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TWO FEDERALIST CONSTITUTIONS OF EMPIRE

Gregory Ablavsky*

INTRODUCTION

Over the past few years, I have written a series of articles and a book on the legal history of the United States in the 1780s and 1790s, focusing particularly on federal governance.¹ This research took me into many Federalists' writings; alongside the works of well-known figures, like George Washington and Alexander Hamilton, I read the papers of cabinet officials, like Secretaries of War Henry Knox and James McHenry, Secretary of State Timothy Pickering, and Secretary of the Treasury Oliver Wolcott, as well as more local officials, like Governor Arthur St. Clair and Secretary Winthrop Sargent of the Northwest Territory. These men all identified as Federalists in both of the term's political connotations in the early United States: all first advocated for the newly drafted Constitution during the heated battle for ratification *and* then became partisans of the nascent political party dominant in the Washington and John Adams administrations.²

What united these disparate men's thought and made them Federalists twice over was commitment to federal power. All of them believed in the need for a newly constituted and strengthened federal government, and all fought fiercely to establish and defend federal authority. Why and to what end? What was the new "general," "national," or "federal" government, as it was interchangeably called at the time, for? Although my research has

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1. See generally GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* (2021); Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631 (2019) [hereinafter Ablavsky, *Administrative Constitutionalism*]; Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019); Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795*, 106 J. AM. HIST. 591 (2019) [hereinafter Ablavsky, *Species of Sovereignty*]; Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631 (2018); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) [hereinafter Ablavsky, *Savage Constitution*]; Gregory Ablavsky, "With the Indian Tribes": *Race, Citizenship, and Original Constitutional Meaning*, 70 STAN. L. REV. 1025 (2018).

2. On these meanings of "Federalist," see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 92–95 (2010); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 97–138 (2009).

addressed disparate topics in present-day law—property, international law, federal Indian law, federalism, and administrative law—this question has been at the center of all this work. I looked for the answer not just in ratification and congressional debates but in the practices of everyday governance, which persuaded me that scholars have overlooked how much federal power was shaped by ad hoc negotiation and politicking. This work also led me to focus on places and areas of law that current constitutional law often deems marginal or exceptional: the U.S. territories, federal lands, and relations between the United States and Native nations. But for late eighteenth-century Federalists, these issues were central, arguably even core, to the federal government’s purpose.

One straightforward answer that this research revealed is that the new federal government was for empire: the new United States was an imperial state that self-consciously sought to assume many of the responsibilities and powers of its British predecessor.³ But empires, as a wealth of recent scholarship underscores, are complicated and multifaceted.⁴ I quickly discovered the existence of at least two distinct imperial Federalist constitutions, both with roots in prerevolutionary practice and thought.

Both constitutions embraced expanded federal power but sought to use it for divergent ends. One constitution sought to use federal authority to discipline recalcitrant states and U.S. citizens, whose selfish and shortsighted behavior, Federalists believed, jeopardized national interests, especially the new nation’s relations with other sovereigns.⁵ The second sought to wield the nation’s bolstered financial and military resources against perceived external threats and enemies.⁶ In my earlier work on the role of Indian affairs in the creation of the Constitution, I called these two strands Madisonian and Hamiltonian, in honor of their principal advocates at the Constitutional Convention.⁷ But both visions swept more broadly than either Indian affairs or the immediate context of the Constitution’s creation and beyond these two men. Here, I label them as the “constitution of constraint” and the “constitution of empowerment.”

Like all tidy dichotomies, this approach artificially imposes a sharp divide on a muddled past. Most self-identified Federalists, especially over the 1790s, embraced *both* the constitution of constraint and the constitution of empowerment. Many regarded them as importantly intertwined: many Federalists adopted a strikingly militaristic approach because they envisioned

3. On the United States as an imperial state, see generally BETHEL SALER, *THE SETTLERS’ EMPIRE: COLONIALISM AND STATE FORMATION IN AMERICA’S OLD NORTHWEST* (2014); Gautham Rao, *The New Historiography of the Early Federal Government: Institutions, Contexts, and the Imperial State*, 77 WM. & MARY Q. 97 (2020).

4. For a brief overview of an enormous literature, see generally LAUREN A. BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900* (2010); JANE BURBANK & FREDERICK COOPER, *EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE* (2010).

5. See *infra* Part I.

6. See *infra* Part II.

7. Ablavsky, *Savage Constitution*, *supra* note 1, at 1006–07.

using a strengthened federal military against *both* external and internal challenges to federal power.

The value of this dichotomy, to my mind, lies as much in explaining the two constitutions' divergent receptions and fates as it does in illuminating Federalist thought. One key theme in my research, building on a long line of scholarship on early American law and politics, is that federal officials, whether Federalists or their emerging Republican opponents, could not readily control how federal authority was used.⁸ Rather, people outside the federal government routinely seized on Federalist constitutionalism to serve their own ends. In this Essay, I focus on the region I have studied the most, the early U.S. territories, which were fractured borderlands where diverse groups contested for sovereignty and allegiance. Residents' constitutional views fell outside the neat partisan categories of Federalist and Republican, although both parties sought to shape federal power to accommodate these outsiders' demands. Native leaders, for instance, actively pressed for the constitution of constraint, while white territorial citizens whom Federalists labeled the "lawless inhabitants of the frontiers" readily embraced the constitution of empowerment.⁹ In short, like elsewhere in the early United States—only perhaps more visibly—the struggle over constitutional meaning in the early territories was a fight over access to power and violence.

We know the end of this story: as Saul Cornell and Gerry Leonard trace in their impressive recent book, Federalist efforts to distance federal power from democratic control failed to anticipate the rise of political parties or the persistence of popular authority, leading Federalists to retreat to the judiciary to fight a partially successful rearguard action.¹⁰ In the process, what I have dubbed the constitution of constraint largely failed, while the constitution of empowerment flourished. In the territories, this outcome meant that Native nations lost, dispossessed by a strengthened federal government placating the demands of territorial citizens.

This outcome might be deemed a form of popular constitutionalism—except that this framing, rather than a neutral description, vindicates a contested constitutional perspective.¹¹ What scholars have labeled popular constitutionalism presupposes what territorial citizens demanded: that there was a unified American "people"—implicitly and explicitly coded, as Cornell and Leonard point out, as white and male¹²—and that the role of the federal government was to protect their interests. But the constitution of

8. See generally ABLAVSKY, *supra* note 1.

9. Letter from Arthur St. Clair to Henry Knox (Apr. 19, 1791), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 174, 174 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832).

10. GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780s–1830s, at 84–92 (2019).

11. On popular constitutionalism, see generally LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295 (2011).

12. LEONARD & CORNELL, *supra* note 10, at 2–3 (noting how advocates of democracy "explicitly excluded all but white men from civic participation").

constraint rested on an alternate vision, embraced by both the Federalists and Native leaders, in which the federal government was often obligated to sacrifice the demands of its own citizens to abstractions like the “national interest” or even “justice.” Early American politics and law together helped doom this approach.

In one sense, this outcome marked a Federalist failure. It certainly demonstrated shortsightedness, as Federalists failed to anticipate how poorly their antidemocratic efforts would fare in a political system in which opportunities for popular control and dissent remained rife. But, as I have also stressed in my work, the dominance of the constitution of empowerment was also a Federalist triumph of a sort.¹³ Both during and after ratification, Federalists sold the new Constitution for its promise of empowerment and then explicitly attempted to curry popular favor in office by deploying federal power to placate these demands. These efforts were often strategic and calculating and at times undercut the core aims that Federalists purported to endorse—and yet they proved consequential. In that sense, though subsequent constitutional history unfolded in ways that the Federalists did not envision and anticipate, it was also a future that they chose.

I. CONSTITUTION OF CONSTRAINT

A. *Creating the Constitution of Constraint*

The key text in the constitution of constraint is perhaps James Madison’s well-known “Vices of the Political System of the United States.”¹⁴ Over multiple pages, Madison decried excesses and failures that had occurred under the Articles of Confederation, as he focused on both the failures of the state governments and the “people themselves.”¹⁵ Madison identified the solution as the creation of a strengthened federal government to impose checks on both. As many have noted, he embraced an antidemocratic approach of filtration that would place in office “the purest and noblest characters.”¹⁶ But the core of what I term the “constitution of constraint” rests in Madison’s observation: “The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to control one part of the Society from invading the rights of another.”¹⁷

13. See Ablavsky, *Administrative Constitutionalism*, *supra* note 1; Ablavsky, *Savage Constitution*, *supra* note 1.

14. James Madison, *Vices of the Political System of the United States* (1787), reprinted in 9 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 345, 348–58 (Robert A. Rutland & William M. E. Rachal eds., 1975).

15. *Id.* at 354.

16. *Id.* at 357. See generally Jack Rakove, *The Structure of Politics at the Accession of George Washington*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 261, 261–65 (Richard Beeman et al. eds., 1987) (reviewing the scholarship and summarizing this view).

17. Madison, *supra* note 14, at 357 (footnote omitted).

Much constitutional historiography can be read as an exegesis of Madison's "Vices." Gordon Wood's *Creation of the American Republic*, for instance, emphasizes Madison's fears of the excesses of state legislatures, especially their monetary and credit practices, which threatened to trample economic stability.¹⁸ In this reading, the new federal government would check these impulses—ultimately not through the federal veto on state actions that Madison sought but instead through the Supremacy Clause as well as the limitations that Article I, Section 10 imposed on state actions.¹⁹ Scholars have fought about this transformation's meaning—debating how much Madison's solicitude for minority rights was at its core a counterrevolution to protect wealth from democracy—but they have largely agreed on its contours.²⁰

Other recent work has picked up on another theme prominent in "Vices": the failure of the United States to comply with the strictures of the law of nations.²¹ Deeply concerned about its precarious sovereign status in the international community, the new United States sought to win global recognition by proving itself a "civilized nation," in the words of Daniel Hulsebosch and David Golove,²² and a "treaty-worthy nation," in the description of Eliga Gould.²³ That meant a nation that would keep its word. But, Madison lamented, the United States under the Articles was not such a nation, as states routinely flouted both the nascent principles of international law and the nation's treaties, especially the Treaty of Paris's requirement that the United States restore confiscated Loyalist property.²⁴ Here, too, the remedy lay in the constitution of constraint: in constitutional provisions that expanded federal authority and limited state power over foreign relations, including by making treaties supreme federal law and in creating "impartial and unbiased" federal courts that would directly enforce treaties and the law of nations.²⁵

18. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 395–562 (1969).

19. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 132–73 (2010).

20. Compare WOOD, *supra* note 18, with TERRY BOUTON, *TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* (2007), and WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* (2007), and MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016).

21. For an overview, see generally Max M. Edling, *Peace Pact and Nation: An International Interpretation of the Constitution of the United States*, 240 *PAST & PRESENT* 267 (2018).

22. See generally 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).

23. ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* 12–13 (2012).

24. See Madison, *supra* note 14, at 349.

25. *THE FEDERALIST NO. 80* (Alexander Hamilton) (E. H. Scott ed., Chicago, Scott, Foresman & Co. 1898); see also Golove & Hulsebosch, *supra* note 22, at 989–1015.

Although much of this work has followed Madison's focus on state excesses, Madison and others were also concerned about purported popular lawlessness.²⁶ Between the lines of "Vices"—and explicitly in much Federalist writing—was deep anxiety over Shays's Rebellion, the populist uprising in western Massachusetts against debt collection and state taxes.²⁷ Massachusetts could barely muster the resources to enforce its laws, leading Madison and others to worry about "internal violence" (including Madison's dark acknowledgment of the threat posed by the presence of enslaved African peoples).²⁸

I found that the constitution of constraint also played a key role in Federalist thought about the early American west, the vast expanse of land between the Appalachians and the Mississippi River that Britain had ceded the United States in the Treaty of Peace, even though it was inhabited almost exclusively by Native peoples.²⁹ Madison gave some thought to the west; he was especially concerned by the defiance and recalcitrance of states in so-called "Indian affairs" under the Articles of Confederation, when Georgia, New York, and North Carolina, all states with vast territorial claims, defied federal authority as they asserted questionable title.³⁰ Madison even witnessed such confrontations firsthand at the Treaty of Fort Stanwix in 1784, in which state and federal officials, in front of Haudenosaunee representatives, battled for authority, prompting arrests and counterarrests that amounted to a comic opera.³¹

But more attention came from Henry Knox, who, as secretary at war under the Articles and then secretary of war under the Washington administration, was charged with overseeing Indian affairs. Knox's proposed remedy to the problem of continual violence between Native peoples and Anglo-Americans was strikingly Madisonian. The United States would enter into treaties with Native nations creating firm boundaries, which the federal government would then police with its military. "[T]he administration of indian affairs," Knox argued, must be "conducted by fixed principles established by [federal] Law, and which being published should be rigidly enforced."³² The problem, according to Knox, was the absence of a neutral arbiter of these conflicts, a

26. See, e.g., Letter from Virginia Delegates to Benjamin Harrison (Nov. 1, 1783), in 7 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES, *supra* note 14, at 391, 392 (decrying the "lawless banditti"). See generally DAVID ANDREW NICHOLS, RED GENTLEMEN & WHITE SAVAGES: INDIANS, FEDERALISTS, AND THE SEARCH FOR ORDER ON THE AMERICAN FRONTIER 57–75 (2008) (describing widespread critiques of perceived lawlessness in the 1780s).

27. See generally SEAN CONDON, SHAYS'S REBELLION: AUTHORITY AND DISTRESS IN POST-REVOLUTIONARY AMERICA (2015).

28. See Madison, *supra* note 14, at 350–51.

29. On Federalist visions for the west, see generally ANDREW R. L. CAYTON, THE FRONTIER REPUBLIC: IDEOLOGY AND POLITICS IN THE OHIO COUNTRY, 1780–1825 (1986); KRISTOPHER MAULDEN, THE FEDERALIST FRONTIER: SETTLER POLITICS IN THE OLD NORTHWEST, 1783–1840 (2019); Peter S. Onuf, *Liberty, Development, and Union: Visions of the West in the 1780s*, 43 WM. & MARY Q. 179 (1986).

30. Ablavsky, *Savage Constitution*, *supra* note 1, at 1018–33.

31. *Id.* at 1021–22.

32. Henry Knox's Notes on the State of the Frontier, in 5 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 76, 79 (Dorothy Twohig et al. eds., 1996).

role he believed only the federal government could play: “[t]here can be neither Justice or observance of treaties, where every man claims to be the sole Judge in his own cause, and the avenger of his own supposed wrongs,” Knox wrote soon after Washington’s inauguration.³³ Instead, federal power must force both Native peoples and U.S. citizens into obedience: “[g]overnment must keep them both in awe by a strong hand,” Knox wrote, “and compel them to be moderate and just.”³⁴

The Constitution and Federalist jurisprudence sought to remedy these problems. “The United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever,” Knox insisted, pointing to the provisions over treaties, the war power, and commerce, which he believed foreclosed all state involvement.³⁵ Knox helped draft the Trade and Intercourse Act of 1790,³⁶ a robust assertion of federal power that made it a federal crime for citizens to murder or steal from Indians in what it called “Indian country” or to attempt to purchase Native land.³⁷ Later versions provided for military enforcement, even as Knox fruitlessly sought to create courts martial to punish offenses against the treaties.³⁸

Moreover, to an underappreciated extent, the creation of the federal territories itself was part of the constitution of constraint. Over time, many states had, at federal urging, ceded their western land claims to the federal government.³⁹ The Constitution specifically blessed sole federal jurisdiction and title over these ceded lands through the Property Clause,⁴⁰ which retroactively authorized the Northwest Ordinance, adopted nearly simultaneously with the Constitution.⁴¹ Later commentators would hail the Ordinance as a harbinger of democracy for its promise of admission to statehood, guarantees of fundamental rights, and prohibition on slavery, but what it created was a strikingly *undemocratic* form of government that James Monroe called “a colonial govt similar to that wh[ich] prevail’d in these

33. Letter from Henry Knox to George Washington (July 7, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 32, at 134, 136.

34. Report of the Secretary at War to Congress (July 10, 1787), in 2 THE TERRITORIAL PAPERS OF THE UNITED STATES, THE TERRITORY NORTHWEST OF THE RIVER OHIO 31, 31 (Clarence Edward Carter ed., 1934) [hereinafter THE TERRITORIAL PAPERS].

35. Henry Knox, Instructions to General Israel Chapin (Apr. 28, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 9, at 231, 232.

36. Ch. 33, 1 Stat. 137 (repealed).

37. *See id.*

38. *See* Intercourse Act (Indian Tribes), ch. 161, 4 Stat. 729 (1834); Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

39. *See generally* PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787 (1983).

40. U.S. CONST. art. IV, § 3, cl. 2.

41. *Id.* For the original text of the Ordinance, see 32 JOURNALS OF THE CONTINENTAL CONGRESS 334–43 (Roscoe R. Hill ed., 1936). The Ordinance was reenacted after the Constitution’s ratification with minor changes to conform to the new constitutional system. *See* Act of Aug. 7, 1789, ch. 8, §§ 1–2, 1 Stat. 50, 51–53.

States previous to the revolution.”⁴² The law placed sole power over the territories with federally appointed officials, while largely depriving territorial residents of all rights to vote or meaningful representation, leading those who lived under the Ordinance’s strictures to denounce it as “impolitic, arbitrary, oppressive and tyrannical.”⁴³ This heavy-handed federal rule, observers have noted, exemplified a Federalist vision for the west that sought to guard against the supposed lawlessness of white emigrants by placing them under firm national control.⁴⁴

B. *Explaining the Constitution of Constraint*

Why did Federalists embrace the constitution of constraint? Federalists explained their actions as a vindication of order and a well-regulated society—what we would likely now call the rule of law. For their opponents and critics, their efforts reflected an attempt to reverse the egalitarian and leveling principles of the American Revolution and reestablish aristocracy in place of republicanism. Both the justifications and the critique reflected ideology and class: a perceived commitment to the “worthy against the licentious.”⁴⁵

But there were other explanations, too. Many Federalists, including George Washington and Henry Knox, demonstrated deep concern over what they called “national character,” reflecting their sense that the new United States was under close international scrutiny.⁴⁶ Knox repeatedly voiced a commitment to “justice” for the new nation’s relationship with Native peoples, a view heavily shaped by Enlightenment humanitarianism.⁴⁷ “As we are now powerful and more enlightened than [Native peoples] are,” he told Washington, “there is a responsibility of national character, that we should treat them with kindness and even liberality.”⁴⁸

Yet even more, Federalists acted from the realities of early American governance and their sense of the national interest. From the beginning, claims and demands besieged the new national government, often with those on both sides of political conflicts appealing for federal support and aid. Sometimes, as Madison had envisioned, these battles were economic struggles *among* U.S. citizens: creditors pit against debtors, land speculators fighting smallholders, eastern merchant elites dependent on Atlantic commerce contesting with farmers as well as westerners reliant on the

42. Letter from James Monroe to Thomas Jefferson (May 11, 1786), in 2 THE PAPERS OF JAMES MONROE 298, 298 (Daniel Preston & Marlana C. DeLong eds., 2006). See generally Ablavsky, *Administrative Constitutionalism*, *supra* note 1.

43. Vitruvius, *Cincinnati*, *September 27.*, CENTINEL N.W. TERRITORY, Sept. 27, 1794.

44. See *supra* note 29.

45. WOOD, *supra* note 18, at 475.

46. See, e.g., Report of Henry Knox to President George Washington (Dec. 29, 1794), *microformed on Senate Territorial Papers*, Reel 2: Territory Sw. of the Ohio River (U.S. Nat’l Archives).

47. *Id.*

48. *Id.*

Mississippi River drainage.⁴⁹ Here, Federalists often favored the wealthy and well connected, fueling popular anger and resentment against them.⁵⁰ But other times, these contests pit what states and most citizens wanted against the interests and demands of those *outside* the political community of the United States. European nations sought to protect their nationals' property against states' expropriative schemes.⁵¹ Native leaders wanted something similar, as states purported to legislate away Native property altogether, opening up enormous tracts of land for white settlement.⁵² Here, too, Federalists, facing a difficult choice about whose interests to favor, often aligned federal power with the outsiders over the United States' own citizens.

This decision partly reflected Federalist predilections: they sought to protect property generally, and they often felt more kinship with foreign political and diplomatic elites—even Native ones—than their own nation's boisterous citizens.⁵³ But it also stemmed from Federalists' realistic assessment of the balance of power. European creditors and investors held enormous power over the fledgling country and its battered finances; Federalists recognized that the success of the United States would depend on establishing the nation's creditworthiness in their eyes.⁵⁴ Native nations possessed considerable power, too. Throughout much of the 1780s and 1790s, their diplomatic and military resistance sank federal plans for western expansion, destroyed any prospect for land sales, and threatened to engulf the United States in enormously expensive conflicts.⁵⁵ “[A] protracted Indian war,” Knox acknowledged in the midst of the fight over ratification, “would be destruction to the republic, under its present circumstance.”⁵⁶ As we shall see, that was very nearly also true of the strengthened federal government postratification, too.⁵⁷ Moreover, Native nations on both the northern and southern borderlands of the United States retained close alliances with Britain and Spain. At multiple points in the early 1790s, these ties threatened to engulf the United States in renewed war not only with Native peoples but either or both European empires, which would have proved catastrophic.⁵⁸

Little wonder, then, that the entire Washington administration concluded that angering its own citizens was preferable to risking relations with European or Native sovereigns. “[T]he U.S. find an Indian war too serious a

49. See WOOD, *supra* note 2, at 97–172.

50. *Id.*

51. See Golove & Hulsebosch, *supra* note 22, at 961–70.

52. See STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 150–89 (2005).

53. See, e.g., NICHOLS, *supra* note 26, at 13, 99–125.

54. MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783–1867, at 17–49 (2014); Golove & Hulsebosch, *supra* note 22, at 939–40.

55. See generally James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, in THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS 197 (Jack P. Greene ed., 1987).

56. Letter from the Secretary at War to Arthur St. Clair (Dec. 8, 1788), in 2 THE TERRITORIAL PAPERS, *supra* note 34, at 166.

57. See *infra* Part II.C.

58. See Ablavsky, *Species of Sovereignty*, *supra* note 1, at 603–05.

thing, to risk incurring one merely to gratify a few [white] intruders with settlements which are to cost the other inhabitants of the U.S. a thousand times their value in taxes for carrying on the war they produce,” one cabinet member wrote.⁵⁹ “I am satisfied it will ever be preferred to send armed force and make war against the intruders as being more just & less expensive.”⁶⁰ These sentiments could have been penned by Knox or Hamilton, but in this instance the robust defender of federal military intervention against U.S. citizens was Secretary of State Thomas Jefferson. As Jefferson’s remarks underscore, the “Federalist” constitution of constraint was as much a recognition of the realities of governance as an endorsement of ideological preferences that Jefferson decidedly did not share.

C. Enacting the Constitution of Constraint: The Southwest Territory

Once in power, Federalists sought to enforce the constitution of constraint in multiple ways in multiple venues. In the realm of foreign relations, the Washington administration proclaimed U.S. neutrality in the wars of the French Revolution and prosecuted citizens who violated these strictures.⁶¹ It also negotiated the Pinckney and Jay Treaties, which secured peace and stability with Spain and Britain by sacrificing the interests of U.S. citizens, or so an extremely heated opposition concluded.⁶² Domestically, the Washington administration sought to enforce federal taxes against the populist Whiskey Rebellion in western Pennsylvania, marshaling 13,000 federalized militia against the tax resisters—an enormous force by the standards of the day, several times larger than the entire U.S. Army.⁶³ Several participants were arrested and convicted of treason.⁶⁴ The Adams administration similarly used federal military might to crush the subsequent Fries’s Rebellion north of Philadelphia, charging the tax resisters with sedition and treason.⁶⁵

But I want to focus on the Southwest Territory, one of my topics of research. This region, today the state of Tennessee, lay on the northern edge of the Native South, home to the powerful Cherokee, Creek, Choctaw, and Chickasaw confederacies, which retained close ties with the Spanish in Florida and Louisiana.⁶⁶ North Carolina claimed ostensible jurisdiction until

59. Letter from the Secretary of State to Judge Campbell (Mar. 27, 1792), in 4 THE TERRITORIAL PAPERS, *supra* note 34, at 130, 131.

60. *Id.*

61. See Golove & Hulsebosch, *supra* note 22, at 1019–39.

62. See generally JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS (1970).

63. See generally THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986); Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006).

64. SLAUGHTER, *supra* note 63, at 219.

65. See generally PAUL DOUGLAS NEWMAN, FRIES’S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION (2004).

66. On the Native South, see generally GREGORY D. SMITHERS, NATIVE SOUTHERNERS: INDIGENOUS HISTORY FROM ORIGINS TO REMOVAL (2019); THE NATIVE SOUTH: NEW HISTORIES AND ENDURING LEGACIES (Tim Alan Garrison & Greg O’Brien eds., 2017).

1790, when it ceded its rights to the federal government—but not before selling or giving away title to 20 percent of the entire territory to state citizens, even though federal law recognized and guaranteed Native title to nearly all this land.⁶⁷ The Creek and Cherokee Nations responded to these reckless claims of ownership, as well as the aggressive policies of neighboring Georgia, with near-constant raids against encroaching white settlements.⁶⁸

The Washington administration sought to resolve these tensions through authoritative treaties. In 1790, the United States ratified the Treaty of New York with the Creek Nation, the first treaty under the new Constitution.⁶⁹ The following year, it signed the Treaty of Holston with the Cherokee.⁷⁰ The administration believed that these treaties, if vigorously enforced, would bring peace to the region.⁷¹

These actions reflected Federalist faith in treaty making, but they also demonstrated the southeastern nations' considerable power, especially while allied with the neighboring Spanish. But the region's Native leaders shared the Federalist view that federal power and the constitution of constraint offered an alternative to violence. For years, influential Creek leader Alexander McGillivray had battled against what he called the “greedy encroachments of the Georgians.”⁷² En route to meet with the Washington administration in New York, McGillivray “spoke freely of the contemptableness of the State of Georgia and in exalted terms of the federal Government, [and] expressed a great desire to form a lasting treaty.”⁷³ The Georgians were outraged by the resulting treaty, but the Federalists ratified it over their objections.⁷⁴

The neighboring Cherokee Nation felt similarly to the Creek, having faced years of encroachments by North Carolinians that Cherokee leaders hoped the federal government would halt. They, too, made treaty concessions “for the sake of peace and quietness,” as Cherokee leader Nenetooyah told Henry Knox, with the expectation that the federal government would vigorously police the resulting boundaries.⁷⁵ “[I]f your People will not obey you, I wish you to write to the President to send regular troops forward to Keep order,” Nenetooyah later told the governor of the Southwest Territory, “for I want

67. ABLAVSKY, *supra* note 1, at 19–50.

68. *Id.* at 139–68.

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

70. Treaty of Peace and Friendship, Cherokee Nation-U.S., July 2, 1791, 7 Stat. 39.

71. *See, e.g.*, Letter from Judge Campbell to the Secretary of State (Feb. 25, 1792), in 4 THE TERRITORIAL PAPERS, *supra* note 34, at 121, 121–28.

72. Letter from James White to Henry Knox (May 24, 1787), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 9, at 20, 21.

73. Letter from William Blount to John Steele (July 10, 1790), in 1 THE PAPERS OF JOHN STEELE 67, 69 (H. M. Wagstaff ed., 1924).

74. David A. Nichols, *Land, Republicanism, and Indians: Power and Policy in Early National Georgia, 1780–1825*, 85 GA. HIST. Q. 199, 215–16 (2001).

75. Conference of the Chiefs of the Cherokee Nation with the Secretary of War (Jan. 11, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 9, at 203, 205.

Peace, that we may travel our paths in Peace and sleep in our Houses and rise in peace on both sides.”⁷⁶

That a Native leader would appeal for federal soldiers is at odds with our image of the dynamics of U.S. colonialism. But Nenotooyah’s statement reflected how Native peoples and Federalists alike found common ground in the constitution of constraint: both sides thought peace possible but only if their bargains were rigorously enforced.⁷⁷

Yet in practice, both Native and federal leaders struggled to constrain their citizens’ actions. “I was convinced it was not the wish of [federal officials] or my self to go to War,” Cherokee leader Kunokeski (also known as John Watts) observed, “but was afraid that the Lawless Men living on our lands & the frontiers, Would be the occasion of all Mischiefs.”⁷⁸ Because authority stemmed more from persuasion than coercion, Cherokee and Creek leaders could do little to completely halt raiding parties from the decentralized, loose confederacies that constituted the Cherokee and Creek Nations. Such attacks quickly disillusioned territorial citizens about the constitution of constraint. “Experience teach[es] us that Treaties answer no other Purpose,” wrote a young Southwest Territory resident, “than opening an Easy door for the Indians to pass [through to] Butcher our Citizens.”⁷⁹ Ironically, this observer—future president Andrew Jackson—was then serving as the region’s U.S. attorney, responsible for indicting any citizens who violated the treaties.

Jackson and nearly all the citizens of the Southwest Territory vociferously demanded a federally supported invasion of the Cherokee and Creek nations, which, they insisted, was the only way to end violence. Until the nations were “made to feel the horrors of war, they will not know the value of peace, nor observe the treaties,” the territorial legislature lectured Congress.⁸⁰ But the Washington administration stubbornly resisted. “[I]t is very questionable, while we are unable, in many cases, to execute our own laws,” Knox lectured Georgia’s governor, “whether we ought, in justice, to levy a general war upon the Creeks, for the criminality of an individual.”⁸¹ After

76. *Correspondence of Gen. James Roberston: Conference at Tellico Blockhouse*, 4 AM. HIST. MAG. 82, 85 (1899) (reporting events of December 31, 1794).

77. See NICHOLS, *supra* note 26, at 9 (“Woodland Indian chiefs and captains shared many interests with the officers and supporters of the American national government. . . . Both believed that expansionist state governments were a threat to peace on the frontier, and both wanted the new American federal government to manage Indian-white relations.”).

78. Letter from John Watts to John Sevier (Mar. 4, 1797) (on file with the Tennessee State Library and Archive, Governor John Sevier Papers, 1796–1801, Box 2, Folder 2).

79. Letter from Andrew Jackson to John McKee (May 16, 1794), in 1 THE PAPERS OF ANDREW JACKSON 48, 48–49 (Sam B. Smith & Harriet Chappell Owsley eds., 1980).

80. Letter from Governor Blount to the Secretary of War (Sept. 21, 1794), in 4 THE TERRITORIAL PAPERS, *supra* note 34, at 354, 354–55, 354 n.21 (quoting The Memorial of the Legislative Council and House of Representatives, to the Congress of the United States of America (Sept. 18, 1794), in JOURNAL OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF THE UNITED STATES OF AMERICA, SOUTH OF THE RIVER OHIO 22, 22–23 (Nashville, McKinnie & Brown, True Whig Off. 1852)).

81. Letter from the Secretary of War to the Governor of Georgia (July 11, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 9, at 256, 256.

extensive discussion, the entire cabinet concluded that Congress alone had the constitutional power to authorize any attacks.⁸² But a Federalist-dominated Congress refused to sanction such violence, despite the over-the-top rhetoric of Southern representatives.⁸³

For citizens of the Southwest Territory, this refusal was proof that the eastern elites that dominated Congress cared nothing about their lives but, on the contrary, favored Native peoples: Congress, one resident complained, “are more favourable to their savage, adopted, and illegitimate, than to us their legitimate children.”⁸⁴ On the floor of Congress, a Georgian representative proclaimed that federal officials betrayed “improper leanings in favor of the Indians” that made his “heart boil.”⁸⁵ And so white residents decided to take matters into their own hands. The Washington administration had authorized territorial officials to call up the militia, unambiguously limiting it to defensive purposes only.⁸⁶ Now, the militia flagrantly defied these orders. In the summer of 1793, they attacked the town of the Cherokee leader Scolocutta, who at that very moment, was meeting with federal representatives.⁸⁷ Undeterred, the militia killed eight or nine Cherokee as well as one of the white officials.⁸⁸ The next summer, an even larger militia expedition destroyed the Cherokee town of Nickajack in a genocidal assault that indiscriminately slaughtered fifty Cherokee men, women, and children as they fled to the Tennessee River.⁸⁹

These actions understandably disillusioned Cherokees in the constitution of constraint. “Surely you are no head-man nor warrior,” Scolocutta wrote to one federal official.⁹⁰ “I think you are afraid of these bad men . . . I think they are making fun of you, and won’t listen to your talks.”⁹¹ Scolocutta was right. The campaigns outraged the Washington administration: the president denounced such “violent and lawless inroads,” while Henry Knox lectured officials that, “[u]nless such crimes shall be punished in an exemplary manner, it will be in vain for the government to make further attempts to establish any plan or system for the administration of Indian Affairs founded on the principles of moderation and justice.”⁹² Territorial officials tried to subject the expeditions’ leaders to the “force of law” but they failed: the expeditions had been widely popular among territorial citizens and so no

82. ABLAVSKY, *supra* note 1, at 150–51.

83. *Id.* at 159–61.

84. Tho. Donnel, *Mr. Roulstone*, KNOXVILLE GAZETTE, Aug. 13, 1793.

85. 4 ANNALS OF CONG. 778 (1794).

86. ABLAVSKY, *supra* note 1, at 139–67.

87. *Id.* at 151–52.

88. *Id.*

89. *Id.* at 152.

90. Letter from Hanging Maw to Secretary Smith (June 15, 1793), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 9, at 460, 460.

91. *Id.*

92. Letter from Secretary of War to Governor Blount (Aug. 26, 1793), in 4 THE TERRITORIAL PAPERS, *supra* note 34, at 299, 299.

grand jury would indict the perpetrators.⁹³ Territorial citizens took the pages of the Territory's sole newspaper to insist that the expeditions were constitutional.⁹⁴ They pointed particularly to the provision of Article I, Section 10 of the Constitution barring state warmaking unless "actually invaded,"⁹⁵ which they liberally interpreted to mean that "when an enemy invades any particular state, such state may engage in war, and Congress is bound to support her"—sidestepping the potential objection that the Territory was not a state.⁹⁶

Federal efforts to restrain the citizens of the Southwest Territory, then, seemingly yielded little other than disillusioning Native leaders and white citizens alike in the promise of federal power. When in 1796, the Territory joined the Union as the new state of Tennessee, it was, as everyone anticipated, staunchly Republican.⁹⁷ Moreover, as a state, Tennessee was even better positioned to thwart Federalist efforts to enforce the constitution of constraint within its borders.

This dynamic was especially clear in the most important and contentious issue in the new state's politics. In 1797, the federal government at last officially surveyed the boundary of the 1791 Treaty of Holston.⁹⁸ The new boundary clarified that an estimated 2500–3000 white Tennesseans claiming ownership under North Carolina's questionable land grants were living on Cherokee land—a crime under the federal 1793 Intercourse Act.⁹⁹ The Federalist Adams administration, committed to placating Cherokee demands and enforcing the Treaty of Holston, dispatched federal soldiers to evict these intruders.¹⁰⁰

White residents were outraged. Some intruders violently resisted, killing several army horses and wounding a federal soldier.¹⁰¹ But the most sustained and effective opposition came from state politicians, especially the state's congressional delegation, which included Andrew Jackson, now Tennessee's sole congressman. The delegation constantly agitated the administration on the subject, bombarding it with letters and petitions.¹⁰² The administration had to decide: would it favor the Cherokees or the state of Tennessee? Ultimately, the choice proved easy: the Cherokees might be upset, but they would likely not risk war over the issue. Meanwhile, Tennessee's representatives effectively convulsed the federal government.

93. Letter from Acting Governor Smith to Secretary of War (June 22, 1793), in 4 THE TERRITORIAL PAPERS, *supra* note 34, at 276, 277.

94. *See, e.g.*, William Cooke, *For the Gazette*, KNOXVILLE GAZETTE, Dec. 29, 1792.

95. U.S. CONST. art. I, § 10.

96. Cooke, *supra* note 94.

97. JOHN R. FINGER, TENNESSEE FRONTIERS: THREE REGIONS IN TRANSITION 118 (2001) (ebook).

98. ABLAVSKY, *supra* note 1, at 201–30.

99. Ch. 19, § 5, 1 Stat. 329, 330; *see also* ABLAVSKY, *supra* note 1, at 215–18.

100. ABLAVSKY, *supra* note 1, at 215–21.

101. *Id.*

102. *See, e.g.*, Letter from Andrew Jackson to John Adams (Mar. 5, 1798), in 1 THE PAPERS OF ANDREW JACKSON, *supra* note 79, at 185, 185–86.

The administration capitulated, and the Senate authorized a new treaty to extinguish Cherokee title to the disputed lands at federal expense.¹⁰³

For their part, the Cherokee strongly resisted any sale, but they finally grudgingly agreed once President Adams made clear that the federal government would not continue to defend Cherokee title: “worthy and well-intentioned settlers” had appealed to Congress, Adams wrote Cherokee leaders, and “the representation of their sufferings induced the Senate of the United States to advise a new purchase of land.”¹⁰⁴ Cherokee leaders, including Nenetoyah, drove a hard bargain and secured a much larger compensation than in previous treaties.¹⁰⁵ Still, they doubtless wondered why only the complaints of the “deserving settlers” carried weight; they, after all, had suffered even more heavily at whites’ hands, as they constantly reminded federal officials.¹⁰⁶ But, as Adams’s letter not so subtly reminded them, the Cherokee, unlike whites, were not citizens, nor did they enjoy “representation” in Congress.¹⁰⁷ In the contest for whose interests the administration would favor, the Cherokee would always face a structural disadvantage.

D. Explaining the Failure of the Constitution of Constraint

The Federalists were not naïve. The Constitution’s drafters and proponents had recognized that pursuing the national interest—including, at times, favoring outsiders over U.S. citizens—would be unpopular and politically costly. As Madison’s “Vices” indicated, they had created the Constitution partly to remedy such difficulties, creating a government further removed from populist demands in an attempt to allow disinterested statesmen to pursue the national interest.¹⁰⁸

Although it has become commonplace to argue that the unexpected rise of partisanship doomed such expectations of filtration,¹⁰⁹ the Federalist vision always misread early American politics. The Federalists did not anticipate how policies they considered in the national interest—like, say, the Sedition Act¹¹⁰—would appear to fellow citizens and later observers alike as pretextual efforts to use federal authority to preserve power. But, as Cornell and Leonard’s recent book demonstrates, the Federalists also failed to foresee how long-standing practices of politics out-of-doors would continue to shape federal power.¹¹¹ Like its predecessor, the Federalists’ renewed imperial

103. ABLAVSKY, *supra* note 1, at 201–30.

104. Talk from the President of the United States to His Beloved Chiefs, Warriors, and Children, of the Cherokee Nation (Aug. 27, 1798), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 9, at 640, 641.

105. Treaty Between the United States of America, and the Cherokee Indians, Cherokee Nation-U.S., Oct. 2, 1798, 7 Stat. 62.

106. Talk from the President of the United States to His Beloved Chiefs, Warriors, and Children, of the Cherokee Nation, *supra* note 104, at 640–41.

107. *Id.*

108. Madison, *supra* note 14, at 351–52.

109. *See, e.g.*, WOOD, *supra* note 2, at 209–38.

110. Ch. 74, 1 Stat. 596 (1798).

111. LEONARD & CORNELL, *supra* note 10, at 44–81.

state confronted mass mobilization and popular protest. Remonstrances, petitioning, and raucous newspaper and pamphlet wars persisted; so, too, did the deeply engrained structures of local governance that federal officials futilely attempted to circumvent or diminish, even in places like the territories under federal jurisdiction.

At times, federal authority might prevail against such obstacles, as the Whiskey Rebellion demonstrated, but only through raw military force.¹¹² And perhaps not even then, as events in Tennessee suggested. In using the army to enforce the Treaty of Holston, the Adams administration had acted just as the advocates of the constitution of constraint intended: it sought to use enhanced federal powers to pursue what it believed to be the national interest, even if that required favoring the outsiders' interests over U.S. citizens' interests.¹¹³ A parochial state elite strongly opposed such measures, as Madison feared. But a national majority did not overcome its objections, as he anticipated. Instead, the rest of the nation proved less disinterested than *uninterested* in what happened in Tennessee, leaving it to those most affected—white Tennesseans and Cherokees—to battle for federal support. This was always an uneven contest: white Tennesseans' vocal and agitated representatives were *part* of the federal government, giving clout that the Cherokees could not match. And so even the sympathetic Adams administration decided not to expend the political will to overcome such determined opposition.

Yet, for all the ways that the Federalists appeared out of touch with the politics of the nation that they helped create, their constitutionalism was not simply a relic of an older, more hierarchical world that newly minted U.S. citizens increasingly repudiated. Rather, the Federalists were arguably the victims of their own success. As the next part explores, their constitution of constraint failed in large part because the constitution of empowerment so readily eclipsed it.

II. THE CONSTITUTION OF EMPOWERMENT

A. *Constitutional Design*

The other Federalist project, what I have dubbed the constitution of empowerment, is also well known in the historiography. Max Edling in particular has drawn attention to how eagerly the Federalists sought to construct a fiscal-military state similar to the behemoths constructed in eighteenth-century Britain and France.¹¹⁴ Although this aim was a particular hobbyhorse of Alexander Hamilton, Edling stresses that it was a goal widely shared among other Federalists.¹¹⁵

112. See *supra* notes 63–64 and accompanying text.

113. See *supra* note 100 and accompanying text.

114. See generally EDLING, *supra* note 54; MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE (2003).

115. EDLING, *supra* note 114, at 8–9.

Experience under the Articles had underscored the need for expanded resources. The United States had fought the American Revolution with ad hoc institutions and a flurry of debt, but its unexpected victory gave the new nation's leaders remarkable confidence bordering on arrogance: "[t]he Citizens of America," George Washington wrote at war's end, were now "the sole Lords and Proprietors of a vast tract of Continent."¹¹⁶ Reality soon dashed such grandiose expectations. This new continental power's army consisted of a miniscule force of a few hundred ill-equipped men, spread across isolated outposts along the Ohio River, which Congress could barely feed.¹¹⁷ Secretary at War Henry Knox routinely penned reports to Congress bemoaning the lack of resources to project any federal power.¹¹⁸

The drafters of the new constitution sought to remedy what one congressional committee had called the "imbecility of the federal government."¹¹⁹ The document created a robust financial system of taxation and authorized the creation of a national military, while granting the federal government the sole power to declare war.¹²⁰ Importantly, it also empowered the federal government to federalize the most substantial military force in the early United States, the state militias.¹²¹

The creation of a fiscal-military state was a quintessentially Federalist project in both senses of the term. As Edling traces, the Constitution's proponents constantly invoked the need for expanded fiscal-military powers to justify the new government.¹²² At the same time, the document's opponents constantly railed against the prospect of a standing army and national debt, which smacked too much of the European statecraft they thought the Revolution had supposedly been fought to reject.¹²³ After ratification, this divide quickly reappeared, separating members of the Washington administration more bullish on the fiscal-military state, especially Hamilton and Knox, from its critics, particularly Jefferson, around whom the nascent Republican opposition coalesced.

B. Explaining the Constitution of Empowerment

Why did the Federalists embrace the constitution of empowerment? In part, for many Federalists drawing from European models, the fiscal-military state represented what governments did: they built the institutional means to project power. For Hamilton and others, a strengthened financial system was also an important aspect of nation building. The national debt would tie local

116. GEORGE WASHINGTON, THE LAST OFFICIAL ADDRESS, OF HIS EXCELLENCY GENERAL WASHINGTON 4 (Hartford, Hudson & Goodwin 1783).

117. See generally RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802 (1975).

118. *Id.*

119. REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783–1812, at 34 (1967).

120. U.S. CONST. art. I, § 1, cls. 1, 11–13.

121. *Id.* cls. 14–15.

122. EDLING, *supra* note 114, at 8–9.

123. *Id.* at 61–68.

financial and economic elites to the new national government, recreating the chains of patronage that glued European empires together, while federal finance would promote internal and foreign commerce.¹²⁴

As for the strengthened military, as we have seen, it was closely tied to the constitution of constraint—a way to discipline an often recalcitrant citizenry.¹²⁵ Strikingly, many of the Federalists were Continental Army veterans, and so embraced a militaristic vision of how law and order worked. This was especially true of Henry Knox, who saw a national military as the sole foundation for peace on the borderlands. “The angry passions of the frontier Indians and whites,” he wrote, “are too violent to be controuled by the feeble authority of the civil power.”¹²⁶ He continued, “In such a case the sword of the Republic only, is adequate to guard a due administration of Justice, and the preservation of the peace.”¹²⁷

Yet the Federalists also embraced the constitution of empowerment as a way to sell a controversial new government. During the hard-fought political campaign for ratification, Federalists rarely talked about marching federal soldiers against the nation’s own citizens. Instead, they constantly and frequently invoked external threats: the British in Canada, the Spanish in Florida and Louisiana, and what Hamilton called, in *Federalist No. 24*, the “savage tribes on our Western frontier.”¹²⁸ Indeed, the constant parade of hostile Europeans and vengeful Native peoples, and the insistence that only the federal government could prevent the challenge, became something of a Federalist trope during ratification.¹²⁹

Much of this rhetoric was expedient. Unlike Washington, Jefferson, or Knox, Hamilton gave little thought or consideration to Native peoples, and, to the extent he did, he shared the Washington administration’s embrace of treaties and federal law as the basis for peace.¹³⁰ But Hamilton and other Federalists recognized that the Indian threat had been routinely and effectively deployed to justify governmental authority for over a half century. Such ritualized invocation of white suffering at Native hands—what historian Peter Silver has called the “anti-Indian sublime”—had proved

124. Max M. Edling, “So Immense a Power in the Affairs of War”: Alexander Hamilton and the Restoration of Public Credit, 64 WM. & MARY Q. 287, 291–93 (2007).

125. See *supra* notes 63–65 and accompanying text.

126. Letter from Henry Knox to George Washington, *supra* note 33, at 136.

127. *Id.*

128. THE FEDERALIST NO. 24, *supra* note 25, at 133 (Alexander Hamilton).

129. See EDLING, *supra* note 114, 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.”).

130. See, e.g., Letter from Alexander Hamilton to George Mathews (Sept. 25, 1794), in 17 THE PAPERS OF ALEXANDER HAMILTON 270, 273 (Harold C. Syrett ed., 1972) (critiquing Georgia’s Indian policy and arguing that “unless means to restrain, by punishing the violences which those inhabitants are in the habit of perpetrating against the Indians, can be put in execution, all endeavours to preserve peace with them must be for ever frustrated”).

especially important for national unity during the Revolution.¹³¹ And so many Federalists readily adopted this rhetorical tact—a position at odds with their preferred policies—to sell their new Constitution’s most controversial features.¹³² But they would discover, after ratification, that these political concessions had consequences, as many newly minted U.S. citizens took the Federalists at their word on the new government’s function.

C. Constitution of Empowerment in Action: The Northwest Territory

As Daniel Hulsebosch has underscored, the new federal government that the Washington administration built proved less a fiscal-military state than a “fiscal-commercial” one.¹³³ Secretary of the Treasury Alexander Hamilton soon constructed a system of national finance and a funded national debt to expand the federal government’s fiscal resources.¹³⁴ By contrast, although Secretary of War Henry Knox sought to create a professional and disciplined national military, his efforts to expand national oversight over the militia and to bolster the nascent professional army were halting and controversial.¹³⁵

Yet the fledgling federal government’s first substantial challenge nonetheless tested its fiscal-military capacity. “The Indian war,” as Anglo-Americans of the time simply called it (scholars have subsequently labeled it the Northwest Indian War) was fought almost entirely within the newly created Northwest Territory.¹³⁶ This purported federal jurisdiction was a homeland for the Wyandots, Miamis, Delawares, Shawnees, Anishinaabeg, and other nations who confederated to combat U.S. encroachments.¹³⁷ With British support, this Native confederacy insisted on the Ohio River as the boundary between Native and U.S. territory; the federal government, which claimed to have already purchased much Native land beyond this line, resisted.¹³⁸ Ultimately, federal military might prevailed. At the ensuing Treaty of Greenville, federal negotiators forced the defeated Native nations to cede the United States most of present-day Ohio.¹³⁹

This capsule summary is as much attention as the conflict receives in most histories of the 1790s—largely because the conflict and its outcome feel so familiar. In hindsight, the Northwest Indian War appears part of an unbroken history of violence against Native peoples that stretched backward to contact

131. PETER SILVER, *OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA* 83–90 (2008).

132. Ablavsky, *Savage Constitution*, *supra* note 1, at 1058–71.

133. Daniel J. Hulsebosch, *Constitution-Making in the Shadow of Empire*, 56 *AM. J. LEGAL HIST.* 84, 84–91 (2016).

134. *See generally* Edling, *supra* note 124.

135. KOHN, *supra* note 117, at 128–39.

136. On the Northwest Indian War, see generally COLIN CALLOWAY, *THE VICTORY WITH NO NAME: THE NATIVE AMERICAN DEFEAT OF THE FIRST AMERICAN ARMY* (2014); WILLIAM H. GUTHMAN, *MARCH TO MASSACRE: A HISTORY OF THE FIRST SEVEN YEARS OF THE UNITED STATES ARMY, 1784–1791* (1974); KOHN, *supra* note 117.

137. *See generally* ERIC HINDERAKER, *ELUSIVE EMPIRES: CONSTRUCTING COLONIALISM IN THE OHIO VALLEY, 1673–1800* (1997).

138. *See* CALLOWAY, *supra* note 136, at 146–48.

139. Treaty of Peace, Aug. 3, 1795, 7 Stat. 49.

and lasted for most of the nineteenth century. These conflicts unfolded similarly: Anglo-Americans arrogated sovereignty and ownership over North America to themselves and, ultimately—through overwhelming force and raw, sometimes genocidal, violence—the federal government crushed Native peoples’ armed resistance to these claims.¹⁴⁰ As with subsequent conflicts, it was not clear that Anglo-Americans considered the Northwest Indian War a “war” in a legal or constitutional sense; Congress never declared war but merely authorized the president to federalize the state militia.¹⁴¹

But reading the Northwest Indian War as simply the first instance when the U.S. Army violently suppressed Native resistance against U.S. imperialism ignores how seriously the conflict challenged the nascent federal government. Unlike later Indian wars, the United States nearly lost, with two federal expeditions suffering catastrophic defeats. The second expedition, in fall 1791, lost two-thirds of its men at the hands of the Northwest Confederacy; this unnamed battle remains the worst defeat that the United States ever suffered at Native hands.¹⁴² The new U.S. Army seemed incapable of maintaining discipline or supplying its own troops, even as the conflict led British officials to talk openly about an imminent renewed war with the United States.¹⁴³ Ultimately, the federal government prevailed—but only after it spent four years, and over half of the new nation’s budget, to equip and dispatch a far better trained and equipped fighting force that eked out an ambiguous victory at the Battle of Fallen Timbers.¹⁴⁴ Even then, historians have argued that U.S. success was owed more to diplomatic than military victories, as the United States persuaded the British to abandon their Native allies, forcing Native nations to the bargaining table.¹⁴⁵

The Northwest Indian War, then, was the most significant early test of the Federalist state and one that the new nation nearly failed. It was also, relatedly, markedly controversial among Anglo-Americans.¹⁴⁶ But the war’s politics did not map neatly onto the nascent Republican-Federalist divide, instead revealing a more complicated history of who in the early United States embraced the fiscal-military state and why.

Partisanship certainly shaped many responses to the war. Many Jeffersonians, for instance, thought the war an unnecessary and pretextual effort to justify an expanded military. Jefferson himself weakly supported the conflict but thought that more assiduous efforts at peace would have been salutary. “Every rag of an Indian depredation will otherwise serve as a ground to raise troops with those who think a standing army and a public debt

140. See generally FRED ANDERSON & ANDREW R. L. CAYTON, *THE DOMINION OF WAR: EMPIRE AND LIBERTY IN NORTH AMERICA, 1500–2000* (2005).

141. See generally Adam Mendel, Note, *The First AUMF: The Northwest Indian War, 1790–1795, and the War on Terror*, 18 U. PA. J. CONST. L. 1309 (2016).

142. CALLOWAY, *supra* note 136, at 6.

143. *Id.* at 5.

144. ABLAVSKY, *supra* note 1, at 139–68.

145. CALLOWAY, *supra* note 136.

146. See *infra* notes 156–57 and accompanying text.

necessary for the happiness of the U.S.,” he observed, “and we shall never be permitted to get rid of either.”¹⁴⁷ Others were similarly skeptical of Knox’s motives. “I have a great respect for the War officer,” one proto-Republican senator wrote Washington, “but he appears to me to be anxiously desirous of having a considerable standing military force, all his views in my estimation tend to that end.”¹⁴⁸

Yet Knox was no warmonger. In his lengthy reports to Washington, the secretary of war had repeatedly advocated peace with Native nations: “[t]he United States can get nothing by an Indian war,” he wrote, “but they risque men, money and reputation.”¹⁴⁹ Yet for Knox, peace would come only by robustly applying the constitution of constraint against “lawless” whites and Native peoples alike. The Northwest Indian War began when Knox authorized a targeted expedition to “extirpate, utterly . . . banditti” Indians, one that would function similarly to the later expeditions against the Whiskey rebels.¹⁵⁰ “[T]he vengeance of the Union is to be pointed only against the perpetrators of the mischief,” Knox stressed, “and not against the friendly nor even neutral tribes.”¹⁵¹

Confident in the purity of his intentions, Knox badly miscalculated. Since the birth of the United States, Native peoples in the Ohio country had suspected that the new nation intended to exterminate them and take their lands.¹⁵² They were not wrong. Many Anglo-Americans sought to do just that, as events like the 1782 Gnadenhutzen Massacre—in which the Pennsylvania militia cold-bloodedly killed nearly one hundred pacifist Delawares—demonstrated.¹⁵³ The federal invasion seemingly confirmed Native peoples’ fears that the United States’ talk of peace was mere trickery; here, it seemed, was proof of the nation’s true intent. As a result, Knox’s targeted expedition quickly brought about the full-blown war that the secretary sought so desperately to avoid.

Once the initial expedition ended in disaster for the U.S. Army, however, the need to prove federal power became its own justification. Believing that establishing the new nation’s overwhelming force was the only way to secure lasting peace, Knox immediately began planning another, larger assault. “The great object of the campaign will be, to convince the indians of the

147. Letter from Thomas Jefferson to James Monroe (Apr. 17, 1791), in 20 THE PAPERS OF THOMAS JEFFERSON 234, 236 (Julian P. Boyd ed., 1950).

148. Letter from Benjamin Hawkins to George Washington (Feb. 10, 1792), in 9 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 32, at 554, 556.

149. Report of Henry Knox to President Washington, *supra* note 46.

150. Letter from Henry Knox to Josiah Harmar (June 7, 1790), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 9, at 97, 97.

151. Letter from Henry Knox to Arthur St. Clair (June 7, 1790), in 2 THE ST. CLAIR PAPERS: THE LIFE AND PUBLIC SERVICES OF ARTHUR ST. CLAIR 147, 148 (William Henry Smith ed., Cincinnati, Robert Clarke Co. 1882).

152. Jeffrey Ostler, “To Extirpate the Indians”: *An Indigenous Consciousness of Genocide in the Ohio Valley and Lower Great Lakes, 1750s–1810*, 72 WM. & MARY Q. 587, 587–622 (2015).

153. SILVER, *supra* note 131, at 267–76; Rob Harper, *Looking the Other Way: The Gnadenhutzen Massacre and the Contextual Interpretation of Violence*, 64 WM. & MARY Q. 621, 621–44 (2007).

futility of resistance,” he told President Washington, “and of the absolute necessity of submitting to the justice and mercy of the United States.”¹⁵⁴ When that campaign failed even more spectacularly, Knox became even more resolute, advocating increasing the army to over 5000 regular soldiers—a number Congress found wildly inflated.¹⁵⁵

The Northwest Indian War was deeply uncomfortable for Knox and other Federalists, as they defended a conflict flatly at odds with their professed aims. Many of their constituents recognized, and resented, this contradiction. “I was a little surprized to find that the Indian War is extremely unpopular in New England,” Washington’s personal secretary reported from the nation’s most Federalist region.¹⁵⁶ “I have not heard it mentioned by a single person who did not consider it as arising rather from a wish on the part of the United States to obtain lands to which they have no just claim”—the exact opposite principle from what Knox sought to establish as the foundation for the nation’s policy toward Native nations.¹⁵⁷

Pressured, Knox and Washington publicly issued a statement to justify the conflict.¹⁵⁸ This was a revealing document. In it, they described the federal government’s assiduous efforts to maintain peace, but they also offered a parade of the perfidious acts of Native peoples, recounting the “barbarous warfare practised by the Indians”¹⁵⁹ and ritually invoking “the tomahawk and scalping-knife.”¹⁶⁰ And they vindicated the war by appealing to the federal government’s purpose. “To obtain protection against lawless violence, was a main object for which the present government was instituted. It is, indeed, a main object of all government,” they recited.¹⁶¹ “[T]he obligation of the government of the United States, to afford the requisite protection, cannot be less sacred in reference to the inhabitants of their Western, than to those of their Atlantic Frontier.”¹⁶²

What is striking about this statement is how sharply it conflicted with the personal views of both Knox and Washington, who both privately bemoaned invocations of the anti-Indian sublime.¹⁶³ Moreover, the document’s vision of the federal role cast aside the constitution of constraint that the two men

154. Letter from Henry Knox to George Washington (Feb. 22, 1791), in 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 32, at 402, 403.

155. CALLOWAY, *supra* note 136, at 142.

156. Letter from Tobias Lear to George Washington (July 21, 1792), in 10 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 32, at 556, 558.

157. *Id.*

158. Henry Knox, The Causes of the Existing Hostilities Between the United States, and Certain Tribes of Indians North-West of the Ohio (Jan. 26, 1792), *reprinted in* 2 THE TERRITORIAL PAPERS, *supra* note 34, at 359.

159. *Id.* at 360.

160. *Id.* at 364.

161. *Id.* at 365–66.

162. *Id.* at 366.

163. *See, e.g.*, Letter from George Washington to Edmund Pendleton (Jan. 22, 1795), in 17 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 32, at 424, 425 (“[I]gnorant Savages . . . poor wretches, have no Press thro’ which their grievances are related; and it is well known, that when one side only of a Story is heard, and often repeated, the human mind becomes impressed with it, insensibly . . .”); *supra* note 149 and accompanying text.

had long advocated for in favor of what we might call frontier constitutionalism—the constitutional views espoused by the white residents of Kentucky, the Northwest Territory, western Pennsylvania, and the new nation’s other borderlands.

Like the citizens of the Southwest Territory, white inhabitants of the Northwest Territory had little patience for the constitution of constraint and readily condemned any government official who opposed their calls for violence. “[W]hoever should attempt to preserve Peace with Indians was instantly denounced as an Indian Friend,” Governor Blount reported from the Southwest Territory, “and the Cry accordingly raised against him.”¹⁶⁴ In the Northwest Territory, residents reportedly plotted to assassinate their arch-Federalist governor for his pro-Native views.¹⁶⁵ In both territories, angry constitutional arguments filled the newspapers, with authors cribbing revolutionary complaints to argue for local autonomy against supposedly heavy-handed federal rule.¹⁶⁶

Yet territorial citizens were not Jeffersonians. They, unlike Jefferson, were eager advocates of a federal fiscal-military state—so long as it acted in their interests.¹⁶⁷ Knox’s assertions about western citizens’ entitlement to federal protection could have been lifted from the territorial newspapers, which routinely invoked this constitutional claim to demand federal aid.¹⁶⁸ Moreover, the borderlands’ economy benefited enormously from the federal invasion. Nearly overnight, the war turned Cincinnati into a boomtown, while Kentucky, one observer noted, was “more full of Money arising from . . . the army North of Ohio than any other Part of America.”¹⁶⁹

The similarity between the administration’s pronouncement on the war’s causes and frontier constitutionalism was not accidental, as the administration deliberately adopted borderlands legal rhetoric to placate restive territorial citizens. Federal military force was the method most likely “to attach the people of the frontiers to the government of the United States,” Knox stated in justifying the expedition into Indian country.¹⁷⁰ Later, in further selling the campaign, Knox noted that it was a “circumstance of no small importance, that the desultory operations will be highly acceptable to the Kentucky district, and other frontier counties.”¹⁷¹ Knox’s comments

164. Letter from William Blount to Alexander Kelley & Littlepage Sims (Dec. 1, 1795), in 4 THE TERRITORIAL PAPERS, *supra* note 34, at 408, 410.

165. WINTHROP SARGENT, POLITICAL INTOLERANCE OR THE VIOLENCE OF PARTY SPIRIT; EXEMPLIFIED IN A RECENT REMOVAL FROM OFFICE 17–18 (Boston, Benjamin Russell 1801).

166. See ABLAVSKY, *supra* note 1, at 132–36.

167. See PATRICK GRIFFIN, AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER 241 (2007) (“Westerners—even those inclined still to view Indians as redeemable—believed that nothing less than the state securing the West by vanquishing Indians and removing them from white settlement areas could rescue it from disorder.”).

168. ABLAVSKY, *supra* note 1, at 187–91.

169. WILLIAM H. MASTERTON, WILLIAM BLOUNT 254 (1954).

170. Henry Knox, Report to the President of the United States upon the Operations to be Adopted for the Ensuing Year upon the Frontier (Mar. 19, 1791) (on file with Northwest Territory Collection, Indiana Historical Society, Box 1, Folder 36, p. 2).

171. Letter from Henry Knox to George Washington, *supra* note 154, at 406.

found echoes among other Federalists, who similarly saw the conflict as a chance to demonstrate their commitment to frontier citizens: “Congress has little occasion to make itself known to them except by acts of protection,” one Massachusetts Federalist wrote.¹⁷²

This evidence suggests two points. First, the Northwest Indian War underscored how little Federalists controlled the meaning of federal power in the early United States. The war was as much a Federalist project as their effort to secure peace through restraining U.S. citizens was; in fact, Knox saw them as interrelated projects. But the war’s course and implications were largely determined by those *outside* the administration. Despite Knox’s intentions, Native nations in the Ohio country reasonably interpreted the U.S. invasion of their homelands not as a targeted attack on “renegade” Native peoples but as proof that the administration’s rhetoric of peace masked its true intent to fulfill whites’ long-standing aspirations to extirpate Native peoples.¹⁷³ Similarly, territorial citizens took the conflict as vindication of their vituperative anti-Indian rhetoric. They had successfully argued that their right of protection mandated federally supported violence against their supposed enemies.

Yet, and second, the forces of popular constitutionalism did not simply overpower the supposedly antipopulist Federalists. Rather, saddled with an expensive and controversial war, the Washington administration calculatedly adopted the principles and rhetoric of the frontier constitutionalism it purported to despise. As this reversal demonstrated, the Federalists not only failed to anticipate how poorly filtration would function, but they also had not guessed how quickly they too would succumb to the power of politics to shape constitutional meaning. Just as during ratification, Federalists’ eagerness to placate some of their citizens helped make a supposedly impartial federal government into an instrument of brutal violence against Native peoples.

D. Explaining the Flourishing of the Constitution of Empowerment

In 1807, shortly after much of the Northwest Territory became the state of Ohio, Joseph Buell wrote to an unknown correspondent on “business of trifling consequence.”¹⁷⁴ Buell wanted to know what to do with a small cannon provided by the federal government “in the time of the Indian war” during “our former stage of government.”¹⁷⁵ The gun’s “principal use” now, he reported, was the “discharging of it on the 4th of July, Reechoing the toasts drank in contempt to the Gen[era]l Government.”¹⁷⁶

172. Letter from Fisher Ames to Rufus Putnam (Feb. 22, 1791), in *THE MEMOIRS OF RUFUS PUTNAM AND CERTAIN OFFICIAL PAPERS AND CORRESPONDENCE* 250, 250 (Rufus Putnam ed., 1903).

173. See *supra* note 152 and accompanying text.

174. Letter from Joseph Buell (July 2, 1807) (on file with the Marietta, Ohio, Collection, Ohio Historical Society, Box 4).

175. *Id.*

176. *Id.*

Viewed from the present, Buell's letter presents a familiar contradiction: the beneficiaries of federal largesse spurning the very government that aided them. Certainly, if the Federalists hoped to win the appreciation and support of the region's inhabitants by lavishing them with federal support, they failed. Soon after the war's end, citizens in the Northwest Territory expressed their "acknowledgments and gratitude" that the federal government had "expended the whole revenue of the union for several years, in order to afford us ample protection"—right before launching into a litany of complaints and attacks on federal policy.¹⁷⁷ In the end, the new state of Ohio, formed from the former territory, became just as staunchly Republican as Tennessee, with most residents eagerly supporting President Jefferson's policies.¹⁷⁸

Yet Buell's letter exemplifies less a paradox than a long-standing fight over the purpose of the federal government. Having created a newly empowered national government, Federalists discovered that they could not easily control how this strengthened state was deployed. Citizens long resented federal efforts to constrain them but eagerly seized the fiscal-military state to serve their own ends. For their part, the Jeffersonians, now elevated to power, did little to alter the militaristic approach they had earlier condemned.¹⁷⁹ Both during the military campaigns of William Henry Harrison against a renewed Native confederacy under Tecumseh and then during the wider conflict of the War of 1812, Jefferson and his copartisans deployed federal fiscal and military resources toward U.S. expansion just as the Federalists had done.¹⁸⁰ And just as with the Federalists, this outcome reflected less hypocrisy than politics: though Jefferson was still personally ambivalent about the federal state and westward expansion, many in the Republican coalition, especially in the West, readily pushed the constitution of empowerment. In the end, the Republicans proved no more consistent, or adept, at controlling the constitution's meaning than their predecessors. And once again, the consequence was that federal power was wielded largely in one direction—against Native peoples who had their own views on the role of the federal government but who were nonetheless excluded from the realm of constitutional politics.

177. *At a Meeting of a Number of the Inhabitants of the Township of Columbia at the House of Mr. William Stanley, on Monday the 25th of January 1796*, CENTINEL N.W. TERRITORY, Feb. 20, 1796.

178. CAYTON, *supra* note 29, at 68–94.

179. 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, 360–82 (James P. Horn et al. eds., 2002). Indeed, although Buell's letter provides little detail, the toasts at issue may have been Federalist attacks on the Jeffersonian embargo.

180. *See generally* ADAM JORTNER, *THE GODS OF PROPHETSTOWN: THE BATTLE OF TIPPECANOE AND THE HOLY WAR FOR THE AMERICAN FRONTIER* (2011); ROBERT M. OWENS, *MR. JEFFERSON'S HAMMER: WILLIAM HENRY HARRISON AND THE ORIGINS OF AMERICAN INDIAN POLICY* (2007).

CONCLUSION

The conventional story of the Federalist Constitution is one of retreat: after a brief reign, the Federalists largely lost power as Republicans captured the presidency and Congress. Yet their influence endured, this story runs, in the judiciary, as judges like James Kent, Joseph Story, and especially Chief Justice John Marshall checked states' efforts to interfere with national authority, enshrined the law of nations, and protected so-called "vested rights" to property.¹⁸¹

Yet even as Marshall embraced the constitution of constraint, he proved an equally robust defender of the constitution of empowerment—sometimes at the same time. The 1810 case of *Fletcher v. Peck*,¹⁸² for instance, is hailed as the origin of Marshall's Contract Clause¹⁸³ jurisprudence, as the Chief Justice held that Georgia's legislature could not invalidate an earlier 1795 sale of millions of acres of western territory to land companies.¹⁸⁴ Yet at the same time, Marshall endorsed, in a sentence, Georgia's right to sell the land even while federal treaties guaranteed Native ownership.¹⁸⁵ Marshall's aside disregarded a decade of legal contentions in which the Washington administration and others had repeatedly insisted that Georgia had no legal or constitutional right to sell land it did not own.¹⁸⁶

Fletcher prefigured *Johnson v. M'Intosh*,¹⁸⁷ Marshall's 1823 decision that defined Native title as a mere right of occupancy.¹⁸⁸ *Johnson* is a strikingly complex decision in which Marshall at once advanced standard Anglo-American attacks on Native ownership even as he distanced himself from them.¹⁸⁹ Yet, under the constitution of constraint, *Johnson* was a pretty easy case: both British and federal law barred individuals from purchasing Native title.¹⁹⁰ Rather than simply invoking positive law, though, Marshall penned a much more expansive decision that endorsed Anglo-Americans' rights to

181. LEONARD & CORNELL, *supra* note 10, at 85–112.

182. 10 U.S. (6 Cranch) 87 (1810).

183. U.S. CONST. art. I, § 10, cl. 1.

184. *Fletcher*, 10 U.S. (6 Cranch) at 87.

185. *Id.* at 142–43 (“The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all Courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State.”).

186. See Thomas Jefferson, Opinion on Certain Georgia Land Grants (May 3, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, *supra* note 147, at 406, 407 (concluding that, under the Constitution, Georgia “could not convey, what she had not herself, that is, the means of acquiring”). On the controversy over ownership of the Yazoo lands, compare ABRAHAM BISHOP, GEORGIA SPECULATION UNVEILED, pt. 2 (Hartford, Hudson & Goodwin 1798) (arguing that Georgia lacked ownership), with ROBERT GOODLOE HARPER, THE CASE OF THE GEORGIA SALES ON THE MISSISSIPPI CONSIDERED (Philadelphia, Richard Folwell 1799) (arguing that Georgia owned the Yazoo lands).

187. 21 U.S. (8 Wheat.) 543 (1823).

188. *Id.* at 574.

189. *Id.*; see also Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 G.W. L. REV. 329, 329 (2006) (describing *Johnson* as “one of the stranger opinions in American jurisprudence” in which “Chief Justice Marshall is elegiac, triumphal, and recurrently ambivalent toward his own reasoning”).

190. *Johnson*, 21 U.S. (8 Wheat.) at 604.

own, buy, and sell title to Native lands even before Native peoples had ceded any rights.¹⁹¹

As a result, *Johnson* quickly became a key text in the constitution of empowerment. Kent cited to the case in his influential *Commentaries on American Law* to describe Native peoples as “separate, subordinate, and dependent.”¹⁹² *Johnson* also emboldened states. In the late 1820s and 1830s, as Georgia, Alabama, Tennessee, and other states began to aggressively assert a long-standing claim that they had absolute jurisdiction over their entire territories, they routinely invoked Marshall’s decision to vindicate their rights. When the Cherokee Nation and its allies responded that federal law recognized their sovereignty and invalidated the states’ actions—invoking, in short, the constitution of constraint, just as earlier Cherokee leaders had done—Southerners replied that *Johnson* was “the death blow to this new doctrine of Indian sovereignty.”¹⁹³

In the end, Marshall disagreed with this interpretation. In *Worcester v. Georgia*,¹⁹⁴ the Chief Justice endorsed a vision of federal supremacy over Indian affairs that foreclosed Georgia’s assertion of jurisdiction, an embrace of the constitution of constraint that might have been cribbed from Henry Knox. But Marshall’s belated change of heart could not erase the principles he had earlier established. Two years after *Worcester*, Chief Justice John Catron of the Tennessee Supreme Court (soon to be a Justice of the U.S. Supreme Court) defied the Court’s decision and upheld state jurisdiction over the Cherokee.¹⁹⁵ Catron cited Marshall against Marshall: “In this conclusion we are fortified by the great and well considered case of *Johnson* against *M’Intosh*; the reasoning in which, by the same distinguished jurist, it must be admitted, if not in direct opposition, is greatly in conflict with *Worcester*’s case.”¹⁹⁶

Worcester famously prompted a confrontation between Marshall and Tennessee’s first congressman: now president Andrew Jackson. If Marshall was a latter-day defender of Federalist constitutionalism, Jackson appears as its antithesis, a populist whose impatience with law’s restraints was sharply at odds with what Washington, Hamilton, and Knox had envisioned for the new republic.¹⁹⁷

The young Jackson had certainly been no fan of the Federalists and had had particular contempt for the constitution of constraint. He mocked Knox and others who thought that “humanity dictates” the pursuit of peace through

191. *Id.* at 573–74.

192. JAMES KENT, 3 COMMENTARIES ON AMERICAN LAW 309–10 (New York, O. Halstead 1828).

193. 6 REG. DEB. 1032 (1830) (statement of Rep. Thomas F. Foster); *see also id.* at 1117 (statement of Rep. Henry G. Lamar) (citing *Johnson* to argue that Georgia has control over its own territory).

194. 31 U.S. (6 Pet.) 515 (1832).

195. *State v. Forman*, 16 Tenn. (1 Yer.) 256, 277–78 (1835).

196. *Id.* at 287–88.

197. *See generally* J. M. OPAL, AVENGING THE PEOPLE: ANDREW JACKSON, THE RULE OF LAW, AND THE AMERICAN NATION (2017).

treaties.¹⁹⁸ Congress “ought to Extend an Equal share of humanity to her own Citizens,” Jackson fulminated, by “Punish[ing] the Barbarians for Murdering her Innocent Citizens.”¹⁹⁹ Reportedly, Jackson acted on this belief by serving as a private in James Ore’s brutal destruction of the Cherokee town of Nickajack.²⁰⁰

Yet Jackson and his ideology were less a repudiation of Federalist constitutionalism than a fulfilment of some of its key legacies. Like the Federalists, Jackson, too, drew his legal understandings from the Constitution and Emer de Vattel’s *The Law of Nations*; he just consistently read them in a single direction, to authorize and vindicate his uses of power rather than restrain them.²⁰¹ Similarly, for all his vaunted hostility toward the Federalist financial machinery, Jackson proved remarkably adept at exploiting the federal government’s expansive fiscal-military powers to rampage through the borderlands. From Ore’s expedition through the slaughter of the Creek Nation during the War of 1812 and the invasion of Spanish Florida during the First Seminole War, Jackson deployed federal authority, federal soldiers, federalized militias, and federal finance toward his own ends, defying the limits his superiors sought to impose.²⁰²

The process euphemistically called “Indian Removal” that followed Marshall’s abortive *Worcester* decision was thus the capstone to Jackson’s exploitation of federal power. This brutal and incompetently executed mass expulsion of Native peoples from their homelands came at states’ behest, but federal authority underwrote and enacted it.²⁰³ Ultimately, the “Indian Removal” cost the federal government \$75 million, a sum historian Claudio Saunt calculates as the equivalent of a trillion dollars in the present.²⁰⁴ He estimates that, in peak years, 40 percent of every federal dollar went to fund the deportation.²⁰⁵

Over the past few years, historians have hotly debated how straight a line to draw between the policies adopted at the moment of the Constitution’s creation and the brutal, even genocidal, practices against Indigenous peoples that came to characterize Anglo-American imperialism.²⁰⁶ Lawyers have

198. Letter from Andrew Jackson to John McKee (May 16, 1794), in 1 THE PAPERS OF ANDREW JACKSON, *supra* note 79, at 48, 48.

199. *Id.* at 48–49.

200. OPAL, *supra* note 197, at 93–102.

201. *Id.* at 5–14; see DEBORAH A. ROSEN, BORDER LAW: THE FIRST SEMINOLE WAR AND AMERICAN NATIONHOOD 72–101 (2015).

202. OPAL, *supra* note 197, at 137–43.

203. See CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY 117–41 (2020).

204. *Id.* at 308.

205. *Id.*

206. See, e.g., JEFFREY OSTLER, SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS (2019); ROBERT A. WILLIAMS JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Gregory Evans Dowd, *Indigenous Peoples Without the Republic*, 104 J. AM. HIST. 19 (2017); Benjamin Madley, *Reexamining the American Genocide Debate: Meaning, Historiography, and New Methods*, 120 AM. HIST. REV. 98 (2015); Ostler, *supra* note 152.

slowly begun to enter this argument, too.²⁰⁷ In this debate, historians' long-standing depictions of the Federalists as well-intentioned but ineffectual policymakers, unable to thwart the Indian-hating whites of the borderlands, appears at best unpersuasive and at worse an "effacement of U.S. settler colonialism."²⁰⁸

Part of the difficulty of this debate is that it seeks to identify a single core to Federalist views. But no such core existed, as the Federalists, like others in the early republic, embraced divergent positions. On the one hand, the Federalists did not represent an egalitarian, anti-racist path not taken: their views on Native peoples were condescending, thoroughly imperialist, and at times exterminatory. On the other hand, their limited embrace of "Indian rights" and autonomy was more than a mere sop to Native power; they sincerely believed in these commitments. In this sense, their seemingly contradictory efforts to guard Cherokee land while also forcibly seizing Wyandot territory were both *Federalist* policies.

Also missing from this debate is politics. Whether valorized or condemned, fixating on the Federalists and their views maintains them as the key actors. In practice, though, more clout lay with Native leaders and borderlands citizens, who made competing demands on the federal government. Navigating between these claims, Knox, Washington, and other Federalists sought, often fruitlessly, to placate both groups. The result was that the federal government simultaneously embraced robust acknowledgment of Native sovereignty *and* exterminatory anti-Indian violence. These vacillations between the two strands of Federalist constitutionalism underscore that, in the end, the Federalists were politicians, if not particularly good ones.

This history suggests a broader point about the political and constitutional history of the early republic. Usually, this period's politics are narrated as a struggle over the scope of federal power: Federalist (and later Whig) nationalists pit against Republican (and later Democratic) defenders of states' rights and strict construction.²⁰⁹ This account depicts the parties' frequent breaks from this ideological script—Jefferson reluctantly endorsing the Louisiana Purchase or the Federalists plotting secession at Hartford—as hypocrisies and ironic concessions to power.

But the meaning of federal authority in the early republic was not as coherent or clear as this narrative posits. The enumeration in Article I, Section 8 notwithstanding, the federal government was not *for* any particular purpose. Rather, it was at once a tool, a resource, and a battleground for competing views. As the two Federalist constitutional visions traced here demonstrate, the Federalists were themselves inconsistent on federal power's

207. See, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019).

208. Patrick Wolfe, *Against the Intentional Fallacy: Legocentrism and Continuity in the Rhetoric of Indian Dispossession*, 36 AM. INDIAN CULTURE & RSCH. J. 1, 4 (2012).

209. See, e.g., FORREST McDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876 (2000).

uses. These contradictions made space for those with their own interpretations of the federal role, including Natives and territorial citizens, who seized on different parts of the Federalist project for their own ends. In the end, Native perspectives on the Constitution largely lost, while whites' frontier constitutionalism prevailed. But this outcome reflected more than Federalist betrayal. It was the overdetermined outcome of a system that placed Native peoples on the outside, limiting their very real power to the military and diplomatic realms, even as their opponents manipulated the clout that politics out-of-doors and popular constitutionalism afforded them.