334. Sydney, *supra* note 330, at 1158. Yates also mentioned the limitation on states' laying of duties on imports and exports. *Id.*

335. Lynd, *supra* note 237, at 225 n.9.

336. See, e.g., Federal Farmer, Letters to the Republican, Letter I (Nov. 8, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 14, 24 (John P. Kaminski & Gaspare J. Saladino eds., 1983) ("Let the general government[']s . . . powers extend exclusively to all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, *Indian affairs*, peace and war . . . leaving the internal police of the community, in other respects, exclusively to the state governments" (emphasis added)); *The Dissent of the Minority of the Pennsylvania Convention*, PA. PACKET, Dec. 18, 1787, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 7, 21 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (endorsing "a confederation of republics, possessing all the powers of internal government; but united in the management of their general, and foreign concerns").

The Federalists repeatedly bemoaned treaties' ineffectiveness under the Articles. As Alexander Hamilton noted, "The treaties of the United States under [the Articles] are liable to the infractions of thirteen different legislatures."³³⁷ This view extended to those on the frontier. The inhabitants of Schenectady, New York, despaired of the collapse of their once booming Indian trade and blamed the continued British occupation of the western posts. "The tracing the Cause of our Wretchedness, points out the Remedy: Give Powers to your own Representatives which will be sufficient to compel the Performance of Treaties as well as to make them."³³⁸

For Federalists, one important solution to the problem of state interference was the creation of federal courts, particularly the Supreme Court, which would avoid contradictory interpretations and local bias in enforcing treaties.³³⁹ Another was to include federal treaties within the Supremacy Clause, thereby compelling compliance. "Is it not necessary that [treaties] should be binding on the States?" delegate Francis Corbin asked at the Virginia ratifying convention.³⁴⁰ "Fatal experience has proved, that treaties would never be complied with, if their observance depended on the will of the States; and the consequences would be constant war. . . . Do not Gentlemen see the infinite dangers . . . if a small part of the community could drag the whole Confederacy into war?"³⁴¹

The inclusion of treaties within the Supremacy Clause was particularly contentious in Virginia, where the state's western residents were deeply hostile to the Jay-Gardoqui Treaty of 1786, which closed the Mississippi River to American navigation.³⁴² This debate quickly expanded to include Indian treaties. Arthur Campbell,

337. THE FEDERALIST NO. 22, *supra* note 53, at 151 (Alexander Hamilton).

338. SCHENECTADY FARMER, TO THE INHABITANTS OF THE DISTRICT OF SCHENECTADY (1788), *reprinted in* 21 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK, 1402, 1402 (John P. Kaminski et al. eds., 2005).

339. See THE FEDERALIST NO. 22, *supra* note 53, at 150–51 (Alexander Hamilton).

340. Virginia Convention Debates (June 19, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA 1387, 1392 (John P. Kaminski & Gaspare J. Saladino eds., 1993); *see also* THE FEDERALIST NO. 22, *supra* note 53, at 150 ("The treaties of the United States, to have any force at all, must be considered as part of the law of the land.").

341. Virginia Convention Debates, *supra* note 340, at 1392.

342. See MAIER, *supra* note 8, at 276–79; *see also infra* notes 363–367 and accompanying text. Many of these residents lived in Kentucky, which depended on the Ohio River to transport goods to market. MAIER, *supra* note 8, at 238, 279. Kentucky remained part of Virginia until it gained statehood in 1792. 1 HISTORICAL STATISTICS, *supra* note 29, at 1-249.

a delegate to the House of Burgesses from backcountry Virginia,³⁴³ questioned in print why "*treaties* should be made the *supreme* law of the land."³⁴⁴ He singled out for attack the treaties made by the congressional commissioners with "different nations of Savages" since 1776.³⁴⁵

[S]ome of them if considered as law, will destroy the private rights of individuals without an hearing; infringe the sovereignty of States, are contradictory one with another; and in not a few instances manifestly unjust. . . . What embarrassments must the Judges of the fæderal courts be under, when they come to pronounce, what is *the supreme law of the land*. They are either to be accessaries to a multiplicity of wrongs, or endure the imputation of trifling with the obligations of a solemn oath.³⁴⁶

Campbell also proposed revisions to the Constitution on behalf of a nebulous Society of Western Gentlemen, which advocated approval of treaties by two-thirds of both houses and the removal of treaties previously "made" by the United States from both the Supremacy Clause and federal judicial jurisdiction.³⁴⁷ The Society also argued for deleting the Property Clause altogether.³⁴⁸

Campbell claimed to speak for a coalition of westerners who feared that the combination of federal Indian treaties, the Supremacy Clause, and federal court enforcement would undermine the security of western land title. These issues reappeared at the Virginia ratifying convention, at which earlier Indian purchases were, according to Madison, one of the "principal topics of private discussion & intrigue, as well as of public declamation," alongside British debts and navigation of the Mississippi.³⁴⁹ Leading Anti-Federalist Patrick

343. See HARTWELL L. QUINN, ARTHUR CAMPBELL: PIONEER AND PATRIOT OF THE "OLD SOUTHWEST" 124 (1990).

344. Many, Essay, VA. INDEP. CHRON., June 18, 1788, reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 340, at 1638, 1638-39.

345. *Id.* at 1639.

346. *Id.*

347. Society of Western Gentlemen, *The Federal Constitution Amended: Or, an Essay To Make It More Comfortable to the Sense of a Majority of the Citizens of the United States*, VA. INDEP. CHRON., Apr. 30 & May 7, 1788, reprinted in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA, 769, 777, 779 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

348. *Id.* at 778.

349. Letter from James Madison to George Washington (June 13, 1788), in 6 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 329, 329 (W.W. Abbot ed., 1997).

Henry³⁵⁰ raised this specter of land purchases in a speech on the federal judiciary; he feared that “citizens . . . who have made large contracts under our present Government” would later be “called to a Federal Court, and tried under retrospective laws.”³⁵¹ “[W]hat is to become of the purchases of the Indians?” he queried pointedly.³⁵² “Those unhappy nations who have given up their lands to private purchasers—who by being made drunk, have given a thousand—nay, I might say 10,000 acres, for the trifling sum of six pence?”³⁵³ Like Campbell, Henry feared that earlier land transactions would not withstand careful scrutiny in the new federal courts.

Henry’s Federalist opponents mocked this specter of “Indian purchases” as a “bugbear[] and hobgobling[.]”³⁵⁴ One seized the opportunity to discourse at length on “the Indian countries,” and ended by mockingly suggesting that, if Henry did “not like this this Government, let him go and live among the Indians; I know of several nations that live very happy.”³⁵⁵ Federalist delegate George Nicholas noted that, although the Virginia Assembly had already resolved land companies’ Indian claims, there were nonetheless “Gentlemen who have come by large possessions, that it is not easily to account for.”³⁵⁶ Henry, an extensive speculator in western lands,³⁵⁷ viewed this statement as a thinly veiled jab and interrupted that he hoped Nicholas “meant nothing personal”; Nicholas replied, “I mean what I say, Sir.”³⁵⁸ The two delegates bickered until the convention president instructed the delegates to “not be personal” and cooperate “in a peaceable manner”; after the two men exchanged halfhearted apologies, the convention moved on.³⁵⁹

As this outburst underscored, little of the debate over federal supremacy over Indian affairs occurred on the high-minded territory

Madison refers here to the “Indiana claim,” a large tract of western land claimed by a purported Indian sale that had been rejected by the Virginia legislature. *Id.* at 329 n.2.

350. See generally THOMAS S. KIDD, *PATRICK HENRY: FIRST AMONG PATRIOTS* 183–211 (2011).

351. Virginia Convention Debates (June 23, 1788), in 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 340, at 1464, 1466.

352. *Id.*

353. *Id.*

354. *Id.* at 1467.

355. *Id.*

356. *Id.* at 1468.

357. KIDD, *supra* note 350, at 72.

358. Virginia Convention Debates, June 23, 1788, *supra* note 351, at 1468.

359. *Id.* at 1468–69.

Madison and Yates marked out. Madison's brief for centralization gained little traction; proponents of the Constitution subsumed the issue into the larger question of treaties' status under the new regime. The Constitution's critics shared this perspective, but latched onto Indian treaties as a compelling argument against granting the national government the power to make and enforce treaties as the supreme law of the land. Federalists regarded this objection as mere venality, but, though significant financial interests were at stake, these complaints also reflected the widespread commitment to western expansion that pervaded Anglo-American society. Federalists appealed to this commitment as well, but they invoked a different set of concerns.

B. Hamiltonian Ratification

The Federalists recognized that ratification would be a difficult and hard-fought struggle. The Federalists' desire for a state with expanded military and financial powers confronted a powerful antistatist tradition hostile to centralized authority. But Secretary at War Henry Knox argued at the close of the Convention that success would be assured if the "majority of the people . . . reflect[ed] maturely on their present situation," and recognized "[t]hat the gover[n]ment at home is . . . without money & without credit—unable either to resist the smallest faction within [or] to chastise the despicable bands of murdering savages on the frontiers."³⁶⁰

Knox's invocation of "murdering savages" to justify a stronger federal government became a common trope in Federalist arguments for ratification.³⁶¹ This rhetoric of savagery gained currency for two reasons. First, the most effective counterargument to Anti-Federalists was the seriousness of external threats that required a more powerful state to meet them. As recent histories have underscored, the Constitution's advocates were keenly aware of and anxious about

360. Draft Letter from Henry Knox (Sept. 1787), in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 320, at 26, 27 (third and fourth alterations in original).

361. Cf. EDLING, *supra* note 23, at 122 ("The idea that the national government would be able to develop the West by pacifying the Indian tribes in the Ohio country through war or treaty was a very common theme in Federalist rhetoric. So, too, was the claim that Britain and Spain had interests in the American interior and that they supported and stirred up the Indian nations against American settlers.")

American status on the international stage.³⁶² Convinced that the Articles' weaknesses had undermined American credibility abroad, they looked to a strengthened federal government to establish the country as a "respectable nation" in the eyes of the world.³⁶³

Although focused on European scrutiny, this anxiety extended to the powerful Native nations on the borderlands watching the failure of the American experiment. "[I]f we are to be much longer unblessed with an efficient national government, destitute of funds and without public credit, either at home or abroad," New Hampshire Federalist Nicholas Gilman wrote, "I fear we shall become contemptible even in the eyes of savages themselves."³⁶⁴ A Pennsylvanian Federalist similarly lamented the nation's "weak and shattered government, which brings on us the contempt of every surrounding tribe and the reproach and obloquy of every nation."³⁶⁵ The outward-looking Federalists thus recognized that American success required impressing Native as well as European nations with strengthened national power.

The second reason was more cynical. Ratification faced substantial hurdles in the West, where Anglo-American settlers were well aware that many Federalists despised them as "white Savages."³⁶⁶ They were thus deeply suspicious that a strengthened federal government designed to ensure rule by a political and cultural elite would privilege eastern interests at their expense.³⁶⁷ As evidence, many pointed to the abortive Jay-Gardoqui Treaty of 1786, which had bargained away rights to navigate the Mississippi River that westerners, particularly Kentuckians, relied on to export their

362. GOULD, *supra* note 18, at 130–32; SADOSKY, *supra* note 18, at 119–47. See generally Golove & Hulsebosch, *supra* note 18.

363. See MAIER, *supra* note 8, at ix.

364. Letter from Nicholas Gilman to President John Sullivan (Nov. 7, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: DELAWARE, NEW JERSEY, GEORGIA AND CONNECTICUT 261, 261 (Merrill Jensen ed., 1978).

365. Pennsylvania Assembly Proceedings (Sept. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 65, 77 (Merrill Jensen ed., 1976).

366. Letter from John Jay to Thomas Jefferson, *supra* note 220, at 599; see SMITH-ROSENBERG, *supra* note 13, at 214–16.

367. Saul Cornell, *Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism*, 76 J. AM. HIST. 1148, 1156–68 (1990). The long-standing Progressive/neo-Progressive interpretation of the Constitution argues that these settlers' fears were well-grounded. For works representative of this historiographical approach, see BEARD, *supra* note 306; TERRY BOUTON, TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION (2007); HOLTON, *supra* note 300.

goods.³⁶⁸ The treaty and its seemingly naked betrayal of western interests gave westerners little confidence that the new government would benefit them.

But the West was also engulfed in ceaseless cycles of violence between Indians and white settlers, and Federalists could portray the strengthened federal government as the savior of Anglo-American victims of Native violence. Invoking the horrors of Indian attack to criticize political opponents for their purported complicity was a well-worn tack in early America, one that historians have labeled the "anti-Indian sublime."³⁶⁹ Observers at the time recognized this: as Abraham Yates, Jr. wrote in critiquing the Federalists, "The Dread of an Indian war, from the Barbarous Manner it is carried on, has ever been alarming, and as such a great handle for sinister purposes to politicians, both under the former and the present government."³⁷⁰ Thus, though Federalist horror over Indian "cruelties" and "devastations" was likely sincere, the decision to embrace the rhetoric of "savagery" also reflected political expediency. Although most Federalists felt little kinship with backcountry settlers, pandering to their hatred of Indians provided a compelling argument in a bitter and divisive political contest.

This strategy meant that the specter of "murdering savages" took its place among the parade of dangers Federalist delegates routinely rehearsed at state ratification conventions. At the Pennsylvania convention, Thomas McKean insisted that only the federal government was "capable of collecting and directing the national strength against foreign force, Indian depredations, or domestic

368. See MAIER, *supra* note 8, at 276-79; Lance Banning, *Virginia: Sectionalism and the General Good*, in RATIFYING THE CONSTITUTION, *supra* note 318, at 261, 263-68, 280-83.

369. SILVER, *supra* note 13, at xx. As Professor Peter Silver notes, the most important use of the anti-Indian sublime was as "a standard of loyalty . . . nearly always applied to people who were not Indian at all." *Id.* at xxi-xxii. "[M]any of the bitterest arguments between groups came to depend on tying enemies to Indians," he argues. *Id.* at xxii. "The mid-Atlantic's Indians were nearly always co-bogeymen: they were seldom discussed as having the initiative to do much harm apart from the aid, comfort, and direction that they were presumably provided by a European villain of the moment." *Id.* at xxii-xxiii.

370. Lynd, *supra* note 237, at 241 n.41. Thomas Jefferson later expressed a similar understanding of the strategic invocations of the Indian threat. See Letter from Thomas Jefferson to James Monroe (Apr. 17, 1791), in 20 PAPERS OF THOMAS JEFFERSON: MAIN SERIES 234, 236 (Julian Boyd ed., 1982) ("Every rag of an Indian depredation will . . . serve as a ground to raise troops with those who think a standing army and a public debt necessary for the happiness of the U.S. and we shall never be permitted to get rid of either.").

insurrection.”³⁷¹ Robert Livingston saw enemies all around New York during that state’s debates; to the northwest he feared “the British posts and hostile tribes of savages.”³⁷² Virginia Governor Edmund Randolph similarly outlined numerous “point[s] of weakness” to argue that the new government was “necessary” for the state’s safety.³⁷³ “Cast your eyes to the Western Country,” he urged the state’s delegates, “that is inhabited by cruel savages, your natural enemies; besides their natural propensity to barbarity, they may be excited by the gold of foreign enemies to commit the most horrid ravages on your people.”³⁷⁴ And in Massachusetts, John Carnes observed that “the probability of an Indian war, &c. evinced the great necessity of the establishment of an efficient federal government, which will be the result of the adoption of the proposed Constitution.”³⁷⁵ As one Virginian delegate succinctly stated, “Much has been said on the subject of war by foreigners, and the Indians”³⁷⁶

Anti-Federalists dismissed this rhetoric as mere fear mongering. Virginian Anti-Federalist delegate William Grayson tired of these “imaginary” and “ludicrous” dangers.³⁷⁷ “Horrors have been greatly magnified since the rising of the Convention,” he argued.³⁷⁸ In the rhetorical world of the Federalists, Barbary pirates would sail up the

371. Pennsylvania Convention Debates (Nov. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 365, at 382, 415.

372. New York Convention Debates (June 19, 1788), in 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK 1681, 1685 (John P. Kaminski et al. eds., 2008) (footnote omitted).

373. Virginia Convention Debates (June 6, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 347, at 970, 977.

374. *Id.* at 977.

375. Massachusetts Convention Debates (Jan. 15, 1788), in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: MASSACHUSETTS 1187, 1204–05 (John P. Kaminski & Gaspare J. Saladino eds., 2000); *see also* Harrison Gray Otis Oration (July 4, 1788), in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 19, at 224, 228 (“[T]he union of the entire strength of the several members, is essential to the safety and perfection of a political confederacy Hostile tribes of Indians make daily incursions upon our frontier, and are supplied by Spaniards and by Englishmen, with the apparatus of modern war.—Thus the horrors of savage ferocity are increased by the contribution of civilized malice.”).

376. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 640 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891).

377. Virginia Convention Debates (June 11, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 347, at 1142, 1167.

378. *Id.*

Chesapeake, South Carolinians "mounted on alligators" would come "and eat up our little children," and "[t]he Indians [would] invade us with numerous armies on our rear, in order to convert our cleared lands into hunting grounds."³⁷⁹ Patrick Henry also objected to Federalists' claims that "the savage Indians are to destroy us," arguing that, in light of superior Anglo-American numbers, "we have nothing to fear from them."³⁸⁰

But Indians were different from alligator-mounted South Carolinians; Indian war was real. Many agreed with the pseudonymous writer Agricola that "the recent hostilities of the savages . . . evince the necessity of a spirited, energetic government, to ward off the calamities of war."³⁸¹ "[S]hould the constitution be rejected," one South Carolinian wrote, "how long can we flatter ourselves to be free from Indian cruelties and depredations . . . if at this moment warded off from us, 'tis principally owing to the dread of an efficacious union of the states by the adoption of the federal constitution."³⁸² James Madison echoed these points when he noted that the "new Govt and that alone" would be able to end British and Spanish "instigat[ion]" and "encourage[ment]" of the Indians, "considerations" Madison thought would carry "great weight with men of reflection."³⁸³

These views resonated with Anglo-American settlers on the frontier. Inhabitants of the frontier towns of Schenectady and Pittsburgh lamented the "weakness of Congress" to prevent British and Spanish intrigues, on which they blamed "the incursions of the savages."³⁸⁴ Pro-Constitution forces in Kentucky welcomed the Fourth

379. *Id.*

380. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, *supra* note 376, at 150, 155.

381. P. Valerius Agricola, *An Essay, On the Constitution Recommended by the Federal Convention to the United States*, ALBANY GAZETTE, Dec. 6, 1787, *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK, *supra* note 334, at 361, 362.

382. Letter to the Publisher, *A Steady and Open Republican*, ST. GAZETTE OF S.C., May 5, 1788, *reprinted in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 387, 387 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

383. Letter from James Madison to George Nicholas (May 17, 1788), *in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 19, at 24, 29.

384. SCHENECTADY FARMER, *supra* note 338, at 1402; John Gibson, *Resolution of the Inhabitants of Pittsburgh*, PITTSBURGH GAZETTE, Nov. 17, 1787, *reprinted in* 2 THE

of July, 1788, with the toast, "May the Savage enemies of America, be chastised by Arms."³⁸⁵

In short, war with the Indians, far from an imaginary threat, was a potent reminder of the Articles' failings. As one French diplomat observed, "[The] hostilities carried out by the Savages of Ohio support the efforts of Federalists and favor Consolidation."³⁸⁶ He suggested that clever Federalists should instigate more conflicts against "these turbulent neighbors" out of self-interest.³⁸⁷ "[T]he noise of guns," he dryly noted, "would stifle the powerless cries of Democrats [that is, the Anti-Federalists]."³⁸⁸

Invoking the Indian threat proved particularly valuable in debates over the creation of a standing army.³⁸⁹ Republican ideology regarded standing armies as a prerequisite for tyranny, and so the Anti-Federalists harped on this provision as evidence of the corruption lurking behind the Constitution.³⁹⁰ Many Federalists countered that standing armies were "essentially necessary" not because of the threat of "an European war"—"[t]his I think is not very probable, provided the Fæderal Government is established," wrote one Federalist—but because of the "peculiar situation of the United States," surrounded by Indian nations.³⁹¹ The early American frontier had always been violent. As one commentator noted, because of Indian wars, Anglo-Americans had not had "six years of peace

DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 365, at 286, 286.

385. *Lexington Celebrates the Fourth of July*, KY. GAZETTE, July 5, 1788, reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 340, at 1730, 1731.

386. Letter from Louis-Guillaume Otto to Comte de Montmorin (Aug. 16, 1788), in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 19, at 333, 334.

387. *Id.*

388. *Id.*

389. See Miller, *supra* note 9, at 155–56 ("The tribes provided the main justification for the federal government's need for armed forces.").

390. See SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 31 (1999).

391. Letter from a Well-Informed Correspondent, to His Friend in this City, on the Subject of the Proposed Fæderal Constitution, VA. INDEP. CHRON., Nov. 28, 1787, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 177, 180 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

since the first settlement of the country, or shall have for fifty years to come."³⁹²

This was a central theme in *Federalist Nos. 24 and 25*, in which Alexander Hamilton defended the Constitution's provision for a standing army. He acknowledged that a "wide ocean" divided the country from Europe, but counseled against "an excess of confidence or security."³⁹³ "The territories of Britain, Spain, and of the Indian nations . . . encircle the Union from Maine to Georgia."³⁹⁴ From their western footholds, the British and Spanish would be constantly intriguing against the United States. In this struggle, "[t]he savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies, because they have most to fear from us, and most to hope from them."³⁹⁵ These threats warranted a national military under federal authority. At the very least, "there has been a constant necessity for keeping small garrisons on our Western frontier."³⁹⁶ These posts would "continue to be indispensable, if it should only be against the ravages and depredations of the Indians."³⁹⁷ And the states were inadequate for that task, for they could neither afford nor be trusted with maintaining separate armed forces.³⁹⁸

Opponents of ratification balked at these claims. Although some Anti-Federalists, unlike Grayson and Henry, were willing to concede the threat of Indians,³⁹⁹ they argued that present arrangements were adequate to address it. Pennsylvania Anti-Federalists rebutted Federalist claims that existing forces along the Ohio River demonstrated "the propriety of a standing army" by insisting that these soldiers were "a mere occasional armament for the purpose of

392. Marcus IV, *Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention at Philadelphia*, NORFOLK & PORTSMOUTH J. (Va.), Mar. 12, 1788, reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 379, 387 (John P. Kaminski & Gaspare J. Saladino eds., 1986); see also THE FEDERALIST NO. 25, *supra* note 53, at 165 (Alexander Hamilton) (noting that "Indian hostilities, instigated by Spain or Britain, would always be at hand," even after ratification).

393. THE FEDERALIST NO. 24, *supra* note 53, at 160 (Alexander Hamilton).

394. *Id.* NO. 25, at 163 (Alexander Hamilton).

395. *Id.* NO. 24, at 161 (Alexander Hamilton).

396. *Id.*

397. *Id.*

398. *Id.* NO. 25, at 162-63.

399. See A Democratic Federalist, Essay, PA. HERALD, Oct. 17, 1787, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 365, at 193, 197 (describing the Indians as "inhuman butchers of their species" with whom "we are always . . . in a state of war").

restraining divers hostile tribes of savages”⁴⁰⁰ and would be disbanded “[a]s soon as the danger is over.”⁴⁰¹ Another Anti-Federalist opined that it was not “prudent for Congress ever to raise an army merely to subdue Wabash Indians or any one single tribe. Should there be a general combination of all the tribes . . . Congress by our present Articles of Confederation are vested with full powers to draw out the military force of the states.”⁴⁰²

The Federalists were less sanguine about the Indian threat and the adequacy of the Articles to redress it. To counter Anti-Federalist arguments, they stressed that, even as Indian war threatened, “we are destitute, of the means of defence, without an army . . . without money to raise and maintain an armament, and without that credit which might enable us to make use of foreign resources.”⁴⁰³ The frontier must be garrisoned, and only Congress could adequately raise forces for this purpose.⁴⁰⁴ A writer in the *Virginia Chronicle* insisted, in florid prose, on the need “to protect our defenceless frontiers from indiscriminating cruelties and horrid devastations of the savages, to which, from its extent, it is so peculiarly exposed.”⁴⁰⁵ “Let a man reflect a moment on the promiscuous scenes of carnage committed by Indians in their midnight excursions,” the author continued, “and he must have a heart callous indeed, if he would object to an army supported for the benevolent purpose of preventing them.”⁴⁰⁶

400. Centinel II, *To the People of Pennsylvania*, PHILA. FREEMAN'S J., Oct. 24, 1787, reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 457, 463 (John P. Kaminski & Gaspare J. Saladino eds., 1981). Prominent Federalist James Wilson had pointed to these forces in defending standing armies during an influential early speech defending the Constitution. See James Wilson, *Speech at a Public Meeting in Philadelphia*, PA. HERALD, Oct. 9, 1787, reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 337, 337–44.

401. A Democratic Federalist, *supra* note 399, at 197.

402. *Letter from Massachusetts*, CONN. J., Oct. 17 & 24, 1787, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION *supra* note 364, at 373, 378 (emphasis omitted).

403. Agricola, *supra* note 381, at 362.

404. See ALBANY FED. COMM., AN IMPARTIAL ADDRESS, TO THE CITIZENS OF THE CITY AND COUNTY OF ALBANY: OR, THE 35 ANTI-FEDERAL OBJECTIONS REFUTED (1788), reprinted in 21 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 338, at 1388, 1392–93 (“Our frontiers must be garrisoned in time of peace; and, should Congress not have power to hire men to do this duty, the militia must be dragged from their families for the purpose.”).

405. Letter from a Well-Informed Correspondent, to His Friend in this City, on the Subject of the Proposed Federal Constitution, *supra* note 391, at 180.

406. *Id.*

According to Federalists, then, Anti-Federalists' opposition to a standing army made them complicit in the inhumane violence of the "savages" on the frontier.

The dominance of Federalist arguments based on Indians' purported savagery demonstrates how ratification—which was, at base, a populist political campaign rather than a high-minded exposition of constitutional theory—shaped constitutional meaning. Hamilton, Randolph, and other, lesser-known Federalists who invoked the terrors of Indian war likely also shared Madison's views that the abuses of expansionist states and squatters were equally to blame for frontier violence.⁴⁰⁷ Yet they were also seasoned politicians who recognized the potency of anti-Indian rhetoric in early America, and so carefully selected their arguments in selling the Constitution. Unlike the speculative horrors of European invasion or internecine violence among the states—which ratification's opponents easily mocked—Indian warfare was happening even as ratification was debated. Anti-Federalist attempts to downplay the Indian threat thus rang hollow, a fact Federalists recognized and exploited by portraying their opponents as complicit in Indian violence.

The Federalists' choices had consequences. Their approach abandoned any consideration of the causes of Indian violence, instead depicting Natives as perpetual enemies of the United States who would always be aggressors on the frontier. This narrative of Anglo-American victimization provided a powerful justification for western expansion. The rhetoric also had political effects. Many were seemingly unpersuaded by Federalist invocations of the Indian threat: western Pennsylvania, Kentucky, and North Carolina remained largely and stubbornly anti-Federalist.⁴⁰⁸ But several prominent

407. Hamilton, for instance, would later urge federal supremacy and diplomacy with Indian nations to the Governor of Georgia. Letter from Alexander Hamilton to George Mathews (Sept. 25, 1794), in 17 PAPERS OF ALEXANDER HAMILTON 270, 272–75 (Harold Syrett ed., 1972). And both Randolph and Hamilton became prominent members of the Washington administration, which adopted an Indian policy focused on restraining frontier settlers where possible. See NICHOLS, *supra* note 8, 98–202 (describing the Federalists' vision that "[o]n the Trans-Appalachian frontier, officials would use courts, armies, and regulated land sales to curb white frontiersmen's appetite for Indian land and Indian blood").

408. See Terry Bouton, *The New and (Somewhat) Improved Frontier Thesis*, 35 REVS. AM. HIST. 490, 493–94 (2007) (reviewing GRIFFIN, *supra* note 35); Cornell, *supra* note 367, at 1149–50. Professor Patrick Griffin challenges the association between westerners and Anti-Federalism claimed by Professors Terry Bouton and Saul Cornell, arguing that "[g]iven the conditions with which they struggled, westerners tended to view broader issues that affected them and all Americans, such as the debate over the Constitution, through the all-encompassing

backcountry representatives—including William Blount, the one-time opponent of the Treaties of Hopewell—cast their lot with the new government.⁴⁰⁹ And in one instance, the Federalists' self-serving rhetoric succeeded, perhaps too well, and became an important part of the Constitution's meaning for expansionist states.

C. *The Lesser of Two Evils: Ratification in Georgia*

Georgia was an unlikely place to support ratification. Delegates to the Continental Congress regarded it as such an "unworthy . . . State . . . that had not taken a single federal measure" that they "very seriously talked of" voting the state "out of the Union" altogether.⁴¹⁰ Abraham Baldwin, one of the state's delegates at the Convention, observed that Georgia had little to gain from any new government.⁴¹¹ North Carolina, demographically and economically similar to Georgia and one of the last states to consider the Constitution, initially rejected adoption by a margin of over two to one.⁴¹² Yet Georgia not only ratified but did so unanimously, only three months after the end of the Convention. This sudden and dramatic conversion in favor of federal power was due largely to the threat of Indian war.⁴¹³

lens of protection. . . . [T]he terms 'anti-federalist' and 'federalist,' as they are conventionally understood, made little sense for the West." GRIFFIN, *supra* note 35, at 195–96.

409. Andrew R.L. Cayton, "Separate Interests" and the Nation-State: The Washington Administration and the Origins of Regionalism in the Trans-Appalachian West, 79 J. AM. HIST. 39, 58–59 (1992).

410. Letter from William Houstoun to Samuel Elbert (Apr. 2, 1785), in 22 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 142, at 300, 301; see also MAIER, *supra* note 8, at 123 ("The state's strong consent to the Constitution stands in stark contrast to its previous disregard for the Confederation: Its delegates to Congress were notable mainly for their absence from its sessions, and Georgia never paid even the relatively small requisitions Congress levied on it.").

411. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 372 ("That State [Georgia] has always hitherto supposed a Genl Governmt to be the pursuit of the central States who wished to have a vortex for every thing — that her distance would preclude her from equal advantage — & that she could not prudently purchase it by yielding national powers.").

412. See MAIER, *supra* note 8, at 422; see also NICHOLS, *supra* 8, at 95 (arguing that "if Georgians had not faced an emergency," the state might "have taken the same course" as North Carolina and rejected the Constitution). North Carolina did not refuse to ratify altogether, but demanded a bill of rights and a new constitutional convention before it would ratify. MAIER, *supra* note 8, at 421.

413. For discussion of historians' debates over Georgia's motivations to ratify, see *infra* note 425.

By the time Georgians began debating ratification, the state's governor was convinced that war with the Creeks was "unavoidable."⁴¹⁴ The state, the governor lamented, was woefully unprepared.⁴¹⁵ The Creeks could field an estimated six thousand riflemen, well supplied with ammunition by the Spanish.⁴¹⁶ By contrast, the Georgians, hobbled with a rapidly depreciating paper currency, struggled to recruit soldiers.⁴¹⁷ The state assembly called for three thousand troops, but could not afford to arm them.⁴¹⁸ Acknowledging that the "aid of the Union will be required," Georgia appealed to the national government it had earlier spurned.⁴¹⁹

Like the legislature, elite Georgians turned to the stronger government proposed in the Constitution as their potential savior. Baldwin believed war would hasten resolution of "the great political question" of ratification.⁴²⁰ Joseph Clay, an influential Savannah merchant, wrote:

We have too much reason to apprehend we are involved in a general Indian war. Many have been killed on both sides. Should it continue it must be attended with the most ruinous consequences to this state. . . . The new plan of government for the Union I think will be adopted with us readily; the powers are great, but of two evils we must chose the least. Under such a government we should have avoided this great evil, an Indian war.⁴²¹

414. Letter from Governor George Mathews to the Speaker of the Assembly (Oct. 18, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 225, 226.

415. *Id.*

416. Letter from James White to Thomas Pinckney (May 24, 1787), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 190, at 20, 21.

417. *Id.*; see also Letter from Governor George Mathews to the Speaker of the Assembly, *supra* note 414, at 225 ("The want of public faith is so fully shown from the depreciation of our currency . . .").

418. Letter from Governor George Mathews (Nov. 15, 1787), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 190, at 23, 23.

419. *Id.*; see also Letter from Governor George Mathews to William Pierce (Oct. 16, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 224, 224 (reporting that Mathews, Governor of Georgia, had written to Knox for "arms and military stores" because the state was "engaged in a war without the means requisite to prosecute it").

420. Letter from Abraham Baldwin to Nicholas Gilman (Dec. 20, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 262, 262.

421. Letter from Joseph Clay to John Pierce (Oct. 17, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 232, 232; see also

Outside commentators agreed that calamity would convert the Georgians into acolytes of federal power. George Washington believed Georgia's precarious situation assured ratification: "[I]f a weak state, with powerful tribes of Indians in its rear and the Spaniards on its flank, do not incline to embrace a strong *general* government, there must, I should think, be either wickedness or insanity in their conduct."⁴²² A visiting French diplomat observed, "The troubles that Georgia has to fear from the restless nature and ferocity of these Savages will make it fervently desire the establishment of a more effective Government."⁴²³

These predictions proved right. Georgia became the fourth state to ratify when its convention unanimously endorsed the Constitution on December 31, 1787, after merely three days of discussion. One delegate speculated that the convention refrained from ratifying the first day only to avoid appearing overhasty.⁴²⁴

Scholars have debated whether Georgia's easy ratification should be attributed to the looming Indian war, as the evidence would seem to suggest.⁴²⁵ For Georgians, the answer was clear. Three years after ratification, the Georgia House of Representatives wrote:

Letter from Joseph Clay to John Williams (Nov. 13, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 234, 234 ("The want of sufficient energy in our government generally is also no small evil, which (at least a large part of) the considerate part of our community hope the new federal system, if adopted, will in part remove.").

422. Letter from George Washington to Samuel Powel (Jan. 18, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 263, 263; *see also* Letter from George Washington to Henry Knox (Jan. 10, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 263, 263 ("[I]n the situation Georgia is, nothing but insanity, or a desire of becoming the allies of the Spaniards or savages, can disincline them to a government which holds out the prospect of relief from its present distresses.").

423. Letter from Comte de Moustier to Comte de Montmorin (June 5, 1788), in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 19, at 151, 152. Even the Anti-Federalist William Grayson, contradicting his later sarcastic comments at the Virginia convention, conceded that Georgian ratification was "highly probable as [Georgia] is at present very much embarrassed with an Indian war, and in great distress." Letter from William Grayson to William Short (Nov. 10, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 262, 262.

424. Letter from Joseph Habersham to John Habersham (Dec. 29, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 272, 272–73.

425. Compare Edward J. Cashin, *Georgia: Searching for Security*, in RATIFYING THE CONSTITUTION, *supra* note 318, at 93, 111–12 ("In his own way, the Creek chieftain Alexander McGillivray may well have been the most important promoter of the cause of the Constitution in Georgia."), and Albert B. Saye, *Georgia: Security Through Union*, in THE CONSTITUTION

Exposed to the depredations of the Indians, and suffering under many other inconveniences from being a frontier state, it was the policy of Georgia at an early period to adopt the foederal Government—And we not only find her among the foremost, but Unanimous in acceding to the Confederation anticipating those advantages which would naturally be derived from an efficient General Government⁴²⁶

Georgia representative James Jackson echoed these sentiments when, demanding federal assistance against the Creeks, he informed Congress that, “[i]n full confidence that a good, complete, and efficient Government would succor and relieve them, [the Georgians] were led to an early and unanimous adoption of the Constitution under which we deliberate.”⁴²⁷ For Georgians, then, arguments about the Indian threat were more than rhetorical hobgoblins, as Anti-Federalists claimed. As Georgia reaped what it had sown, Creek power and state weakness transformed it from a stubborn opponent of Congress into one of the “foremost” proponents of a strengthened federal government.

Georgia’s decision had important national consequences. Ratification, which required nine votes,⁴²⁸ was hard fought and highly contingent. Proponents and critics alike knew how much rested on events in other states, which they followed closely: one common image represented the states as a series of domino-like pillars reflecting the progress of ratification.⁴²⁹ Georgia’s early ratification built momentum. If Georgia had followed North Carolina’s lead and refused to ratify the Constitution as written, the results would have been unpredictable, particularly for two crucial states—Virginia and

AND THE STATES 77, 80 (Patrick T. Conley & John P. Kaminski eds., 1988) (“In essence, Georgia wanted a stronger central government to assist the states . . . against the Indians . . .”), with MAIER, *supra* note 8, at 124 (questioning whether “Georgia ratif[ied] because it desperately needed federal help in fighting attacks by Creek Indians”). The most nuanced discussion of Georgia’s decision to ratify notes that Georgians likely ratified because they were anxious to secure federal military support, but did not thereby endorse federal supremacy over Indian affairs. See *Introduction to The Ratification of the Constitution by Georgia*, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 201, 210–11.

426. Letter from the Georgia House of Representatives to Governor Edward Telfair (June 10, 1790), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, microfilm supp. no. 59, doc. 50, at 178, 179.

427. 1 ANNALS OF CONG. 696 (Joseph Gales ed., 1834) (statement of Rep. Jackson).

428. U.S. CONST. art. VII.

429. Robert L. Alexander, *The Grand Federal Edifice*, 9 DOCUMENTARY EDITING, June 1987, at 13, 13–17.

New York—that held late conventions.⁴³⁰ In both states, the weight of prior ratifications played a critical role in securing approval; nonetheless, in both states, the vote in favor of ratification was extremely close.⁴³¹ Absent Georgia's ratification, Anti-Federalists' arguments to condition ratification on a second constitutional convention to adopt proposed amendments would have had a much better chance for success.⁴³²

Georgian ratification also demonstrated the effect of the Federalists' arguments. By emphasizing the power of the federal government to counter the Indian threat and downplaying federal supremacy over Indian affairs, the Federalists secured ratification by offering the Georgians all carrot and no stick. As one French diplomat wrote, "Attacked by Indians, it was in [Georgia's] interest to appear federally inclined in order to obtain help from the present Union. But if Georgia preceded the other Southern States in the adoption of the new Constitution, it can hardly be expected from eagerness to execute it."⁴³³ Ratification on these terms meant that Georgia's support for the federal government extended only as far as self-interest dictated.

D. Ratification as Compact and Its Legacy

Many western settlers, particularly south of the Ohio River, shared Georgia's attitude toward the newly created federal government. They viewed the national state instrumentally: they were willing to offer loyalty and obedience as long as the government fulfilled what they considered its most basic function of protection.⁴³⁴ And although some settlers had flirted with secession or alliance with Spain, the strengthened federal government was the region's most

430. MAIER, *supra* note 8, at 255–319, 342–97.

431. In Virginia, the vote was eighty-nine to seventy-nine. *Id.* at 305. In New York, it was even closer; the vote to ratify was thirty to twenty-seven, *id.* at 396, while the effort to condition ratification on a later convention failed by two votes. *Id.* at 393.

432. This effort retained considerable force even after defeats in New York and Virginia, especially when North Carolina refused to ratify. *Id.* at 425–29.

433. Letter from G.J.A. Ducher to Comte de la Luzerne (Feb. 2, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 364, at 283, 283.

434. See GRIFFIN, *supra* note 35, at 166 ("[O]ne idea that ran through all emerging facets of a popular frontier commonwealth vision and lent them all meaning was the hatred of Indians."); *id.* at 174 ("If government failed to protect and, just as significant, failed to decimate Indians—the form that people insisted sovereignty had to take—the people owed no obedience.").

promising guardian.⁴³⁵ Many backcountry leaders, then, supported the new Constitution based on the self-interested calculation that the new federal government would fulfill the Federalists' promises and defend them against "murdering savages."⁴³⁶

This strain of thinking, in short, interpreted ratification as *quid pro quo*: allegiance in return for military support to eradicate the Indian threat.⁴³⁷ Soon after George Washington was sworn in as president, appeals arrived from western settlers professing their loyalty, decrying state protection as insufficient, and "implor[ing]" the federal government to send "an army . . . into the heart of [Indian] Country Sufficient to extirpate their whole Savage race."⁴³⁸ Georgia had similar expectations. One congressional delegate sardonically

435. See Cayton, *supra* note 409, at 58 ("The great advantage of the federal Union established by the Constitution of 1787 was that it was the most promising candidate to accomplish those goals [of securing protection]. Clearly, North Carolina was not up to the task; neither was Georgia.").

436. See *id.* at 59 (noting that backcountry leaders "became federalists . . . not because they were deeply attached to the Union, not because they had a profound commitment to strong government . . . but because, simply put, their interest in finding a protector had intersected with the emergence of a (theoretically) more powerful American government"). On the trope of "murdering savages," see *supra* Part III.B.

437. Cf. GRIFFIN, *supra* note 35, at 241-44 (describing the creation of the Revolution settlement in the West as a Hobbesian "covenant to create commonwealth" in which "Indian hatred . . . became a lasting foundation of the nation").

438. Letter from the Citizens of Mero District, North Carolina, to George Washington (Nov. 30, 1789), in 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 345, 347 (W.W. Abbot & Dorothy Twohig eds., 1993); see also *id.* at 346 (decrying that the citizens of the Mero District—located in present-day central Tennessee—lacked "the most distant prospect of any further assistance from the legislative body of the State" to protect against Indian attacks); Letter from Harrison County, Va., Field Officers to George Washington (Feb. 2, 1790), in 5 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, at 93, 94 (Dorothy Twohig, Mark A. Mastromarino & Jack D. Warren eds., 1996) ("[I]n the name and behalf of our Suffering fellow Citizens over whom we preside as field Officers of the militia, [we] pray that Your Excellency would take our distressed Situation under your Parential Care and grant us Such Reliefe as you in your Wisdom shall think proper . . ."); Letter from the Officers of the Mero District (Aug. 1, 1791), in 8 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, at 397, 397 (Dorothy Twohig & Mark A. Mastromarino eds., 1999) ("We implore Your interposition, fully hoping to meet with a more ample Protection than we have hertofore receivd from the State of North Carolina—the expectation of which was a Powerful incentive inducing us to use Our utmost influence to obtain the Act of Cession."); Letter from the Representatives of Monongahela, Harrison, and Randolph Counties, Virginia, to George Washington (Dec. 12, 1789), in 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra*, at 397, 397-98 ("beg[ging]" that defensive measures "be continued in our country until it may be thought necessary to carry on offensive war into the enemy's country as to bring about a lasting peace," and asking President Washington to "suffer us further to assure you, that we, on the behalf of our bleeding country look up to you, and to you only, for that assistance that our necessities require").

observed, “[A]ltho the USA have already expended as much to defend Georgia, as the whole State upon a fair valuation would sell for, She . . . expects the USA go on conquering, more Indian Lands for her emolument.”⁴³⁹

In one sense, Georgia’s strategic ratification worked. “[T]he new government,” Creek leader Alexander McGillivray reported, “is established on a basis which renders it capable of making war on us in a fashion that would assure them a complete success.”⁴⁴⁰ Rather than confront this strengthened federal military, McGillivray opted to negotiate.⁴⁴¹ The resulting Treaty of New York, the first treaty ratified under the new Constitution, promised an end to hostilities.⁴⁴²

But by invalidating several state purchases and guaranteeing Creek lands,⁴⁴³ the treaty outraged the Georgians, who regarded the Washington administration’s decision to negotiate with rather than fight the Creeks as a betrayal of their understanding of ratification as a reciprocal bargain. Infuriated Georgians turned on the federal government they had recently supported; hostile newspaper articles questioned whether the administration had breached the “compact which makes Georgia a part of the Union,” thereby releasing the state from its obligations.⁴⁴⁴

For the next forty years, Georgia fought the federal government for control over Indian affairs. “[T]he United States are at peace with all the world except the state of Georgia,” Washington reportedly exclaimed in the face of such intransigence.⁴⁴⁵ In flagrant violation of federal treaties, statutes,⁴⁴⁶ and, in Thomas Jefferson’s opinion, the

439. Letter from Samuel A. Otis to James Warren (Feb. 6, 1788), in 24 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 158, at 636, 636–37.

440. Letter from Alexander McGillivray to Carlos Howard (Aug. 11, 1790), in CAUGHEY, *supra* note 166, at 274.

441. *See id.* (“These motives have led me to agree to . . . articles of peace to end our disputes.” (footnote omitted)).

442. Treaty of Peace and Friendship, U.S.-Creeks, Aug. 7, 1790, 7 Stat. 35, 36 [hereinafter Treaty of New York]; *see* NICHOLS, *supra* note 8, at 121–24.

443. Treaty of New York, *supra* note 442, arts. IV–V.

444. David A. Nichols, *Land, Republicanism, and Indians: Power and Policy in Early National Georgia, 1780–1825*, 85 GA. HIST. Q. 199, 216 (2001); *see also* Cayton, *supra* note 409, at 61–64 (explaining southern disillusionment in federal power after the failure to commit military forces to the South).

445. *Introduction to The Ratification of the Constitution by Georgia*, *supra* note 425, at 211 (quoting Marius, Editorial, AUGUSTA CHRONICLE, Dec. 24, 1791).

446. Act of July 22, 1790, ch. 33, 1 Stat. 137, enacted by the First Congress, prohibited the sale of Indian lands “unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.” *Id.* § 4, 1 Stat. at 138.

provisions of the Constitution,⁴⁴⁷ the state sold speculators land guaranteed to the Creeks and Cherokees.⁴⁴⁸ Subsequent treaty negotiations replayed earlier farces at Fort Stanwix and Hopewell, with open hostility between federal and Georgian commissioners.⁴⁴⁹ One informant wrote Washington that frontier Georgians “now consider the troops and servants of the United States . . . nearly as great Enemies as they do the Indians and for no other reason than that they recommend moderation and a compliance with the laws of the land.”⁴⁵⁰ In 1802, Georgia became the last state to cede its lands to the national government, in return for a federal promise to extinguish Indian title as quickly as possible.⁴⁵¹ But the federal government did not act quickly enough to satisfy the Georgians, who resumed open defiance of federal treaties; in the 1820s, the state’s governor even mobilized the militia to forestall a federal threat to use the army to enforce a federal Indian treaty.⁴⁵²

This struggle culminated with Indian removal and Chief Justice John Marshall’s decision in *Worcester v. Georgia*,⁴⁵³ where the Supreme Court invalidated the state’s unilateral effort to assert jurisdiction over the Cherokee Nation.⁴⁵⁴ Marshall read the war

447. Thomas Jefferson, Opinion on Certain Georgia Land Grants (May 3, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES 406, 407 (Julian P. Boyd ed., 1961) (arguing that Georgia’s land grants were invalid because “[t]he[] paragraphs of the Constitution, declaring that the general government shall have, and that the particular ones shall not have, the rights of war and treaty, are so explicit that no commentary can explain them further, nor can any explain them away”); see also Letter from Thomas Jefferson to Henry Knox (Aug. 10, 1791), in 7 THE WRITINGS OF THOMAS JEFFERSON 226, 226–27 (Albert Ellery Bergh ed., 1907) (“[N]either under the present constitution, nor the ancient confederation, had any State or person a right to treat with the Indians, without the consent of the General Government . . .”).

448. MAGRATH, *supra* note 17, at 2–6.

449. See 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 190, at 590–94; see also SADOSKY, *supra* note 18, at 171 (“Within hours of their coming into contact with one another, agents of the state of Georgia and the federal government were engaged in a vitriolic correspondence about Indian treaty protocols. . . . [T]he key question was, ‘Who is in charge?’ The Federalists believed that the Constitution gave one answer (the federal government), but Georgia could, and did, claim that they retained a role in the treaty-making process.”).

450. Letter from James Seagrove to George Washington (July 27, 1792), in 10 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 577, 578 (Philander D. Chase, Robert F. Haggard & Mark A. Mastromarino eds., 2002).

451. Act of Apr. 24, 1802, No. 35, 1802 Ga. Laws 48; see FORD, *supra* note 17, at 25; MAGRATH, *supra* note 17, at 34–36.

452. See ULRICH BONNELL PHILLIPS, GEORGIA AND STATES RIGHTS: A STUDY OF THE POLITICAL HISTORY OF GEORGIA FROM THE REVOLUTION TO THE CIVIL WAR, WITH PARTICULAR REGARD TO FEDERAL RELATIONS 15–86 (1902).

453. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

454. *Id.* at 561–63.

power, the treaty power, and the Indian Commerce Clause to create exclusive federal authority over Indian affairs.⁴⁵⁵ The ruling went famously unenforced, as President Andrew Jackson implicitly endorsed Georgia's refusal to comply with the Court's decision.⁴⁵⁶ But the crisis represented more than the rejection of the rule of law or the judicial supremacy of the Supreme Court, as it is usually read.⁴⁵⁷ It was a clash between two divergent constitutional strains of thought. Marshall embraced the Madisonian emphasis on federal supremacy and restraint, but the Georgians, as well as many southern state supreme courts, could justly point to an alternate constitutional tradition committed to expansion and dispossessing Indians.⁴⁵⁸ Notwithstanding the cries of Whigs and later commentators, their

455. *Id.* at 558–60. In the decision, Marshall delved into the history of Indian affairs under Article IX of the Articles, noting that its “ambiguous phrases . . . were so construed by the states of North Carolina and Georgia as to annul the power itself.” *Id.* at 559. But, Marshall continued, the correct construction of Article IX was not before the Court because of the “adoption of our existing constitution.” *Id.* “That instrument,” he wrote,

confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. . . . The shackles imposed on this power, in the confederation, are discarded.

Id. Marshall thus adopted Madison's reading that the shift in language from the Articles was intended to grant exclusive power over Indian affairs.

456. See NORGREN, *supra* note 17, at 122–30. See generally Anton-Hermann Chroust, *Did President Andrew Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of Its Injunction Against the State of Georgia?*, 4 AM. J. LEGAL HIST. 76 (1960).

457. See, e.g., STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 22–31, 66–67, 71 (2010) (describing *Worcester* as exemplifying the limits of Supreme Court power); DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 4 (2007) (arguing, in the context of the Cherokee cases and Indian removal, that “[t]he rule of law obtained only in places and on subjects where local majorities supported it”); KRAMER, *supra* note 26, at 182–83 (interpreting the Cherokee cases in the context of contests over the judicial supremacy of the Supreme Court).

458. See generally TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS (2002) (tracing three southern supreme court decisions rejecting *Worcester* and arguing that they “did not change the law” but “reflected the majority view of American lawyers and legislators and, indeed, the white American public, and that view was that the tribes were not sovereign nations”). Marshall himself had arguably endorsed the expansionist states' reading when he concluded that Indians' right of occupancy did not preclude the sale of underlying title. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 603 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 146 (1810). This position conflicted with the Washington administration's earlier interpretation that grants of Indian land guaranteed by federal treaties were unconstitutional. See *supra* note 447; see also BANNER, *supra* note 35, at 150 (“In the early 1790s, American lawyers and government officials considered the Indians the *owners* of their land. By 1823, however . . . the United States Supreme Court declared . . . that the Indians were in fact *not* the owners of the land but had merely a ‘right of occupancy.’”).

resistance to the Court was not simple lawlessness.⁴⁵⁹ Instead, they insisted on the sanctity of the bargain they believed ratification represented. Indian removal, Jackson informed Congress in 1830, was “a duty which this Government owes” the states, as it “was substantially a part of the compact which made them members of our confederacy.”⁴⁶⁰ In the end, this interpretation prevailed and the Indians were removed. In the antebellum United States, it proved to be the Georgians, not Marshall, who determined what the Constitution meant.⁴⁶¹

IV. LEGACIES AND IMPLICATIONS

Soon after ratification, word of the new Constitution spread throughout Indian country. “Our Union, which was a child, is grown

459. An increasing body of literature has challenged the elite depiction of backcountry settlers as merely “lawless,” and focused on their construction of “quasi-legal” norms, often at odds with state-constructed legal orders. *See, e.g.,* HULSEBOSCH, *supra* note 8, at 101–04; NICHOLS, *supra* note 8, at 55–76. Professor Lisa Ford offers a particularly insightful discussion of “legality and lawlessness” on the Georgia frontier. FORD, *supra* note 17, at 85–107. As she notes, “Settler violence . . . was clothed in law—a law which, in important respects, settlers constituted and controlled. . . . [S]ettlers used their control of legal discourse, legal evidence, and juries to ensure that common law served the interests of plurality in early Georgia” *Id.* at 85–86. For the most influential statement on the meanings of “law” within a pluralist system with competing sources of authority, see generally Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899.

460. 7 REG. DEB. app. at x (1830).

461. *Cf.* FORD, *supra* note 17, at 195 (“The juridical solution to Georgia’s sovereignty problems lay not in the Supreme Court’s pallid defense of Indian sovereignty and jurisdiction . . . but in the legislatures and the courts of the South . . . [which created] a powerful, efficacious and new practice of sovereignty that harried the Cherokee over the Mississippi . . .”). Long after what Ford terms “perfect settler sovereignty,” *id.* at 183, had been established over the trans-Appalachian West—after, that is, the federal government had largely dispossessed and removed the region’s Natives—Marshall was arguably vindicated, as *Worcester’s* “broad principles . . . came to be accepted as law.” *Williams v. Lee*, 358 U.S. 217, 219 (1959). Indeed, Whigs-cum-Republicans cited *Worcester* to justify the reshaping of federalism in the Fourteenth Amendment. *See* Magliocca, *supra* note 17, at 929–37. Now, however, the case’s canonical status is often honored largely in the breach. *See* Nevada v. Hicks, 533 U.S. 353, 361 (2001) (observing while citing *Worcester* that “it was ‘long ago’ that ‘the Court departed from Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries” (alteration in original) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980))); *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 257 (1992) (noting, in discussing *Worcester*, that “[t]he ‘platonic notions of Indian sovereignty’ that guided Chief Justice Marshall have, over time, lost their independent sway” (quoting *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973))); *see also* Frickey, *supra* note 11, at 418–26 (arguing that the Supreme Court has “moved away from Chief Justice Marshall’s model [in *Worcester*] in dramatic fashion”).

up to manhood," federal commissioners told the Creeks.⁴⁶² Now that "[o]ne great council is established, with full powers to promote the public good," the United States would ensure "justice" for the Native nations within its borders.⁴⁶³ The Indians took them at their word. "We rejoice much to hear that the great Congress have got new powers, and have become strong," the Cherokees wrote the new federal government.⁴⁶⁴ "We now hope that whatever is done hereafter by the great council will no more be destroyed and made small by any State."⁴⁶⁵ The Six Nations expressed similar sentiments in a letter to George Washington⁴⁶⁶; when New York emissaries demanded yet another land cession, Iroquois leaders waved copies of the federal statute barring state purchases of Indian lands in front of them.⁴⁶⁷

The sale happened anyway, a recurring pattern that quickly dashed Native hopes for the new government.⁴⁶⁸ Federal officials spoke the Madisonian language of paternalism, but their efforts at restraint were halfhearted and ineffectual.⁴⁶⁹ Georgia's defiance of federal authority was especially brazen, but not unique: many states claimed and exercised a constitutional right to govern Indians until well after the Civil War.⁴⁷⁰ By contrast, the Hamiltonian Constitution

462. Abortive Negotiations at Rock Landing (Sept. 1789), in 18 *EARLY AMERICAN INDIAN DOCUMENTS*, *supra* note 20, at 547, 550.

463. *Id.*

464. Letter from Representatives of the Cherokee Nation to George Washington, President of the U.S. (May 19, 1787), in 1 *AMERICAN STATE PAPERS: INDIAN AFFAIRS*, *supra* note 190, at 56, 57.

465. *Id.*

466. Letter from the Five Nations at Buffalo Creek to George Washington (June 2, 1789), in 18 *EARLY AMERICAN INDIAN DOCUMENTS*, *supra* note 20, at 517, 517.

467. See TAYLOR, *supra* note 114, at 231–34, 302–07.

468. *Id.*

469. This is the dominant theme in the works of Father Francis Paul Prucha, whose two-volume study on federal Indian policy remains foundational. See generally FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* (1984). Prucha argues that federal officials "sought to treat the Indians honorably, even though they acted within a set of circumstances that rested on the premise that white society would prevail. The best term for this persistent attitude is *paternalism* . . ." 1 *id.* at xxviii.

470. See, e.g., Letter from George Washington to Alexander Hamilton (Apr. 4, 1791), in 8 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES*, *supra* note 438, at 57, 58 (complaining in the context of Indian affairs that "the States individually are omitting no occasion to interfere in matters which belong to the general Government," and that "the interferences of States, and the speculations of Individuals will be the bane of all our public measures"); see also GARRISON, *supra* note 458, at 103–24, 151–68, 198–247; LAURENCE M. HAUPTMAN, *CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE* 61–64, 209–12 (1999); DEBORAH A. ROSEN, *AMERICAN INDIANS AND STATE*

functioned as the Federalists had promised. Indians turned out to be the substantial threat they invoked: the first military expeditions against the western Indian confederacy, in 1790 and 1791, suffered the worst defeat “Indians ever inflicted on the U.S. Army in its entire history.”⁴⁷¹ But, after tripling the size of its army and spending \$5 million—five-sixths of all federal expenditures from 1790 to 1796⁴⁷²—the United States ultimately prevailed, seizing most of present-day Ohio.⁴⁷³ War between the United States and Native nations remained a near constant for the next century, but the outcome was never again so close.⁴⁷⁴ The fiscal-military state the Constitution created proved its most enduring legacy in Indian country, and made Natives among the biggest losers of ratification.⁴⁷⁵

This is not to suggest that Native dispossession was the simple result of federal military conquest. Just as significant as federal financial and military support for expansion was the entrenchment of a militaristic paradigm that cast Anglo-American settlers as victims and force against “savages” as both justified and necessary. Although Madisonians had hoped the new government would keep “both [whites and Natives] in awe by a strong hand, and compel them to be moderate and just,” in practice the constitutional structures of popular sovereignty and federalism ensured that the federal

LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880, at 51–79 (2007); TAYLOR, *supra* note 114, at 231–34, 302–07. See generally Cynthia Cumfer, *Local Origins of National Indian Policy: Cherokee and Tennessean Ideas About Sovereignty and Nationhood, 1790–1811*, 23 J. EARLY REPUBLIC 21 (2003).

471. WOOD, *supra* note 16, at 130. Other accounts of the war may be found in HORSMAN, *supra* note 12, at 84–95; RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 91–127 (1975); WHITE, *supra* note 1, at 454–55 (1991).

472. TAYLOR, *supra* note 114, at 238. See generally Gerard Clarfield, *Protecting the Frontiers: Defense Policy and the Tariff Question in the First Washington Administration*, 32 WM. & MARY Q. 443 (1975) (describing the vituperative political battles over the financing of the Northwest Indian Confederacy War). I am indebted to Andrew Fagal for bringing the Clarfield citation to my attention.

473. WOOD, *supra* note 16, at 130–31.

474. R. DOUGLAS HURT, *THE INDIAN FRONTIER, 1763–1846*, at 103–36, 164–88 (2002).

475. See, e.g. EDLING, *supra* note 23, at 140 (“The army had been brought into existence to deal with western expansion and to coerce the Indians.”); ERIC HINDERAKER, *ELUSIVE EMPIRES: CONSTRUCTING COLONIALISM IN THE OHIO VALLEY, 1673–1800*, at 226 (1997) (“In the end, national leaders and western settlers established a complicated pattern of mutual support, which served as the foundation for a new relationship between state and society in the west—one that sapped, with remarkable speed, Native American autonomy and power.”); NICHOLS, *supra* note 8, at 199 (“[T]he federal government, which [Henry] Knox had hoped would shield the Indians from the ill effects of American expansion, was instead becoming the foremost agent of their dispossession and removal.”).

government's "legal coercive power" ran largely one way.⁴⁷⁶ The specter of the "sword of the Republic" undergirded all laws and treaties regulating Native interactions with the United States, often obviating actual bloodshed.⁴⁷⁷ Through this alchemy, "lawless" violence was refined into the purer stuff of constitutional liberty and order.⁴⁷⁸

This postratification history of Indian affairs was neither inevitable nor accidental; it was, in a certain sense, the deliberate choice of the Constitution's proponents. Though the Madisonians should not be anachronistically valorized as racial egalitarians—their paternalism reflected their own imperialist aims and disdain for Natives⁴⁷⁹—they were sincerely committed to using the new government to secure Indians what they repeatedly termed justice. But the Federalists, though they likely shared Madison's humanitarian impulses, nonetheless prioritized the heightened power of the United States to control the borderlands and defeat Native nations when selling the Constitution's virtues. Their implicit bargain helped ensure that, instead of checking expansionist states and settlers, the federal government proved their valuable ally, engendering a perverse form of cooperative federalism at Natives' expense.⁴⁸⁰ As French observer Alexis de Tocqueville perceptively noted in the era of Indian removal,

The Union treats the Indians with less cupidity and violence than the several States, but the two governments are alike deficient in

476. Report of the Secretary at War to Congress, *supra* note 209, at 31–32.

477. Letter from Henry Knox to George Washington (July 7, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, at 134, 136 (Dorothy Twohig ed., 1989).

478. See Paul Frymer, *Building an American Empire: Territorial Expansion in the Antebellum Era*, 1 U.C. IRVINE L. REV. 913, 917–19 (2011) (stressing the importance of non-military exercises of federal power in facilitating western expansion, particularly through "the legitimating power of law"); cf. HULSEBOSCH, *supra* note 8, at 11 ("[Americans] conquered the continent less with violence than with the confidence with which they carried forward their notions of constitutional liberty."). For a thoughtful consideration of violence in Native experiences of imperialism, see generally NED BLACKHAWK, *VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST* (2006).

479. Subsequent events also proved that paternalism and exclusive federal power did not necessarily lead to more humane or just outcomes for Natives. See, e.g., BANNER, *supra* note 35, at 258–92 (depicting the harms caused by allotment). See generally FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920* (1984) (describing the deleterious effects of the federal government's paternalist assimilation campaign).

480. See ROSEN, *supra* note 470, at 78–79 ("The common goal of the state and federal governments with regard to Indians was control of Indians and Indian lands. . . . [T]hey acted in tandem to achieve that goal.").

good faith. . . . [T]he tyranny of the States obliges the savages to retire; the Union, by its promises and resources, facilitates their retreat; and these measures tend to precisely the same end.⁴⁸¹

The history presented here revises some of our understandings of the Constitution. For certain constitutional provisions, the context of Indian affairs is critical. As this Article has demonstrated, relations with Indians were a central site for early debates over federalism. Moreover, works that purport to expound the original understanding of the treaty or war power—without acknowledging that in its first decade the federal government entered six “foreign” and eleven Indian treaties,⁴⁸² or that the U.S. Army fought two “foreign” and at least ten Indian wars before the Civil War⁴⁸³—present a partial perspective.⁴⁸⁴ As one example, some scholars have argued that the drafters of the Constitution anticipated that “treaties that sought to have a domestic, legislative effect” would require subsequent legislative enactment.⁴⁸⁵ But this conclusion is difficult to reconcile with the reality that Indian treaties—perhaps the paradigmatic instance of treaties having domestic legislative effects, as resistance

481. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 452–53 (Francis Bowen ed., Henry Reeve trans., N.Y., The Century Co. 1898) (1835).

482. This includes treaties from 1789 through 1799; single treaties concluded with multiple Indian nations were each counted as only one treaty. If each agreement with a separate Indian nation is considered a distinct treaty, then the number of treaties concluded with Indian nations in the decade rises to thirty-one. *Compare* 7 Stat. 28–62 (recording treaties with Indian nations), *with* 8 Stat. 116–177 (recording treaties with “foreign” nations).

483. The two “foreign” wars were the War of 1812 and the Mexican–American War, both of which also involved fighting with Indian nations. Because Indian wars were rarely formally declared, counting them is more challenging: I have included the war against the Northwest Indian Confederacy (1790–95), Tecumseh’s War (1810–13), the Creek War (1813–14), the Black Hawk War (1832), the Creek War of 1836, the First (1814–19), Second (1835–43), and Third (1855–58) Seminole Wars, the Cayuse/Yakima/Rogue River War (1847–58), and the Paiute War (1860). *See generally* HURT, *supra* note 474.

484. Articles on these topics that offer otherwise careful considerations of constitutional history but omit serious discussion of Indian affairs include Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695 (1996); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996). Professor John Yoo considers the Washington administration’s war against the Northwest Indian Confederacy more fully, but ignores the role of Indians in shaping the constitutional war powers, even though the sources from ratification he cites repeatedly mention Indians. *See id.* at 271–72, 290–91.

485. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2074 (1999); *see also* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 410–17 (1998) (arguing based in part on constitutional history for federalist limitations on the treaty power).

under the Articles underscores—were considered self-executing.⁴⁸⁶ Yet even scholars who have used constitutional history extensively to critique this position and advance a nationalist interpretation of the treaty power have similarly ignored Indian treaties, even though the history recounted here powerfully supports their arguments, and even when the sources they cite specifically mention Indians.⁴⁸⁷

More fundamentally, focusing on Indian affairs challenges traditional conceptions of what the Constitution was. Legal scholars understandably privilege a view of the “Founding” as a legal and intellectual event: a serene gathering of statesmen, well-versed in European political philosophy and English legal thought, who translated these abstractions into the foundation of a new government intended to curb past abuses through a new American “science of politics.”⁴⁸⁸ This vision stresses the document’s restraining function through the mechanistic “checks and balances”⁴⁸⁹ that have

486. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 70–79 (1994). Congress generally appropriated money for treaty purposes before a treaty was held and subsequently ratified any treaty; no further legislation was required. See *id.*

487. See, e.g., Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 616–19 (2008) (discussing the inclusion of treaties within the Supremacy Clause as a response to the failures of the Articles, but omitting Indian treaties). See generally, e.g., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999) (critiquing Yoo’s historical claims, see Yoo, *supra* note 485, without discussing Indian affairs); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (1999) (providing a lengthy historical argument for a nationalist treaty power without mentioning Indian affairs). At several points in Professor David Golove’s article, his sources explicitly discuss Indian treaties, but he passes over this fact in silence. See Golove, *supra*, at 1167 n.278, 1178 n.317, 1179 n.319, 1243 n.557, 1278 n.695.

This issue has received renewed attention as the Supreme Court has heard *Bond v. United States*, No. 12-158 (U.S. argued Nov. 5, 2013), which addresses whether the treaty power authorizes Congress to criminalize local conduct. Yet even an amicus brief in the case filed by professors of international law and legal history arguing in favor of a robust national treaty power ignored Indian treaties, even though early Indian treaties routinely contained provisions addressing criminal law within state boundaries. Brief for Amici Curiae Professors of International Law and Legal History in Support of Respondent, *Bond*, No. 12-158, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/12-158bsacProfsIntlLawandLegalHistory-FINAL-ok-to-print.pdf>; cf., e.g., Treaty of New York, *supra* note 442, arts. VIII–X (addressing criminal law issues).

488. This is the predominant perspective and tone of the most influential intellectual history of the Constitution of the last century. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969).

489. See FEDERALIST NO. 51, *supra* note 53, at 322 (James Madison).

become shibboleths of our constitutional culture: limited government, federalism, enumerated powers, and separation of powers.⁴⁹⁰

This perspective, though valid, is partial. Integrating Indians into our constitutional histories helps reveal how the Constitution was also made *outside* Independence Hall—in the violent, pluralist borderlands, where the United States contested with Native nations, European empires, and states and squatters to assert sovereignty over vast spaces of the continent. In 1783, the United States's triumph in this "Long War for the West" was, in words of one scholar, "the most unlikely scenario of all," a reality underscored by the disasters of the Articles.⁴⁹¹ Yet less than seventy years later, the federal government—having expanded its jurisdiction to the Pacific, incorporated seventeen new states, and forcibly removed most Indian nations from east of the Mississippi River—was the contest's undisputed victor.⁴⁹² This improbable success owed much to the conscious designs of the Constitution's drafters. All inhabited a world marked by a seemingly perpetual crisis of authority on the frontier, and they crafted a national government with formidable powers to address this challenge: to create the extended republic envisioned by Madison by expanding the nation and governing the West.⁴⁹³ From this perspective, the Constitution was not a document of restraint, but the

490. The literature on this topic is vast. For a historical view on the question, see JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 19, 55–70 (2007).

491. François Furstenberg, *The Significance of the Trans-Appalachian Frontier in Atlantic History*, 113 *AM. HIST. REV.* 647, 650 (2008). Professor François Furstenberg convincingly argues that "the great problem of North American, and perhaps even Atlantic, history from 1754 to 1815 [was] the fate of the trans-Appalachian West." *Id.* at 648. "[The] primary objective [of the United States] after the Revolution was to become an independent nation-state; and as many at the time recognized, the greatest obstacles to that ambition lay in the trans-Appalachian West." *Id.* at 659. Furstenberg further notes that "[f]rom 1783 through the end of the eighteenth century and beyond," American sovereignty over the region was very much uncertain; it could "be ensured only by overcoming three challenges: the geography of North America, and of the Appalachian Mountains in particular; Native American resistance; and the ambiguous loyalties of western colonists." *Id.* Arguably, success in overcoming all three was partially attributable to the new Constitution and the strengthened federal state it created.

492. See HOWE, *supra* note 457, at 852–55. See generally Frymer, *supra* note 478.

493. See *FEDERALIST NO. 10*, *supra* note 53, at 81–84 (James Madison). On the importance of federal authority in the early American West, see Bethel Saler, *An Empire for Liberty, a State for Empire: The U.S. National State Before and After the Revolution of 1800*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* 360 (James Horn, Jan Ellen Lewis & Peter S. Onuf eds., 2002). See generally WILLIAM H. BERGMANN, *THE AMERICAN NATIONAL STATE AND THE EARLY WEST* (2012); EDLING, *supra* note 23; Frymer, *supra* note 478.

foundation of what historians have increasingly recognized as a powerful early national state, whose authority was strongest on its peripheries.⁴⁹⁴ “[T]he American spirit, assisted by the ropes and chains of consolidation, is about to convert this country into a powerful and mighty empire,” warned Patrick Henry at the Virginia ratification convention.⁴⁹⁵ Henry’s prescience foretold much Native suffering.

Natives were among the first subjects of this empire, but they were not the last. In the creation of the Constitution, as in much of early American history, Indian affairs were a central site of American state formation, prefiguring later imperial projects.⁴⁹⁶ The Federalists’ strategic deployment of the rhetoric of savagery anticipated future debates, as Indians became the stock template for America’s subsequent cross-cultural encounters, their supposed primitiveness evolving into a free-floating discourse to justify rule over other purportedly inferior peoples.⁴⁹⁷ At the same time, the legal and constitutional structures created to dispossess Natives and control the West—the national fiscal-military state, federal territorial plenary power, the exclusion of subject peoples from the privileges of representation and citizenship—became the bases of America’s later

494. For recent scholarship emphasizing the strength of the early national state, see BALOGH, *supra* note 16; EDLING, *supra* note 23; Frymer, *supra* note 478; William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752 (2008).

495. Virginia Convention Debates (June 5, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 347, at 943, 959. Empire was a common theme in the ratification debates, invoked by both Federalists and Anti-Federalists. For thoughtful considerations of this aspect of ratification, see HULSEBOSCH, *supra* note 8, at 210–58; JAMES G. WILSON, *THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY* 77–89 (2002).

496. For arguments emphasizing the centrality of Natives to the construction of the American national state, see BALOGH, *supra* note 16, at 151–218; ROCKWELL, *supra* note 16, at 1–8; Jeff Pasley, *Midget on Horseback: American Indians and the History of the American State*, COMMON-PLACE (Oct. 2008), <http://www.common-place.org/vol-09/no-01/pasley>.

497. See, e.g., REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 210–12, 239–44 (1981) (describing the use of anti-Indian rhetoric to justify the conquest and dispossession of Mexicans); Brian Rouleau, *Maritime Destiny as Manifest Destiny: American Commercial Expansionism and the Idea of the Indian*, 30 J. EARLY REPUBLIC 377, 379 (2010) (“By the nineteenth century, Native Americans . . . became a stereotyped frame of reference applied to peoples encountered outside the continental context.”). See generally RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE BUILDING* 232–401 (1980) (emphasizing the connection between “Indian-hating” and American imperial projects in the Philippines, Puerto Rico, and southeast Asia).

global empire.⁴⁹⁸ Unwittingly and unwillingly, Natives were the handmaidens of the United States's imperial Constitution.

As this narrative suggests, including Indians in constitutional histories also raises questions about the Constitution's complicity in historical injustice. Most scholarship on this issue, unsurprisingly, has addressed the Constitution's paradigmatic moral failure: its entrenchment of chattel slavery.⁴⁹⁹ There are important similarities, for the issues of Natives and slavery were closely intertwined. Southern states' land hunger stemmed from the plantation complex's imperative for ceaseless expansion, as Georgia and other states rapidly populated formerly Creek and Cherokee land with enslaved Africans.⁵⁰⁰ Moreover, like its entanglement with slavery, the Constitution's commitment to the expropriation of Native lands enshrined a practice many at the time considered morally abhorrent to secure the more immediate goal of union.⁵⁰¹ The delegates themselves made a connection: at the Convention, Charles Pinckney

498. For works emphasizing the links between the laws governing Indians and other American imperial projects, see Lauren Benton, *Colonizing Hawai'i and Colonizing Elsewhere: Toward a History of U.S. Imperial Law*, 38 *LAW & SOC'Y REV.* 835 (2004) (book review); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1 (2002); Patrick Wolfe, *Corpus Nullius: The Exception of Indians and Other Aliens in US Constitutional Discourse*, 10 *POSTCOLONIAL STUD.* 127 (2007). The legal structures of American empire are explored in *COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE* (Alfred W. McCoy & Francisco A. Scarano eds., 2009); and GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004). A thorough examination of the historical connection between American empire and military power appears in FRED ANDERSON & ANDREW CAYTON, *THE DOMINION OF WAR: EMPIRE AND LIBERTY IN NORTH AMERICA, 1500–2000* (2005).

499. The literature on this subject is large. For the most recent historical treatments, see generally DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY* 28–47 (Ward M. McAfee ed., 2001); VAN CLEVE, *supra* note 240; WALDSTREICHER, *supra* note 240; Finkelman, *supra* note 240; Earl M. Maltz, *The Idea of the Proslavery Constitution*, 17 *J. EARLY REPUBLIC* 37 (1997).

500. For discussions of the link between expansionism and the rise of the Cotton Belt in former Indian lands, see HOWE, *supra* note 457, at 125–32; WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM 18–45* (2013); ADAM ROTHMAN, *SLAVE COUNTRY: AMERICAN EXPANSION AND THE ORIGINS OF THE DEEP SOUTH* 37–72 (2005); Countryman, *supra* note 29, at 360–61. Twenty-two years after ratification, as Georgia rapidly expanded into Creek and Cherokee territory, the state's slave population had tripled to over 100,000. IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 370 tbl.1 (1998).

501. Cf. HENDRICKSON, *supra* note 18, at 240 (“Injustice to African-Americans and injustice to Indian nations—a constitutional obligation to protect and even advance the slave power, an acknowledged duty to dispossess the Indian nations of the interior—were by this powerful logic woven into the inner fabric of their beautiful union.”).

of South Carolina deflected a heated attack on the Three-Fifths Compromise with the contention that “the Western frontier [is] more burdensome to the U.S. than the slaves.”⁵⁰²

But the constitutional history of Indian affairs also presents different challenges for the contemporary Constitution than slavery.⁵⁰³ Unlike the document’s frequent (albeit oblique) references to slavery, nothing in the constitutional text explicitly mandates an imperialist Indian policy. For a textualist, this may absolve the document from its unpleasant historical associations. Yet in practice this absence has made the effects of this history all the more insidious. Although slavery’s legacy persists in profound ways, its appearance in the Constitution forced the nation to confront African-Americans’ status as a constitutional issue; the struggle to repudiate that history yielded powerful tools to further an antiracist constitutional agenda. The Constitution remains silent, however, on Native struggles to overcome our nation’s historical injustices. Even as views on Indians have shifted dramatically,⁵⁰⁴ Native nations remain legally a quasi-conquered people, subject to the plenary power of a sovereign created in part to dispossess them.⁵⁰⁵ The idea of the “savage” as an enemy justifying expansive federal military power survives, too: the U.S. Justice Department has claimed that precedent from nineteenth-century Indian wars legitimizes current practices in the War on Terror and the U.S. military codenamed Osama bin Laden “Geronimo,”

502. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 223.

503. The contrast I draw here concerns implications for present-day constitutional doctrine and theory, not the ahistorical and unhelpful question of whether slavery or the dispossession of Indians constitutes the greater “constitutional evil,” as Professor Mark Graber terms the Constitution’s entrenchment of slavery. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006). Moreover, my contrast at the level of doctrine and theory should not obscure the now neglected historical reality that chattel slavery was an integral part of Native dispossession: enslavement of Indians was a widespread practice in the Euro-American colonies that persisted into the nineteenth century. See Gregory Ablavsky, Comment, *Making Indians “White”: The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy*, 159 U. PA. L. REV. 1457, 1463–67, 1515–17 (2011).

504. See generally Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2008).

505. See, e.g., *United States v. Lara*, 541 U.S. 193, 200 (2004) (“The ‘central function of the Indian Commerce Clause,’ we have said, ‘is to provide Congress with plenary power to legislate in the field of Indian affairs.’” (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989))). But see *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565–71 (2013) (Thomas, J., concurring) (questioning the doctrine of plenary power based on the purported “original understanding” of the Indian Commerce Clause).

after the nineteenth-century Apache chief.⁵⁰⁶ The problem is not that federal Indian policy has not changed; prompted by Native activism, the federal government has made significant, if incomplete, strides toward respecting Native nations as separate, self-governing sovereigns.⁵⁰⁷ But considering the history of Indian conquest and dispossession as incidental to the Constitution has allowed doctrines crafted to justify this process to endure, as if they could be abstracted from their imperial origins.⁵⁰⁸ These doctrines' persistence underscores that, for Natives, the history traced here has not yet ended.

The other contrast is at the level of constitutional theory. Originalists reassure themselves that the Constitution's entanglement with slavery represented a concession to the unfortunate realities of the time that has since been expunged from the text, and so need not trouble their normative conclusion that the original meaning of the Constitution ought to continue to govern.⁵⁰⁹ This Article does not delve into the dense and tangled thicket of constitutional theorizing concerning interpretive methods, nor does it examine this account's merits as a description of slavery's historical and constitutional

506. Matthew L.M. Fletcher & Peter S. Vicaire, *Indian Wars: Old & New*, 15 J. GENDER RACE & JUST. 201, 223–30 (2012); Karl Jacoby, Op-Ed, *Dishonored*, L.A. TIMES, May 10, 2011, at A11; see also DRINNON, *supra* note 497, at 402–67 (describing the links between the history of Indian-hating and the Vietnam War). For a discussion of ongoing uses of tropes of “savagery” in current law and policy, see Ann E. Tweedy, “Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 737–54 (2011).

507. See CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 177–268 (2006) (tracing the role of Native activism in creating a federal Indian policy founded on tribal self-determination).

508. This is epitomized by recent Supreme Court doctrine, which has interpreted Marshall’s long-ago proclamation of Native sovereigns as “domestic dependent nations,” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), to impose significant quasi-constitutional restrictions on Natives’ exercise of sovereignty. See, e.g., *Montana v. United States*, 450 U.S. 544, 563–67 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206–08 (1978); cf. *Lara*, 541 U.S. at 228 (Souter, J., dissenting) (arguing that the Court’s “previous understanding of the jurisdictional implications of dependent sovereignty was constitutional in nature”). For criticism of this line of cases, see generally DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1997); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

509. For discussions of the implications of slavery for originalism, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 111–12 (2004); ORIGINALISM: A QUARTER-CENTURY OF DEBATE 176–77 (Steven G. Calabresi ed., 2007); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1757–64 (2009).

implications. Nonetheless, the history presented here questions the empirical foundation for this originalist argument. Slavery was not an island of oppression in a sea of liberty. Rather, the creation of a democratic republic necessarily rested on the exclusion and marginalization of others.⁵¹⁰ Particularly in Indian affairs, the enforcement of racial and other hierarchies, and the expansion of white “civilization” across the American continent, were among the fundamental purposes of both the national and local state in early America.⁵¹¹ By offering too-easy answers derived from a blinkered focus on slavery, then, originalists have failed to grapple with these deeper normative questions about their project to employ eighteenth-century meanings to govern a twenty-first-century nation.

Expanding focus beyond slavery to include Indian affairs also troubles understandings of constitutional history that privilege federal power to remedy injustice. The fundamental protection of slavery in the Constitution was the protection of state sovereignty and the adoption of a limited federal government of enumerated powers.⁵¹² In a similar vein, conventional accounts posit that federal indifference undid the promise of Reconstruction and allowed Jim Crow to flourish until the civil-rights movement, when federal power became a critical tool for combating racial injustice.⁵¹³ This narrative elides deep

510. See, e.g., HINDERAKER, *supra* note 475, at 268–70 (“[I]t is no accident that the exploitation of nonwhite peoples in the United States deepened and intensified before it began to be ameliorated. The Revolution liberated white men to pursue their economic and political independence.”); EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 386 (1975) (“Racism became an essential, if unacknowledged, ingredient of the republican ideology that enabled Virginians to lead the nation.”); SMITH-ROSENBERG, *supra* note 13, at 1–43, 465–68 (arguing that early American national identity was founded “on systematic patterns of exclusion”); JOHN WOOD SWEET, *BODIES POLITIC: NEGOTIATING RACE IN THE AMERICAN NORTH, 1730–1830*, at 3–5, 399–407 (2003) (exploring how American democracy “was shaped by the legacy of colonial conquest, enslavement, and racial domination”); WOOD, *supra* note 16, at 508–42 (observing that the marginalization and racialization of African-Americans “were the strange and perverse consequences of republican equality and democracy”); ROSEMARIE ZAGARRI, *REVOLUTIONARY BACKLASH: WOMEN AND POLITICS IN THE EARLY AMERICAN REPUBLIC 180* (2007) (noting that, in early America, “[u]niversal male suffrage was increasingly defined against—even predicated on—women’s and blacks’ exclusion from governance”).

511. See, e.g., HOWE, *supra* note 457, at 852–54 (identifying as the “primary driving force” in the antebellum United States “the domination and exploitation of the North American continent by the white people of the United States and their government”).

512. See Finkelman, *supra* note 240, at 443–45 (describing the restriction on federal authority as the “ultimate” protection of slavery in the Constitution).

513. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 564–612 (1988).

federal involvement in perpetuating discrimination against African-Americans,⁵¹⁴ but it is particularly inapposite in the realm of Indian affairs, where the federal government was the primary actor in marginalizing and dispossessing Native nations. Natives' experience underscores that our racial and constitutional injustices were not simply a product of national acquiescence in local prejudices, and cannot always be solved by enforcing a national consensus on recalcitrant states.

CONCLUSION

In August 1788, Josiah Harmar commanded the entire federal military—a little over five hundred men, strung out in a series of isolated forts along nearly eight hundred miles of the Ohio and Wabash Rivers.⁵¹⁵ Reduced to eating spoiled bread and short on funds, Harmar and his men watched in impotent fury as Natives attacked surveyors and squatters who ventured into Indian country.⁵¹⁶ Anxious for relief, Harmar closely followed political events further east. On August 7, he wrote his aide that news had at last reached his remote outpost: "New Hampshire has adopted the new Constitution, which makes the tenth state. I am in hopes the wheels of government will now be soon put in motion, in order that we may be enabled to extirpate these perfidious savages if they continue committing hostilities."⁵¹⁷

Harmar's hopes were never quite realized. Natives survived, and, for the past half century, have turned to the federal courts to hold the government to the treaty promises it made long ago—have invoked,

514. See generally FEHRENBACHER, *supra* note 499.

515. See William B. Skelton, *The Confederation's Regulars: A Social Profile of Enlisted Service in America's First Standing Army*, 46 WM. & MARY Q. 770, 781 (1989) (noting that the army averaged 520 men during this period); see also WILLIAM H. GUTHMAN, *MARCH TO MASSACRE; A HISTORY OF THE FIRST SEVEN YEARS OF THE UNITED STATES ARMY, 1784–1791*, at 1–90 (1975) (describing the federal military during this period); KOHN, *supra* note 471, at 54–72 (describing the weakness and financial difficulties of the Confederation army). According to data supplied by the Army Corps of Engineers, the river distance from Fort Harmar (present-day Marietta, Ohio) to Post Vincennes (present-day Vincennes, Indiana) is 782 miles. See Email from John D. Cheek, P.E., Great Lakes and Ohio River Div., U.S. Army Corps of Eng'rs, to Alvin L. Dong (Sept. 4, 2013) (on file with the *Duke Law Journal*).

516. OUTPOST ON THE WABASH, *supra* note 145, at 93–105.

517. Letter from Josiah Harmar to John Hamtramck (Aug. 7, 1788), in OUTPOST ON THE WABASH, *supra* note 145, at 99, 100; see also Letter from Brigadier-Gen. Harmar to Henry Knox, Sec'y of War (July 23, 1788), in 2 THE ST. CLAIR PAPERS, *supra* note 97, at 64, 64 ("I sincerely hope that the new government will soon begin to operate, in order that we may be enabled to sweep these perfidious villains [the hostile Indians] off the face of the earth.").

in other words, the Madisonian Constitution to remedy injustice. But for much of American history, the “wheels of government” proved remarkably effective at dispossessing Natives of the continent. In this respect, the Constitution functioned just as Harmar, and many others, had envisioned.
