DENYING THE VIOLENCE: THE MISSING CONSTITUTIONAL LAW OF CONQUEST

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TABLE OF CONTENTS

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INTRODUCTION

> *If against these Indians, the end proposed should be their extermination, or their removal beyond the lakes or Illinois [R]iver. The same world will scarcely do for them and us.*
>
> —Thomas Jefferson to George Rogers Clark, 1780[1]

The United States committed at least two original sins. The one, slavery, is well known. The other, conquest, is both obvious and unknown at the same time.

The Constitution was designed and implemented to facilitate American empire. The country we now know grew from a narrow strip of colonies along the east coast to encompass much of a continent, from sea to shining sea. It grew purposefully, through powers newly granted in the Constitution. The conquest of native America happened pursuant to the Constitution.

The fact of conquest is proven by the sheer magnitude of the land transfer from indigenous people to white Americans.[2] Before the conquest, native Americans possessed all 1.9 billion acres of the continental United States.[3] After the conquest, they retain only 56 million acres of land held "in trust" by the United States, together with some land owned by natives in fee simple.[4] This number is two one-hundredths of one percent (.02%) of what they owned prior to conquest. Over time, non-Indians, mostly whites, managed to take 99.98% of the continental lands originally inhabited by Native peoples. Most of the natives who survived were removed to isolated

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1 *From Thomas Jefferson to George Rogers Clark* (Jan. 1, 1780), NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-03-02-0289 [https://perma.cc/5ABD-23R2].

2 It is important to make clear what I mean by "conquest." As I use the term, "conquest" means the forcible seizure of land from indigenous people. Such forcible seizure can occur through the violence of military force, as by invasion and occupation, or by coercion, under the threat of violence or physical harm.

3 *The Indicator: The U.S. Has Nearly 1.9 Billion Acres of Land. Here's How It Is Used*, NAT'L PUB. RADIO (July 26, 2019), https://www.npr.org/2019/07/26/745731823/the-u-s-has-nearly-1-9-billion-acres-of-land-heres-how-it-is-used [https://perma.cc/WY6J-RJW2].

4 U.S. DEP'T OF THE INTERIOR, *Native American Ownership and Governance of Natural Resources*, NAT. RES. REVENUE DATA, https://revenuedata.doi.gov/how-it-works/native-american-ownership-governance/ [https://perma.cc/493W-MBML].

reservations located in the parts of this country that were least desirable to whites.

This transfer of land is one of the monumental facts of American history. It demands further explanation. As described by legal scholar Robert A. Williams, Jr., "[t]he history of the American Indian . . . reveals that a will to empire proceeds most effectively under a rule of law."[5] Alexis De Tocqueville came to a similar conclusion regarding the effectiveness of law in dispossessing Native Americans. Writing in 1835, Tocqueville witnessed the removal of Cherokees from North Carolina:

> [T]he Americans of the United States have accomplished this twofold purpose [the extermination of Indians and deprivation of their rights] with singular felicity; tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.[6]

As I shall show, Tocqueville was wrong in stating that no blood was shed. He describes a fictively orderly, glossy, legal surface of the conquest while minimizing the warfare and violence that actually accomplished it.

Interestingly, constitutional law has taken little or no account of how westward expansion happened and of the role of the Constitution in this expansion. Most theorists of constitutional law, and most authors of constitutional law casebooks, have ignored entirely one of the most momentous developments in our national identity: the acquisition of its land, which forms the now-familiar silhouette of the lower forty-eight states. How can it be that the making of the United States, the conquest of this huge part of the American continent, has generated such little attention among many of the most prominent scholars of the Constitution?

It would be one thing if the Constitution had little or nothing to do with the conquest. Then silence might make sense. But the Constitution, improving upon the weaknesses perceived in the Articles of Confederation, provided Congress with powers to create and support an Army, commanded by a single Commander-in-Chief, and powers to tax and borrow to finance that army.[7] Although there is more to the story, as we shall see, the Constitution made the conquest possible and actual.

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5 ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 325 (1990).

6 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 385–86 (Henry Reeve trans., John C. Spencer 4th ed., 1845).

7 *See* U.S. CONST. art. I, § 8, cls.1, 12; *id.* art. II, § 2, cl. 2.

In addition, usually after the fact, the Supreme Court ratified and justified the conquest of America in numerous decisions. In *Johnson v. M'Intosh*, Chief Justice Marshall adopted the discovery doctrine as the justification for federal control over Indian lands. The discovery doctrine posits that the first (white) European nation to claim lands inhabited by native people shall have a superior and defensible claim against all other (white) European nations. So the British, who claimed prior discovery of its colonial lands, had a defensible claim to the lands populated by its citizens, the alleged discoverers. This is constitutional law: The Court decided that the federal government had the exclusive right to purchase and sell Indian lands.

Johnson v. M'Intosh begins, but does not exhaust, the line of cases in which the Supreme Court ratifies the conquest.[8] Subsequent Court cases clarify that Indian nations are subject to federal plenary power, that a mere federal statute can abrogate a treaty, and that Congress has the power to decide whether constitutional rights apply, or not, to colonial territories.[9] These cases are all constitutional law: the constitutional law of conquest. How is it that most constitutional law casebook authors have not seen fit to include any of this material in their casebooks? Is the conquest and production of our national territory truly less important than, say, the dormant commerce clause?

We must look to the literature of settler colonialism to begin to understand the answers to these questions. It may surprise some readers to learn that the United States is understood to be the quintessential example of settler colonialism in the world. As written by historian Walter Hixson, "American history is the most sweeping, most violent, and most significant example of settler colonialism in world history."[10] Indeed, the United States is the world leader in settler colonialism:

> Inserted in the history of colonialism, America appears less as exceptional and more as a pioneer in the history and technology of settler colonialism. All the defining institutions of settler colonialism were produced as technologies of native control in North America.[11]

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8 For a more balanced and generous view of the Constitution as an instrument of both protection and conquest for native people, see Joseph William Singer, *Indian Nations and the Constitution*, 70 ME. L. REV. 199 (2018).

9 *See, e.g.*, *infra* notes 382–384.

10 WALTER L. HIXSON, AMERICAN SETTLER COLONIALISM: A HISTORY 1 (2013) [hereinafter HIXSON, AMERICAN SETTLER COLONIALISM]. *See also* MAHMOOD MANDANI, NEITHER SETTLER NOR NATIVE: THE MAKING AND UNMAKING OF PERMANENT MINORITIES 22 (2020) ("[T]he United States is the outcome of a history of genocide, ethnic cleansing, official racism, and concentration camps (known as Indian reservations.").

11 Mahmood Mamdani, *Settler Colonialism: Then and Now*, 41 CRITICAL INQUIRY 596, 608 (2015).

Settler-colonial societies like the United States are characterized by disavowal, "the active and interpretive production of indigenous absence. In settler democratic thought, the absence of native conquest is not assumed or forgotten; it is discursively produced."[12] The need to make natives and their histories disappear is a way to resolve the cognitive dissonance between the violent, unjust origins of the society and its present claims to justice and morality. This has been called "the paradox of political founding," which occurs when a "political order is founded on extra-legal violence that stands outside of democratic legitimacy."[13]

As I shall show, the conquest of America happened through military violence and coercion, pursuant to law and official policy. As with slavery, the country's origins were violent and deeply unjust. Given its unjust origins, the only way to regard the United States as a just society is to construct a glorious, positive narrative about its origins and to actively deny the injustice and violence of its founding.

This is exactly what has happened. As I shall show, many theorists and scholars of the Constitution have written about its "glorious past," and constitutional law textbooks, while providing occasional instances of unjust rulings, agree implicitly that the Constitution and its origins are fundamentally sound. This can only be done by minimizing the extent and harm of slavery and by making disappear the violent conquest of native people.[14] This recitation of virtue and omission of harm leave scholars and law students with "'an imaginary relation to actual state colonialism.'"[15]

It is important to recognize that this discussion of American conquest and settler colonialism is, simultaneously, a discussion of early white supremacy in the United States. All of the actors responsible for imagining, pursuing, authorizing, planning, and executing the conquest were white men, cooperating with other white men to establish dominance. This study of the creation and execution of their power to conquer also provides insight on the techniques employed to create and preserve white supremacy.

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12 ADAM DAHL, EMPIRE OF THE PEOPLE: SETTLER COLONIALISM AND THE FOUNDATIONS OF MODERN DEMOCRATIC THOUGHT 4 (2018) [hereinafter DAHL, EMPIRE OF THE PEOPLE].

13 *Id.* at 3.

14 NED BLACKHAWK, VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST 5 (2006) ("[T]hose investigating American Indian history and U.S. history more generally have failed to reckon with the violence upon which the continent was built.") [hereinafter BLACKHAWK, VIOLENCE OVER THE LAND].

15 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 12–13; *see also* Lorenzo Veracini, *Historylessness: Australia as a Settler Colonial Collective*, 10 POSTCOLONIAL STUDS. 271 (2007).

While there is a recent literature on settler colonialism, there are relatively few studies of the relationship between law and settler colonialism.[16] As I shall show, settler colonialism has huge implications for our understanding of what law does.[17] Remarkably, the legal academy has largely ignored these implications. While constitutional law books deal inadequately with slavery and its implications,[18] they have, to date, even less to say about settler colonialism and its implications. This Article seeks to fill this silence by showing how ideology and law, supported by violence, enabled the conquest of America.

The conquest of native America required three things to align. There was desire for conquest, thirst for the land. There was power to conquer. And there was a plan for conquest. Accordingly, the first three parts of the Article correspond to these three aspects of conquest. Part I describes the desire for conquest in two sections: the first covers the British antecedents of conquest in royal charters, legal cases, and philosophy; the second describes the embrace of these ideas by prominent framers of American independence, including Benjamin Franklin and George Washington. Part II describes the development of the powers for conquest, also in two sections: the first describes the Articles of Confederation and their weaknesses with regard to centralized governance of Indian affairs and defense against border violence; the second describes how the Constitution remedied these weaknesses and created the power for conquest. Part III then describes the plan for conquest. Usually described as "glorious" for its detailed description of orderly westward expansion, the Northwest Ordinance provided for the partitioning and governance of land the United States neither possessed nor controlled. Its fulfillment depended on conquest, and so it became the plan for conquest.

Part IV shows how the desire, the power and the plan for conquest came together and were executed. George Washington's little-known Indian Wars (1790–94) eventually yielded the conquest of the Northwest Territory after

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16 *See, e.g.*, NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE AND THE LAW (2020) (studying the development and exercise of plenary power over persons of color). Other excellent works studying the relationship between the constitution and Indian law include Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 HARV. L. REV. 1787 (2019) [hereinafter Blackhawk, *Federal Indian Law*] (demonstrating the extensive influence of colonialism and Indian law on numerous areas of constitutional doctrine) *and* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) (tracing the understated influence of Indians upon the Constitution).

17 Blackhawk, *Federal Indian Law*, *supra* note 16, at 1793 (stating that "this Nation's history with colonialism and federal Indian Law is central to public law").

18 *See* Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123 (2012) ("[T]he authors of constitutional law casebooks sometimes ignore or, more generally, minimize the proslavery interpretation of the Constitution.").

two major defeats by united Indian forces. Here we see the fact of conquest, the violence and the determination of whites seeking to dispossess Indians of their land. Lastly, Part V explores some of the consequences and implications of the conquest. Here I demonstrate how the materials of constitutional law create among lawyers and law students "'an imaginary relation to actual state colonialism.'"[19] In this imaginary there was no white conquest of native America, no violence, and no negative consequences of note. The evidence, however, says differently.

I. DESIRE FOR CONQUEST

A. The British Legacy: The Ideology of Conquest

As English colonists invaded the New World, they brought with them intellectual concepts that helped rationalize and justify their conquest of North America.[20] In 1585, Richard Hakluyt the elder stated succinctly and with prescience the prevailing English view regarding the colonization and conquest of America: "The ends of this voyage [to America] are these: 1. To plant Christian religion. 2. To trafficke [in commerce]. 3. To conquer. Or, to doe all three. To plant Christian religion without conquest will bee hard. Trafficke easily followeth conquest: conquest is not easie."[21]

Though conquest is not easy, it is made easier by demonizing native people. In 1608, Lord Edward Coke's opinion in *Calvin's Case* expressed views of the differences between Christians and "infidels" that were readily adaptable to conquest in the colonies. The lawsuit dealt with rights to sue or maintain an action for land. These rights differed markedly between "infidels" and Christians:

> But a perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action, or get anything within this realm. All infidels are in law perpetui inimici, perpetual enemies . . . for between them,

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19 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 12–13; *see also* Veracini, *supr*a note 15.

20 I use the term "invaded" deliberately. It seems to be the best term to describe arrival with the intention to possess land and to stay, regardless of the wishes of the prior inhabitants. *See* ROXANNE DUNBAR-ORTIZ, INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 39 (2014) ("By the time Spain, Portugal and Britain arrived to colonize the Americas, their methods of eradicating peoples or forcing them into dependency and servitude were ingrained, streamlined, and effective.").

21 ALDEN T. VAUGHAN, ROOTS OF AMERICAN RACISM: ESSAYS ON THE COLONIAL EXPERIENCE 107 (1995).

> as with devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace.[22]

In contrast to these presumptions visited upon non-Christian peoples, fellow European Christians, including Germans, French and Spaniards were deemed alien friends with limited rights to sue.[23] Lord Coke disparaged the relevance of "infidel" laws relative to those of Christian conquerors: "[I]f a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature . . . ."[24] Further laying the ground for conquest, infidels were properly to be judged by the English: "[U]ntil certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes."[25] According to Coke, the foundational laws of Christianity and nature required the imposition of English law and sovereignty upon indigenous infidels.

In addition to Lord Coke, philosopher John Locke's views on property became influential in justifying the dispossession of Indians. Locke viewed Indians as savage children, perhaps teachable, but beginning from a position of ignorance:

> Amongst *children*, *idiots*, *savages*, and the grossly illiterate, what general maxims are to be found? Their notions are few and narrow, borrowed only from those objects, they have had to do with, and which have made upon their senses the frequentist and strongest impressions. A child knows his nurse, and his cradle, and by degrees the play things of little more advanced age. And a young savage has, perhaps, his head filled with love and hunting, according to the fashion of his tribe. But he that from a child untaught, or a wild inhabitant of the woods, will expect these abstract maxims and reputed principles of sciences, will I fear, find himself mistaken. Such kind of general propositions, are seldom mentioned in the huts of *Indians*.[26]

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22 WILLIAMS, *supra* note 5, at 200.

23 Calvin's Case (1608) 77 Eng. Rep. 377, 397.

24 WILLIAMS, *supra* note 5, at 200.

25 *Calvin's*, 77 Eng. Rep at 398.

26 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 64, *in* WORKS OF JOHN LOCKE (Peter H. Nidditch ed., 1975). As a young man, Locke drafted the Fundamental Constitutions of Carolina in 1669. In this early work, Locke saw Indians as ignorant, and regarded their displacement by proper Christians as unjustified: "But since the natives of that place, who will be concerned in our plantation, are utterly strangers to Christianity, whose idolatry, ignorance, or mistake gives us no right to expel or use them ill." Locke feared that discrimination against non-Christians, including Jews and "heathen" natives, would scare them away from Christianity. THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA (Mar. 1, 1669), *available through* THE AVALON PROJECT, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. https://avalon.law.yale.edu/17th_century/nc05.asp [https://perma.cc/8X8D-KJMS].

Locke had reason to know better, as he had extensive knowledge of colonial affairs and of American Indian linguistic and cultural diversity.[27] Locke presumed that Indians, lacking the "general principles" and "abstract maxims" of European science and Christianity, were closer to idiots than to proper English men.[28] In fact, native peoples were sophisticated agriculturalists whose fields were organized differently than those of the English.[29]

Locke's theory of property ownership provided a powerful rationale for Indian dispossession. Locke described a God-given duty to make the land productive through cultivation:

> God gave the world to men in common; but since he gave it to them for their benefit, and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of *the industrious and rational* . . . .[30]

The improvement of property by one's own labor, in particular its cultivation and enclosure, produced the laborer's private ownership of the property: "His labour hath taken it out of the hands of nature, where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself."[31] According to Locke, cultivation and enclosure made the land productive:

> He who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind: for the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land are . . . ten times more than those which are yielded by an acre of land of an equal richness lying waste in common[.]32

Locke's descriptions of property use assumed that landowners would use only as much land as they could make productive, and that the limits of productivity ensured that there would always be more land available for newcomers. Locke's views on property and agriculture were widely shared. For example, Governor John Winthrop of the Massachusetts Bay Colony, writing in the 1630s, stated that "that which lies in common, and hath never

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27 KATHY SQUADRITO, LOCKE AND THE DISPOSSESSION OF THE AMERICAN INDIAN, *in* JULIE K. WARD & TOMMY L. LOTT, PHILOSOPHERS ON RACE: CRITICAL ESSAYS 103 (2002).

28 *Id.* at 103–04.

29 DUNBAR-ORTIZ, *supra* note 20, at 30–31.

30 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 15 (C. B. Macpherson ed., 1980) (emphasis added).

31 *Id.* at 14. *See* Barbara Arneil, *The Wild Indian's Venison: Locke's Theory of Property and English Colonialism in America*, 44 POL. STUDS. 60, 63 (1996) [hereinafter cited as Arneil, *Wild Indian's Venison*].

32 LOCKE, *supra* note 30, at 17.

been replenished or subdued is free to any that possesse and improve it . . . . if we leave them sufficient for their use, we may lawfully take the rest, there being more than enough for them and us."[33]

In contrast to the productivity of the "industrious and rational" English, Locke viewed native American land uses as waste:

> For I ask, whether in the wild woods and uncultivated waste of America, left to nature, without any improvement, tillage or husbandry, yield the needy and wretched inhabitants as many conveniencies of life, as ten acres of equally fertile land do in Devonshire, where they are well cultivated?[34]

Locke was wrong, for many Indian nations engaged extensively in agriculture, just with a different form than enclosed English farms.

Following Locke, English colonists were fulfilling God's plan for them by dispossessing Indians who were letting their land go to waste. Locke preferred to appropriate land "by industry rather than force."[35] This meant, however, that Indians would have to resemble English cultivators, as judged by the English, to retain possession of their lands.[36]

Locke's theory of property has been viewed by many historians as justification for the dispossession and displacement of native Indians. In one historian's view, "[a]ware that Indians in the New World could claim property through the right of occupancy, Locke developed a theory of agrarian labour which would . . . specifically exclude the American Indian from claiming land."[37] Whether or not Locke's intent was to exclude Indians from property ownership, his ideas were useful to settler colonialists who were intent on dispossessing Indians and removing them from their land.[38]

In addition to Locke, Swiss philosopher Emmerich de Vattel, author of *Law of Nations* (1758), was influential in colonial and early national America.[39] In the United States, he was regarded as the foremost authority on war and

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33 John Winthrop, 2 WINTHROP PAPERS 141 (1931) (Mass. Hist. Soc'y ed., 1931), *quoted in* SQUADRITO, *supra* note 27, at 107.

34 *Id.* at 24.

35 Arneil, *Wild Indian's Venison*, *supra* note 31, at 72.

36 *Id.* at 73–4. Interestingly, Locke was skeptical of the idea that violent conquest transferred property ownership to the conquerors.

37 Barbara Arneil, *John Locke, Natural Law and Colonialism*, 13 HIST. OF POL. THOUGHT 587, 603 (1992).

38 SQUADRITO, *supra* note 27, at 107; *but see id.* at 121 (noting that Locke's "agricultural argument simply did not play the vital role in dispossession that some scholars have assigned to it").

39 Ian Hunter, *Vattel in Revolutionary America: From the Rules of War to the Rules of Law*, *in* BETWEEN INDIGENOUS AND SETTLER GOVERNANCE 12 (Lisa Ford & Tim Rowse eds., 2012).

law.[40] Like Locke, Vattel distinguished between civilized peoples who cultivated the land and savages who did not conform to European standards. Vattel argued that Europeans, "finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies."[41] Vattel also offered a rationale for exterminating Indians: "[T]hose nations that inhabit fertile countries but disdain to cultivate their lands and chuse rather to live by plunder . . . deserve to be extirpated as savage and pernicious beasts."[42] Presumed civilized European nations, according to Vattel, enjoyed the right of "punishing and even exterminating . . . savage nations . . . who seem to delight in the ravages of war."[43]

Thus the rationales supplied in *Calvin's Case*, and by Locke and Vattel, were complementary. *Calvin's Case* characterized indigenes as infidels, perpetual enemies of the crown, whose law was properly and instantly abrogated by Christian conquerors. The case provided a rationale for conquest. Locke, while disavowing conquest, authorized the dispossession of wasteful natives by "industrious and rational" Englishmen. Vattel went further, authorizing violence and even the extirpation of natives who engaged in war. Taken together, these ideas lay the foundation for conquest.

B. The Desire for Conquest in America

The First Virginia Charter of 1606 was the first actual plan for English colonization and is consistent with many of the propositions stated in Calvin's Case. In the charter, the King of England granted his proprietors license to colonize Virginia and to possess its vast resources:

> JAMES, by the Grace of God, King of England . . . [grants] licence, to make habitation, plantation, and to deduce a colony of sundry of our people into that part of America commonly called Virginia, and other parts and territories in America . . . . [T]hey shall have all the lands, woods, soil, grounds, havens, ports, rivers, mines, minerals, marshes, waters, fishings, commodities, and hereditaments, whatsoever . . . . [A]nd shall and may inhabit and remain there; and shall and may also build and fortify within

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40 Jeffery Ostler, *'Just and Lawful War' as Genocidal War in the (United States) Northwest Ordinance and Northwest Territory, 1787–1832*, 18 J. GENOCIDE RSCH. 1, 7 (2016) [hereinafter cited as Ostler, *Genocidal War*].

41 *Id.*

42 *Id.*

43 *Id.*

> any the same, for their better safeguard and defense, according to their best discretion.[44]

This authority to colonize and possess the lands extended only to lands "which are not now actually possessed by any Christian prince or people."[45] So while the King and his colonists might respect the claims of other Europeans, they had no respect for the native owners of the land. The King claimed lands and resources over which he had no actual control, ignoring entirely the rights of the indigenous owners and possessors of the land.

Part of the colonizing mission was to convert Indians to Christianity and to a settled existence, "[to] propagat[e] Christian religion to such people, as yet live in darkness and miserable Ignorance of the true knowledge and worship of God, and may in time bring the infidels and savages, living in those parts, to human civility, and to a settled and quiet government."[46] While on the one hand recognizing the Indians as "people," they are seen as brutes, "Infidels and Savages," living in "darkness and miserable Ignorance" and lacking "human civility." Indians are assumed to be wanderers, not "settled." For the English, Indian civilization was no civilization at all.

The charter also formally transplanted English law to the colony, establishing a Council in the colony "which shall govern and order all matters and causes, which shall arise … within the … colonies, according to such laws, ordinances, and instructions . . . given and signed with our hand or sign manual, and pass under the privy seal of our realm of England."[47] The colonizing English retained the same rights as English subjects born within the realm, whereas indigenous people had no such rights.[48] The ruling law in the colony was to be the law of England, again ignoring indigenous people and assuming that they had no law nor rights that the English were bound to respect.

Colonial charters depicted indigenous people as justifiably absent from their land and subject to violence. The New England charter of 1620, for example, describes natives as absent from their lands because of the hand of God:

> [W]ithin [these] late Yeares there hath by God's [Visitation] raigned a wonderfull Plague, together with many horrible Slaugthers, and Murthers,

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44 1 VA. STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 57–59 (William Waller Hening ed., R. & W. & G. Bartow 1823).

45 *Id.* at 57–58.

46 *Id.* at 58.

47 *Id.* at 60–61.

48 *Id.* at 64.

> committed amoungft the Sauages and brutish People there, heertofore inhabiting, in a Manner to the utter Deftruction, Deuaftacion, and Depopulacion of that whole Territorye . . . .[T]he appointed Time is come in which Almighty God in his great Goodnefs and Bountie towards Us and our People, hath thought fitt and determined, that thofe large and goodly Territoryes, deferted as it were by their naturall Inhabitants, fhould be poffeffed and enjoyed by fuch of our Subjects and People as heertofore have and hereafter shall by his Mercie and Favour, and by his Powerfull Arme, be directed and conducted thither.[49]

God destroyed the "savages" and brutes with disease and violence, and favored the English by making them the rightful possessors of allegedly empty lands. The English saw themselves as God's chosen people, fulfilling his divine plan by possessing the lands he had emptied on their behalf.

In 1622, in response to increasing colonial pressure on Indian lands and increasing disdain from the "civilized" English, Indians led by Opechancanough launched a surprise attack on English settlements near Jamestown, Virginia, killing approximately 340 colonists, over one-fourth of the population.[50] In the wake of the attack on Jamestown, subsequent charters described natives as enemies subject to unlimited violence.[51] For example, the Maine charter of 1639, with unintended irony, described Indians as intruders and invaders on their own lands:

> And because in a Country so far distant and seated amongst so many barbarous nations the Intrusions or Invasions as well of the barbarous people as of Pirates and other enemies may be justly feared, [colonists are permitted] to pursue and prosecute [such enemies] out of the limits of the said Province or Premises and then (if it shall so please God) to vanquish, apprehend and take and being taken either according to the Law of arms to kill or to keep and preserve them at their pleasure.[52]

This charter authorized unlimited killing of Indians in the discretion of the colonists. By this time, Indians had become the "perpetual enemies" described in *Calvin's Case*: the colonies had been "frequently ravaged by Indian enemies," laid waste with "fire and sword" by "the neighboring savages" with "great numbers of English inhabitants, miserably massacred."[53]

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49 Charter of New England, 1620; *see* CHRISTOPHER L. TOMLINS & BRUCE H. MANN, THE MANY LEGALITIES OF EARLY AMERICA 175 (2012).

50 VAUGHAN, *supra* note 21, at 117, 120–21.

51 TOMLINS & MANN, *supra* note 49, at 175–76.

52 Grant of the Province of Maine, 1639, *quoted in* TOMLINS & MANN, *supra* note 49, at 75–76.

53 Georgia Charter of 1739; *see* TOMLINS & MANN, *supra* note 49, at 187 & n.155.

As Indians responded to white encroachment with violence, the charters authorized increasing violence against them. Indian resistance to white colonization, both by violent resistance to encroachment on their lands and by rejecting white norms of civilization, led to the racialization of Indians as warlike, savage red men, as opposed to civilized white Englishmen.[54] Relations between English colonizers and Indian natives, while at times cooperative on the surface, were fraught with tension and the potential for and actuality of violence.[55] English colonists, unwilling to leave Indians alone, "seized Indian corn, exacted tribute, and wherever possible forced Indian submission to English authority."[56]

Frequent and violent encounters between whites and Indians hardened settler views of Indians as ferocious, warlike savages. In response to the 1622 attack on Jamestown, Indians were disparaged as "having little of Humanitie but shape," "more brutish than the beasts they hunt," and "naturally born slaves."[57] Similarly, in the aftermath of King Phillip's war, a New England poet described Indians as "Monsters [shaped] and fac'd like men."[58]

In addition to the violence, Indians' rejection of white civilization and religion fueled further negative stereotypes. Indians usually rebuffed missionary efforts to anglicize and convert natives to Christianity.[59] In the words of one New Englander,

> The Christianizing the Indians scarcely affords a probability of success; for their immense sloth, their incapacity to consider abstract truth . . . and their perpetual wanderings, which prevent a steady worship, greatly impede the progress of Christianity, a mode of religion adapted to the most refined temper of the human mind . . . . The feroce manners of a native Indian can never be effaced, nor can the most finished politeness totally eradicate the wild lines of his education.[60]

Indigenous resistance to the cultural and territorial encroachment of the English fueled settler views of Indians reminiscent of the views expressed in *Calvin's Case*. Indians were increasingly seen as a savage heathens and

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54 VAUGHAN, *supra* note 21, at 21–26.

55 *Id.* at 118–21.

56 *Id.* at 117.

57 *Id.* at 23.

58 *Id.* at 24.

59 *Id.* at 25.

60 Wood Rogers, ed., NEW ENGLAND'S PROSPECT 94 (1764), *quoted in* VAUGHAN, *supra* note 21, at 26.

perpetual enemies, imagery which in turn was used to justify policies of removal, extermination and confinement on reservations.[61]

C. The Framers' Desire

1. The Adoption of British Ideals

The Framers embraced the English philosophies of empire, and made them their own. They envisioned a white empire peopled with English and European immigrants, in which land was always, and easily, available for distribution to them. And, despite the presence of Indians throughout these lands, the Framers saw the land as an empty wilderness awaiting distribution to the white farmers who they thought would make the land productive.

The Framers largely assumed that the vast lands to the west of the Appalachian Mountains would become their empire, notwithstanding the fact that these lands were already inhabited by Indians. Writing early in his career, Benjamin Franklin saw America as the foundation for the British Empire: "I have long been of Opinion, that the Foundations of the future Grandeur and Stability of the British Empire, lie in America; and tho', like other Foundations, they are low and little seen, they are nevertheless, broad and Strong enough to support the greatest Political Structure Human Wisdom ever yet erected."[62] After the Revolution, Franklin's wish for British empire became his wish for a U.S. empire.[63] In 1783, George Washington, commenting on a trip through western New York, wrote the following:

> I could not help taking a more contemplative & extensive view of the vast inland navigation of these United States, from Maps and the information of others; & could not but be struck with the immense diffusion & importance of it; & with the goodness of that providence which has dealt her favors to us with so profuse a hand. Would to God we may have wisdom enough to improve them. I shall not rest contented 'till I have explored the Western Country, & traversed those lines (or great part of them) which have given bounds to a New Empire.[64]

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61 George M. Frederickson, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY 17–20 (1981).

62 Letter from Benjamin Franklin to Lord Kames (Jan. 3, 1760).

63 Richard H. Immerman, EMPIRE FOR LIBERTY: A HISTORY OF AMERICAN IMPERIALISM 21 (2010).

64 Letter from George Washington to François-Jean de Beauvoir, Marquis de Chastellux (Oct. 12, 1783).

According to Washington, the American empire would span the continent; American citizens were "in the most enviable condition, as the sole Lords and Proprietors of a vast tract of Continent."[65]

The view of the United States as an empire persisted into the founding and beyond. At the time of the drafting of the Constitution, Alexander Hamilton began his defense of the Constitution in *Federalist No. 1* with the notion of an American empire, "an empire in many respects the most interesting in the world."[66] Thomas Jefferson argued that "Our confederacy must be viewed as the nest from which all America, North and South, is to be peopled."[67] Jefferson extolled the United States and its Constitution: "[W]e should have such an empire for liberty as she has never surveyed since the creation: & I am persuaded no constitution was ever before so well calculated as ours for extensive empire & self government."[68]

The Framers considered the vast territories of the United States to be a nearly empty wilderness, available and ready for the use of white settlers regardless of the Indians who already occupied the land. Benjamin Franklin wrote that "so vast is the Territory of North-America, that it will require many Ages to settle it fully,"[69] disregarding the fact that it was already settled by Indians. Franklin explicitly linked land acquisition, Indian removal, and the development of the nation. Franklin praised the "Prince that acquires new Territory, if he finds it vacant, or removes the Natives to give his own People Room."[70] Thomas Jefferson referred to the expansion of immigrant settlements "in the wilds of America."[71] Jefferson also wrote that "a society taking possession of a vacant country, and declaring they mean to occupy it, does thereby appropriate to themselves, as prime occupants, what was before

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65 Letter from George Washington to the States (June 8, 1783).

66 THE FEDERALIST NO. 1 (Alexander Hamilton).

67 *From Thomas Jefferson to Archibald Stuart* (Jan. 25, 1786), NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-09-02-0192 [https://perma.cc/F7EA-JKX2].

68 *Thomas Jefferson to James Madison* (Apr. 27, 1809), NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-01-02-0140 [https://perma.cc/EE95-SKCY].

69 *Observations Concerning the Increase of Mankind* (1751), NAT'L ARCHIVES, https://founders.archives.gov/documents/Franklin/01-04-02-0080 [https://perma.cc/9MFD-R2D8].

70 *Id.*

71 Thomas Jefferson, *A Summary View of the Rights of British America*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/jeffsumm.asp [https://perma.cc/G6Z3-Y579].

common."[72] George Washington described the white citizens of America as "the sole lords and proprietors of a vast tract of Continent."[73]

Widely diffused land ownership was another essential element of the Framers' vision for the country. Benjamin Franklin encouraged potential English migrants to come to America, where cheap land would become the basis of wealth for them and their children:

> Land being thus plenty in America, and so cheap as that a labouring Man, that understands Husbandry, can in a short Time save Money enough to purchase a Piece of new Land sufficient for a Plantation, whereon he may subsist a Family; such are not afraid to marry; for if they even look far enough forward to consider how their Children when grown up are to be provided for, they see that more Land is to be had at Rates equally easy, all Circumstances considered.[74]

John Adams saw the wide distribution of land as essential to maintaining the balance of power and virtue in the society:

> [T]he Ballance of Power in a Society, accompanies the Ballance of Property in Land. The only possible Way then of preserving the Ballance of Power on the side of equal Liberty and public Virtue, is to make the Acquisition of Land easy to every Member of Society: to make a Division of the Land into Small Quantities, So that the Multitude may be possessed of landed Estates. If the Multitude is possessed of the Ballance of real Estate, the Multitude will have the Ballance of Power, and in that Case the Multitude will take Care of the Liberty, Virtue, and Interest of the Multitude in all Acts of Government.[75]

Embracing a similar idea, Thomas Jefferson became the "father of the family farm," advocating westward expansion through the creation of small farms.[76] Jefferson advocated farming as a way of cultivating civic virtue: "Those who labour in the earth are the chosen people of God, if ever he had

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72 *To George Washington from Thomas Jefferson* (May 3, 1790), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-05-02-0241 [https://perma.cc/Z3KH-433B].

73 *From George Washington to the States* (June 8, 1783), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/99-01-02-11404 [https://perma.cc/XW35-YALS].

74 *Observations Concerning the Increase of Mankind* (1751), *supra* note 69.

75 *From John Adams to James Sullivan* (May 26, 1776), NAT'L ARCHIVES, https://founders.archives.gov/documents/Adams/06-04-02-0091 [https://perma.cc/T5XV-444V].

76 ROBERT G. KENNEDY, JEFFERSON'S LOST CAUSE: LAND, FARMERS, SLAVERY, AND THE LOUISIANA PURCHASE 42 (2003).

a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue."[77]

Given the importance of land acquisition and control to early Americans, it is no surprise that land ownership became central to freedom and political membership in the colonies.[78] Land ownership provided an ethical basis for membership, a stake in community life, and economic independence: "the productive control wrought by land ownership taught independence and self-reliance; this ensured that when property owners joined together in political life, their collective efforts would express virtuous and autonomous reflection."[79] In contrast, the economic dependence of those who did not own property, including poor whites, Indians and slaves, lacked "the moral character to participate in political life."[80] Settler desires for freedom and full political participation required land ownership, which provided further impetus for dispossessing Indians of their land.

The Framers made plain their desire for an empire populated by, and for the benefit of, white people. Writing in 1751, Benjamin Franklin expressed his wish for a country populated exclusively by white people:

> [T]he Number of purely white People in the World is proportionably very small. All Africa is black or tawny. Asia chiefly tawny. America (exclusive of the new Comers) wholly so . . . . [The Saxons], with the English, make the principal Body of White People on the Face of the Earth. I could wish their Numbers were increased. And while we are, as I may call it, *Scouring* our Planet, by clearing America of Woods, and so making this Side of our Globe reflect a brighter Light to the Eyes of Inhabitants in Mars or Venus, why should we in the Sight of Superior Beings, darken its People? why increase the Sons of Africa, by Planting them in America, where we have so fair an Opportunity, by excluding all Blacks and Tawneys, of increasing the lovely White and Red?[81]

At the time, Franklin had a narrower view than other Framers of who was white, including only Saxons and the English, and excluding most Europeans as "swarthy."[82]

By the time of the founding of the nation, however, he and other Framers encouraged white European migration to the United States. According to

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77 Thomas Jefferson, *Query XIX Notes on Virginia*, *in* THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE (H.A. Washington ed., 1854).

78 AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 54 (2010).

79 *Id.*

80 *Id.*

81 *Observations Concerning the Increase of Mankind* (1751), *supra* note 69.

82 *Id.*

George Washington, the vast continent was to become a haven for oppressed white European immigrants: "Rather than quarrel abt [sic] territory, let the poor, the needy, & oppressed of the Earth; and those who want Land, resort to the fertile plains of our Western Country, to the second Land of promise, & there dwell in peace."[83]

Their wishes for a homogeneous, white country were widely shared. Alexander Hamilton, writing in *Federalist No. 2*, stated that "Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs."[84] The country Hamilton imagined had no place for the broad diversity of America at that time, which included Indians, African slaves, and Europeans from various countries. Thomas Jefferson, corresponding with James Madison, also imagined a vast, homogeneous white empire:

> it is impossible not to look forward to distant times, when our rapid multiplication will expand itself beyond those limits, & cover the whole Northern, if not the Southern continent with a people speaking the same language, governed in similar forms, & by similar laws: nor can we contemplate, with satisfaction, either blot or mixture on that surface.[85]

2. The Framers' Land Speculation

> *Speculation in lands was the most absorbing American enterprise during the later Colonial, the Revolutionary, and the early Republican periods. . . . The insatiable desire for territory manifested by young and land-poor America cannot be fully comprehended unless it is understood that, in those days, the country was run largely by speculators in real estate.*[86]

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83 *From George Washington to David Humphreys* (July 25, 1785), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/04-03-02-0142 [https://perma.cc/RD57-4649].

84 THE FEDERALIST NO. 2 (John Jay).

85 *From Thomas Jefferson to James Monroe* (Nov. 24, 1801), NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-35-02-0550 [https://perma.cc/X6HF-6VN8]. Earlier, in his Notes on the State of Virginia, Jefferson made clear reference to African slaves as a "blot" on the country: "Under the mild treatment our slaves experience, and their wholesome, though coarse, food, this blot in our country increases as fast, or faster, the whites." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 96 (Apex Data Servs. Inc. ed., 2006). Jefferson's reference to populating the continent with people speaking the same language, seems a clear reference to white people.

86 DANIEL M. FRIEDENBERG, LIFE, LIBERTY AND THE PURSUIT OF LAND 132 (1992) (quoting THOMAS P. ABERNETHY, FROM FRONTIER TO PLANTATION IN TENNESSEE: A STUDY IN FRONTIER DEMOCRACY 45 (1967)).

The Framers' desire for a vast, white empire made the dispossession of Indians a necessary condition for national identity. The prospect of large numbers of white settlers moving west in search of better fortunes based on land ownership guaranteed that demand for former Indian lands would be great. Land speculators, including many of the Framers, knew they could profit from early purchases of Indian lands that would become more valuable as the national identity stabilized and as migrants moved west.[87] This process was described by historian Forrest McDonald:

> One worked or connived to obtain a stake, then worked or connived to obtain legal title to a tract of wilderness, then sold the wilderness by the acre to the hordes of immigrants, and thereby lived and died a wealthy man. Appropriately, the most successful practitioner of this craft was George Washington, who had acquired several hundred thousand acres and was reckoned by many as the wealthiest man in America.[88]

As we shall see, Washington was a prolific land speculator, and so was Benjamin Franklin.

a. Benjamin Franklin

Throughout his career, Benjamin Franklin was deeply involved in plans for Western expansion and land speculation. Indeed, Franklin was "the New World's foremost expert on and advocate for empire—first for that of the British, then for that of the Americans."[89] In his Albany Plan of 1754, Franklin proposed a strong central colonial government which would be the only authorized purchaser of Indian lands.[90] Also in 1754, twenty-two years before the Revolution and thirty-three years before the Constitution, Franklin drafted his Plan for Settling Two Western Colonies, proposing the settlement of "[t]he great country back of the Appalachian [M]ountains, on both sides the Ohio, and between that river and the lakes," and eventually encompassing "[t]he settlement of all the intermediate lands, between the present frontiers of our colonies on one side, and the lakes and Mississippi on

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87 Land speculation can be defined as "the purchasing of land at a low price with the expectation of selling it in the future for a higher price." Thomas D. Curtis, *Riches, Real Estate, and Resistance: How Land Speculation, Debt and Trade Monopolies Led to the American Revolution*, 73 Amer. J. Econ. & Soc. 474, 502 (2014).

88 FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 10 (1974).

89 RICHARD H. IMMERMAN, EMPIRE FOR LIBERTY: A HISTORY OF AMERICAN IMPERIALISM 21 (2010).

90 THOMAS ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION 14–15 (New York, Russell & Russell, Inc. 1959) (1937). [hereinafter cited as ABERNETHY, WESTERN LANDS].

the other."[91] Franklin argued that settlement of these lands would lead to the "great increase of Englishmen, English trade, and English power," and to the decline of French power.[92] Franklin also argued that through the sale of lands in this territory "a great sum of money might be raised in America," money which would pay for land purchases from Indians and provisions and ammunition for the new settlers.[93]

Franklin, one of "the leading land speculators of the late eighteenth century," invested in remote lands for profit.[94] Franklin led a Quaker faction that opposed proprietary claims to Indian lands made by the Penn family and sought its own claims to the lands.[95] Early on, Franklin obtained a grant of 20,000 acres of land in Nova Scotia.[96] Franklin also represented and participated in a partnership, the Illinois company, that sought to purchase 1,200,000 acres in the Illinois territory from its French owners.[97] He worked assiduously to win Crown approval for the proposal, which ultimately was denied in 1768.[98] Franklin also participated in another venture organized by the same investors, to take advantage of Indian desires to make restitution to traders who had suffered losses from Indian violence.[99] The restitution was to be made through cessions of Indian lands.[100] This new scheme, titled the "Suffering Traders," involved buying the claims of the actual traders and transferring the land to the company for subsequent resale.[101] Eventually, the Iroquois made restitution by ceding a land grant called the Indiana grant, and the "Suffering Traders" became known as the Indiana Company.[102] The Indiana grant was, however, temporarily laid aside by the Crown.[103]

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91 *A Plan for Settling Two Western Colonies* (1754), NAT'L ARCHIVES, https://founders.archives.gov/documents/Franklin/01-05-02-0132 [https://perma.cc/WC9Z-KZ9U].

92 *Id.*

93 *Id.*

94 FRIEDENBERG, *supra* note 86, at 159.

95 ABERNETHY, WESTERN LANDS, *supra* note 90, at 18.

96 FRIEDENBERG, *supra* note 86, at 160.

97 ABERNETHY, WESTERN LANDS, *supra* note 90, at 29–30.

98 *Id.* at 30; PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION 43 (2017) [hereinafter FRYMER, BUILDING AN AMERICAN EMPIRE].

99 ABERNETHY, WESTERN LANDS, *supra* note 90, at 31–32.

100 *Id.* at 31–32.

101 *Id.* at 31–32.

102 *Id.* at 36–37, 40.

103 *Id.* at 44. After an infusion of wealthy members of the British upper class orchestrated by Thomas Walpole, the Indiana company became known as the Walpole company or the Vandalia company. The Walpole company proposed to purchase 2,400,000 acres of the ceded lands and to establish a

b. George Washington

George Washington was born into the Virginia aristocracy, so his relationship with wealth and land speculation began when he was quite young. At age sixteen, he became part of a team surveying the lands of Thomas Lord Fairfax, who held title to millions of acres on the western frontier.[104] He began speculating in western lands shortly after. At around the age of eighteen, he purchased over 1,450 acres in Virginia in the Shenandoah Valley and along a tributary of the Shenandoah River.[105] At age twenty-one, he inherited lands including 2100 acres in Deep Run tract and three lots in Fredericksburg, Va., and ten slaves.[106] In 1751, Washington and other prominent, wealthy Virginians joined the Ohio Company, which was organized to promote trade with Indians and to engage in land speculation.[107] The Ohio company had received a royal grant of 200,000 acres in the Ohio valley.[108] Washington later joined the Mississippi Company, with largely the same membership as the Ohio Company.[109] The Mississippi Company petitioned for a huge, 4,000 square mile tract of land between the Wabash and Mississippi rivers.[110] Washington also invested in the "Adventurers for Draining the Dismal Swamp," a project involving swampland south of the Chesapeake Bay.[111]

Washington also pursued assiduously bounty lands he thought he had been promised in exchange for his service to Britain in the French and Indian war.[112] As an inducement to enlist Virginians to fight in the French and Indian war, British Governor Dinwiddie pledged two hundred thousand acres in the Ohio territory as bounty lands for the men.[113] Washington acted

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colony named Vandalia. Like its predecessors, the Vandalia colony project collapsed, this time because of the onset of the Revolution. *Id.* at 54–57.

104 JOHN E. FERLING, THE FIRST OF MEN: A LIFE OF GEORGE WASHINGTON 12 (Oxford Univ. Press 2010) (1988) [hereinafter THE FIRST OF MEN].

105 *Id.* at 14.

106 *Id.* at 8.

107 ABERNETHY, WESTERN LANDS, *supra* note 90, at 5, 8.

108 *Id.* at 5, 8; FERLING, THE FIRST OF MEN, *supra* note 104, at 17.

109 ABERNETHY, WESTERN LANDS, *supra* note 90, at 20; FERLING, THE FIRST OF MEN, *supra* note 104, at 70.

110 ABERNETHY, WESTERN LANDS, *supra* note 90, at 20; FERLING, THE FIRST OF MEN, *supra* note 104, at 70.

111 FERLING, THE FIRST OF MEN, *supra* note 104, at 71.

112 *Id.*

113 JOHN E. FERLING, THE ASCENT OF GEORGE WASHINGTON: THE HIDDEN POLITICAL GENIUS OF AN AMERICAN ICON 1165 (2010).

covertly to ensure that officers received most of the bounty lands and that he would receive the best of these lands.[114]

Before the British lifted the Proclamation of 1763, Washington sent his surveyor, William Crawford, to locate and claim the best of these bounty lands for himself. Instructing Crawford, Washington wrote:

> The other matter, just now hinted at and which I proposed in my last to join you, in attempting to secure some of the most valuable lands in the King's part, which I think may be accomplished after a while, notwithstanding the proclamation that restrains it at present, and prohibits the settling of them at all; for I can never look upon that proclamation in any other light (but I say this between ourselves) than as a temporary expedient to quiet the minds of the Indians, and must fall, of course, in a few years . . . any person, therefore, who neglects the present opportunity of hunting out good land, and in some measure marking them and distinguishing them for his own (in order to keep others from settling them), will never regain it . . . .
>
> I would recommend it to you to keep this whole matter a profound Secret, or trust it only with those in whom you can confide and who can assist you in bringing it to bear by their discoveries of Land and this advice proceeds from several very good Reasons, and in the first place because I might be censured for the opinion I have given in respect to the King's Proclamation and then if the Scheme I am now proposing to you was known it might give the alarm to others and by putting them upon a Plan of the same nature.[115]

Keeping his knowledge of the best lands to himself, Washington attempted to buy the bounty lands of officers and enlisted men, advising them that there was a significant "chance of our never getting the land at all."[116] Washington then told his fellow officers that there were no differences between the allotments of land. In the end, Washington received the best lands: Crawford assured him that "none in that Country is as good as your land"; Washington's lands were "much the best on the whole River from one end of the Surveys to the other."[117] His fellow officers, upon discovering that

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114 *Id.* at 1256, 1270–1324.

115 George Washington, *George Washington to William Crawford* (Sept. 17, 1767), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/02-08-02-0020 [https://perma.cc/CYP3-2JCC].

116 FERLING, THE ASCENT OF GEORGE WASHINGTON, *supra* note 113, at 1292–1310, 1324–32. *See, e.g.*, George Washington, *George Washington to William Crawford* (Sept. 17, 1767), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/02-08-02-0020 [https://perma.cc/CYP3-2JCC].

117 William Crawford, *William Crawford to George Washington* (Nov. 12, 1773), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/02-09-02-0287 [https://perma.cc/8P6J-NDFM].

their lands were inferior to Washington's, reacted with anger and resentment, "a good deal [chagrined]" in Crawford's words.[118]

Land speculation was so important at the time that it motivated one of the provisions of the Declaration of Independence. The British government enacted two statutes that were intended to abolish land speculation: the Proclamation of 1763, forbidding land transactions with Indians except as approved by the Crown; and the Quebec Act of 1774, which gave all the lands west of the Ohio River to the province of Quebec.[119] These statutes, as long as they were in force, essentially killed the dreams of many national leaders who sought wealth through land speculation. Their complaints about British interference in their potential land ownership found expression in one of the provisions of the Declaration of Independence: "He has endeavoured to prevent the Population of these States; for that Purpose . . . raising the Conditions of new Appropriations of Lands."[120]

While there were additional motivations for the Declaration, it is important to recognize that British interference with the desires of land speculators was so important that it became one of the reasons justifying revolution and independence from Great Britain. The desire for westward expansion was not just a matter of ideology. It was also a matter of private profit for many of the Framers.

Washington continued to speculate in land for profit during his presidency.[121] Washington was chairman of the board of the Potomac company, which sought to make the area around Georgetown and Alexandria the site of the new capitol.[122] Washington's property holdings, including Mount Vernon and properties in Alexandria, stood to increase in value if this area on the Potomac River was chosen. Washington admitted that his financial self-interest was a large factor in his advocacy, describing the "intimate connection in political and pecuniary considerations between

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118 *Id.*

119 WOODY HOLTON, FORCED FOUNDERS 36–37 (1999); ABERNETHY, WESTERN LANDS, *supra* note 90, at 21.

120 THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

121 *See, e.g.*, Letter from George Washington to Presley Neville (June 16, 1794), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-16-02-0192 [https://perma.cc/QCY4-GC8G] (documenting Washington apparently trying to sell some of his land to Neville and bragging that "To give a further description of these lands than to say they are the cream of the Country in which they are; that they were the first choice of it . . . .").

122 FERLING, THE FIRST OF MEN, *supra* note 104, at 398.

the federal district and the inland navigation of the Potomac."[123] Washington asserted that, in this instance, "public and private motives therefore combine."[124] Commenting on Washington's self-interest, historian John Ferling wrote, "[a]s always, he convinced himself that the nation was the chief beneficiary of his actions."[125] Washington also used his influence to help James Madison and Henry Lee with a land investment project in the vicinity of the capitol: "Washington, Madison and Lee linked personal friendships to the nation's destiny: whatever benefited one, benefited the other. They would prosper personally while uniting America and making it self-sufficient."[126]

George Washington became very rich through land speculation, eventually acquiring several hundred thousand acres and being perceived as one of the wealthiest men in America.[127] He understood well that westward expansion would increase the value of his lands: "Lands are permanent—rising fast in value—and will be very dear when our Independancy is established, and the Importance of America better known."[128] In 1795, during his second term as President, he wrote to a friend that his lands on the Ohio and Kanawha rivers "will fetch me fifty [percent] more at this time than I would have sold them for two years ago."[129] As described by one Washington biographer, speculation in land was "oldest and closest to his heart."[130]

It is very important to recognize that many of the Framers had important personal stakes in the results of national governance: Their wealth depended on crafting law and policy that would facilitate westward expansion. The Framers would never have approved national law that put their wealth at risk. Rather, they would encourage and shape law that would protect their wealth.

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123 Letter from George Washington to David Stuart (Apr. 8, 1792), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-10-02-0134 [https://perma.cc/5WXJ-D3V6].

124 *Id.*

125 FERLING, THE FIRST OF MEN, *supra* note 104, at 398.

126 STUART LEIBIGER, FOUNDING FRIENDSHIP: GEORGE WASHINGTON, JAMES MADISON, AND THE CREATION OF THE AMERICAN REPUBLIC 55 (1999).

127 FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 10 (1974); FRIEDENBERG, *supra* note 86, at 171, 176.

128 George Washington, *George Washington to John Parke Custis* (May 26, 1778), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/03-15-02-0227.

129 George Washington, *George Washington to Charles Morgan* (Jan. 17, 1795), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-17-02-0269.

130 FERLING, THE FIRST OF MEN, *supra* note 104, at 335.

This was the case with slavery. Approximately twenty-five of the fifty-five delegates to the constitutional convention were slave owners.[131] In the end, the Constitution was drafted with numerous protections for the property of slave owners: extra representation in the House of Representatives and the Electoral College corresponding to three-fifths the number of slaves owned; protection of slave importation for twenty years after enactment of the Constitution; creation of a national, constitutional right to recapture escaped slaves; protection for all the states against slave insurrections.[132] All of this, without once mentioning the word "slave."

Just as slave owners protected their property under the Constitution, I argue that this was the case with land speculators too. Scholars have established that ownership of public debt was a significant factor in support for the Constitution.[133] Alexander Hamilton perceived the importance of making the financial interests of financiers align with the new constitutional government. Hamilton wrote that by "identifying their interests with those of the new government, the latter would be secure; they would not desert the ship in which they were all afloat."[134]

Land speculators were riding the same ship. It would have been against their financial interests to approve of a Constitution that interfered with their present and future landholding. They had a vested interest in a Constitution that protected their present and future property interests, that kept them afloat.

Many of the Framers, in addition to Franklin and Washington, were land speculators. Eight delegates to the constitutional convention were "speculators on a grand scale": Washington, Robert Morris, Thomas Fitzsimons, Nathaniel Gorham, Jonathan Dayton, James Wilson, George Mason, and William Blount.[135] Other Framers, like Alexander Hamilton

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131 *See* Steven Mintz, *Historical Context: The Constitution and Slavery*, GILDER LEHRMAN INST. OF AMER. HIST. (last visited Dec. 20, 2022), https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-constitution-and-slavery [https://perma.cc/E7VS-WY5R]; *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS (3d ed. 2014).

132 U.S. CONST. art. I, § 2, cls. 3 (the apportionment clause); art. 2, § 2, cl. 2 (incorporating the apportionment clause by reference to the number of Senators and Representatives).

133 Friedenberg, *supra* note 86, at 325 (quoting CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1st ed. 1913)); ROBERT A. MCGUIRE, TO FORM A MORE PERFECT UNION 4–6 (2003).

134 BEARD, *supra* note 133, at 101.

135 FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 220 (1985).

and James Madison, also had financial stakes in land speculation,.[136] In addition, Thomas Jefferson, George Mason, Richard Henry Lee, Patrick Henry, William Duer, Charles Carroll, and Supreme Court Justices John Marshall and John Jay also speculated in land.[137] These were many of the wealthiest and most influential men in the country at the time. What are the chances that they would support laws and policies that would cost them their present and future expectations of wealth?

Conquest begins with desire. As we have seen, white desire for Indian lands began with British charters granting huge tracts of land to charter companies armed with a philosophy that privileged British land uses over all others. The Framers adopted these concepts, perceiving the Northwest Territory and beyond as a "vast wilderness" from which they and the nation could profit. Despite their desire for western lands, government under the Articles of Confederation proved ineffective in facilitating westward expansion. We turn now to examine why the Articles proved inadequate for accomplishing dreams of empire.

II. THE POWERS FOR CONQUEST

A. The Articles of Confederation

The Revolutionary War was settled in the Treaty of Paris of 1783, with Britain agreeing to transfer sovereignty over its lands east of the Mississippi River to the United States. These lands included the Northwest Territory. During and after the Revolution, the management of Indian affairs was a principal concern of both the Confederation and state governments. This was because Indians possessed the land, the most valuable and sought-after resource in the United States.[138]

Adopted in 1781, the Articles provided as follows:

Art. VI:

136 CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 110–11, 125 (1st ed. 1913); *The Founders and the Pursuit of Land*, LEHRMAN INST. (2005), https://lehrmaninstitute.org/history/founders-land.html.

137 WOODY HOLTON, FORCED FOUNDERS 3, 36–37 (1999); LEHRMAN INST., *supra* note 136; FORREST MCDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776–1790, 41 (Liberty Fund, Inc., 1979) (1965).

138 Ablavsky, *supra* note 16, at 1010–11 (2014).

> No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted;
>
> **Art. IX:**
>
> The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances.
>
> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.

Under the Articles, and absent actual or imminent invasion, States were prohibited from engaging in war with Native nations without congressional consent. Congress had sole powers to declare war, to enact treaties, and to regulate trade and other affairs with Indians, provided that Congress did not infringe upon any state's borders. Congress at the time was too weak, however, to command adherence to these provisions.

The principal stated feature of Indian policy at the time was to acquire Indian lands by purchase and negotiation, while avoiding more costly war.[139] George Washington was instrumental in defining Indian policy in the period after the Revolution. In September 1783, he wrote an influential letter to James Duane, chair of a congressional committee formulating Indian policy, in which he expressed his views of Confederation Indian policy.[140] Washington saw the Indians as a conquered people, conquered when the United States defeated the British. Erroneously, he assumed that the United States could dictate terms to the Indians. Washington also assumed erroneously that as more whites encroached on Indian territory, Indians would be willing to sell their land, making war unnecessary. Washington wanted settlement of the western territory to proceed by purchase and negotiation, rather than costly war:

> but the [Settlement] of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other. for I repeat it, again, and I am clear in

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139 *See* REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783–1812 (1992) [hereinafter HORSMAN, EXPANSION].

140 George Washington, *From George Washington to James Duane* (Sept. 7, 1783), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/99-01-02-11798 [https://perma.cc/C8T9-5Q3Z].

> my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey [though] they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less [expense], and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them.[141]

Washington also warned that unless expansion proceeded orderly as he outlined, unauthorized "banditti" would skim and dispose of "the Cream of the Country at the [expense] of many suffering Officers and Soldiers who have fought and bled to obtain it," and the nation would risk war with the Indians.[142] Of course, Washington stood to profit from his bounty lands, as well as from the land claims of those suffering soldiers whose claims he had bought.

The congressional committee adopted Washington's recommendations, often using language from his letter. The committee recommended the negotiation of boundaries with hostile Indians and, if necessary, the payment of compensation for their lands. The committee listed several reasons to negotiate peace with the Indian nations:

> because the faith of the United States stands pledged to grant portions of the waste and uncultivated lands as a bounty to their army, and in reward of their courage and fidelity; and the public finances do not admit of any considerable expenditure to extinguish the Indian claims upon such lands; because it is become necessary, by the increase of domestic population, and emigrations from abroad, to make speedy provision for extending the settlement of the territories of the United States; and because the public creditors have been led to believe, and have a right to expect, that those territories will be speedily improved into a fund towards the security and payment of the national debt.[143]

These were Congress's urgent reasons for taking Indian land: because they had promised bounty lands for service in the Revolutionary war; because the country was too poor to make large purchases of Indian land;

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141 *Id.*

142 *Id.*

143 Oct. 15, 1783 Report to Continental Congress on Indian Affairs, LIBR. OF CONG., https://www.loc.gov/resource/bdsdcc.08801/?sp=1&st=text [https://perma.cc/5MK5-U7ER].

and because the growing domestic and immigrant population demanded expansion.

Several years of experience under the Articles of Confederation, however, revealed serious weaknesses in their design, making it impossible for Congress to implement its Indian policy. James Madison recognized that a central problem lay in the government's manifest lack of "coercion," or power to compel obedience. The government therefore lacked "the great vital principles of a Political Constitution."[144]

The central government was underfunded and weak. There was no money available to finance a strong, centralized military.[145] Notwithstanding the oft- stated preference for purchasing Indian lands, the government lacked money to purchase Indian land in order to resell to speculators and other purchasers.[146] In the words of the Continental Congress, "the public finances do not admit of any considerable expenditure to extinguish the Indian claims upon such [western] lands."[147] The government lacked the authority to raise funds both to support itself and to support a strong military.

This military and fiscal weakness became deeply problematic because of the ongoing specter of a general war with Indians. The threat of war existed both in the Northwest Territory and south of the Ohio River. Aggressive efforts to claim Indian lands in the Northwest Territory "by right of conquest" had the predictable effect of angering and alienating the resident Indian nations. Congress retreated from its aggressive stance and adopted a more conciliatory policy out of weakness, not diminished desire for land. Secretary of War Henry Knox commented, in February 1787, that "the treasury has been declining daily for these last two years—if it is not in the last gasp I am mistaken."[148] In a subsequent report to Congress on July 10, 1787(during the constitutional convention), Knox wrote that "in the present embarrassed state of public affairs and entire deficiency of funds an [I]ndian war of any considerable extent and duration would most exceedingly distress the United States."[149]

Another flaw in the Articles was a lack of clarity about who had final authority to deal with Indians in disputes over territory and matters of trade.

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144 JAMES MADISON, *Vices of the Political System of the United States*, *in* 2 THE WRITINGS OF JAMES MADISON 361, 363 (Gaillard Hunt ed., 1901).

145 HORSMAN, EXPANSION, *supra* note 139, at 35–36.

146 *Id.* at 5, 35–36.

147 Ablavsky, *supra* note 16, at n.68 (quoting 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, 682 (Gaillard Hunt ed., 1922)).

148 HORSMAN, EXPANSION, *supra* note 139, at 35–36.

149 *Id.* at 36.

Before the Revolution, individual colonies, later states, had managed their own Indian affairs as they saw fit. While some recognized the need for a single, centralized authority in Indian affairs, other states like Virginia, New York and South Carolina rejected federal interference in their affairs.[150] In compromise language, Article 9 of the Articles stated that "[t]he United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians . . . provided that the legislative right of any State within its own limits be not infringed or violated."[151]

The problem with Article 9 was that any federal regulation of Indian affairs occurring within a state would necessarily infringe upon the internal rights of the State. James Madison described the provision as "obscure and contradictory," noting that "how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible."[152]

State policies often intruded on confederation policies, leading to contradictory, incoherent results. As one example, in 1784 the state of New York sought to negotiate its own treaty with the Six Nations.[153] Congress also wanted a treaty with the Six Nations, but New York had an earlier start in the process. New York Governor George Clinton, apparently relying on Section 9 of the Articles, rejected congressional interference with New York's treaty. Clinton declared to the federal commissioners that while the United States could negotiate with Indians within federal jurisdiction, he "expect[ed] however and positively stipulat[ed] that no long agreement be entered into with Indians residing within the Jurisdiction of this State, with whom only I mean to treat."[154] In the end, the state negotiations were unsuccessful, and the federal negotiations resulted in the Treaty of Fort Stanwix of 1784, in which the Six Nations ceded their "rather nebulous" claims in the Ohio Valley to the United States.[155]

Similar incoherence in Indian relations arose with southern states eager for expansion. Georgia had already negotiated the Treaty of Augusta with

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150 Ablavsky, *supra* note 16, at 1012, 1020.

151 ARTICLES OF CONFEDERATION of 1777, art. IX, para. 4.

152 THE FEDERALIST No. 42, at 217 (James Madison) (Ian Shapiro ed., 2009).

153 HORSMAN, EXPANSION, *supra* note 139, at 17.

154 *Id.* at 18.

155 *Id.* at 20.

the Cherokee nation and a select few representatives of the Creek nation.[156] North Carolina simply confiscated all Indian lands in the state except for certain Cherokee lands.[157] Land speculators in North Carolina added to the confusion by negotiating on their own for desirable lands.[158] When U.S. negotiators concluded the Treaty of Hopewell, the boundaries gave North Carolina much less land than the state wanted. North Carolina's representatives protested, claiming that the Treaty violated the state's rights.[159]

James Madison recognized such encroachments as one of the "Vices" occurring under the Articles of Confederation: "Examples of [encroachment] are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians."[160]

States managed Indian affairs badly. They were unable to restrain white settlements in Indian territory, which continued to provoke retaliatory violence.[161] White encroachments on Indian lands threatened the possibility of full war with Indian tribes that were organizing against invasion by the United States or individual states.[162]

As illustrated by these examples, a further problem with the Articles was the lack of effective central authority for planning and managing westward expansion. The confederation government lacked power to enforce boundaries set in federal treaties when states insisted on their own prerogatives. Though the land ordinances of 1784 and 1785 represented federal efforts to regularize westward expansion, they too were ineffective because of federal weakness. It was not until the Constitution and the Northwest Ordinance of 1787 that the powers for expansion began to align with the plans for expansion.

B. The Powers for Conquest: The Constitution

> *Speculation in western lands was one of the leading activities of capitalists in those days. . . . The chief obstacle in the way of rapid appreciation of these lands was the*

156 *Id.* at 27–29.

157 *Id.* at 28.

158 *Id.* at 28.

159 *Id.* at 29–30.

160 JAMES MADISON, *Vices of the Political System of the United States*, *in* 2 THE WRITINGS OF JAMES MADISON 361, 361 (Gaillard Hunt, ed., 1901).

161 HORSMAN, EXPANSION, *supra* note 139, at 50–51.

162 *Id.* at 31.

> *weakness of the national government which prevented the complete subjugation of the Indians, the destruction of old Indian claims, and the orderly settlement of the frontier. Every leading capitalist of the time thoroughly understood the relation of a new constitution to the rise in land values beyond the Alleghenies.*[163]

As we have seen, the Constitution was enacted during wartime, with threats of general Indian wars posed in both the Northwest Territory and southern territories. The Constitution's drafters, who included many land speculators, were well-aware of the costs and casualties of Indian wars. They were also well-aware of the chronically underfunded, weak U.S. government and other flaws in the Articles. Accordingly, a meeting was convened in Philadelphia to revise the Articles of Confederation, a meeting which became the constitutional convention. The constitutional convention met during the summer of 1787 and, in August, produced our Constitution. Also during that summer, members of the confederation Congress met in New York and drafted the Northwest Ordinance in July 1787.

There is an important connection between these two enactments beyond their simultaneous timing. Both were enacted during a time of threatened war with Indian nations. In a powerful sense, these two enactments were complements. The Constitution provided the powers for conquest. And the Northwest Ordinance became the plan for conquest. Both were necessary components of the American conquest. I shall discuss each in turn, beginning with the Constitution.

In 1809, President Thomas Jefferson extolled the United States and its Constitution: "we should have such an empire for liberty as she has never surveyed since the creation: & I am persuaded no constitution was ever before so well calculated as ours for extensive empire & self government."[164] Jefferson's appraisal of the Constitution was correct. Although he may not have been referring to conquest as such, he found the constitution well calculated for "extensive empire," an undertaking which simply was not possible without the conquest of Native America.

The Constitution, drafted to create a strong central government and to eliminate the weaknesses evident in the Articles, was indeed well suited for empire. However, its nature as an instrument of conquest is not necessarily evident on its face. The entire text of the Constitution refers to "Indians"

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163 CHARLES A BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 23 (1961).

164 Thomas Jefferson, *Thomas Jefferson to James Madison* (Apr. 27, 1809), NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/03-01-02-0140 [https://perma.cc/RR68-8UF4].

only twice: [T]he apportionment clause makes an explicit point of "excluding Indians not taxed;"[165] and the Indian Commerce Clause grants to Congress the power "to regulate Commerce . . . with the Indian Tribes."[166]

Many scholars have concluded, erroneously, that Indians and Indian affairs lacked importance in the drafting of the Constitution because Indians are mentioned only two times in the document.[167] Aligning with this misinterpretation of constitutional history, treatises and casebooks on constitutional law hardly make mention of Native Americans in their pages. As we shall, see, the truth is otherwise.

A careful consideration of the Constitution in light of the governmental weaknesses made evident during the Confederation period demonstrates the large degree to which the ongoing threat of Indian wars, and the ongoing desire for Indian lands, influenced the content of the Constitution. I will discuss several areas of governmental weakness identified earlier to demonstrate the Constitution's responsiveness to these concerns: first, the chronic poverty of the federal government; second, the chronic weakness of the federal military power; third, the lack of centralized authority to make Indian policy and treaties; and fourth, the lack of centralized authority to manage westward expansion.

The Framers addressed the problem of chronic federal poverty by giving Congress two new enumerated powers to raise money through taxation and borrowing. The Constitution gives Congress the power "to Lay and collect Taxes . . . to pay the debts and provide for the common defence and general welfare of the United States."[168] As we have seen, the common defense and general welfare of the United States depended on having the fiscal power to fund a strong military and to purchase Indian lands for subsequent resale. Congress also received the authority "to borrow money on the credit of the United States."[169]

The Framers addressed the chronic weakness of the federal military in several provisions of the Constitution. Congress received numerous enumerated powers for the creation and support of a strong federal military: the powers to "declare war;"[170] to "raise and support armies;"[171] "to provide

165 U.S. CONST. art. I, § 2, cl. 3.
166 U.S. CONST., art. I, § 8, cl. 3.
167 Ablavsky, *supra* note 16, at 1001–2.
168 U.S. CONST. art. I § 8, cl. 1.
169 U.S. CONST. art. I § 8, cl. 2.
170 U.S. CONST. art. I § 8 cl. 11.
171 U.S. CONST. art. I § 8 cl. 12.

and maintain a Navy;"[172] to make rules "governing land and naval forces;"[173] to "call forth the militia to execute the laws of the union, suppress insurrections and repel invasions;"[174] and to organize, arm, and discipline the militia.[175] In addition, the Constitution created a single commander-in-chief over military affairs: "The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the service of the United States."[176]

Several provisions in the Constitution sought to minimize the previously serious problem of state interference in the centralized management of Indian affairs. First, the Supremacy Clause made federal Indian treaties the supreme law of the land, regardless of contrary state laws: "all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby".[177] In addition, Article III of the Constitution empowered federal courts to hear disputes involving Indian Treaties: "The judicial power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made, under [U.S.] Authority."[178] And if a state was a party to such a dispute, as later happened, the Supreme Court would have original jurisdiction.[179] This meant that cases involving the interpretation of Indian treaties would be heard by federal judges, with lifetime tenure and sworn to uphold the Constitution, rather than by state judges more apt to act in the interests of their individual states. All state and federal officers were required to take a solemn oath to support this Constitution.[180]

Several provisions also explicitly limited the state interference in Indian affairs that had been most problematic. The Constitution forbade states from making their own treaties: "No state shall enter into any treaty, alliance, or confederation."[181] And states were forbidden from engaging in war on their own behalf, "unless actually invaded, or in such imminent Danger as will not admit of delay."[182] These provisions reinforced the power of the

172 U.S. CONST. art. I § 8 cl. 13.
173 U.S. CONST. art. I § 8 cl. 14.
174 U.S. CONST. art. I § 8 cl. 15.
175 U.S. CONST. art. I § 8 cl. 16.
176 U.S. CONST. art. II § 2 cl 1.
177 U.S. CONST. art. VI, § 2.
178 U.S. CONST. art. III, § 2, cl 1.
179 U.S. CONST. art. III, § 2, cl. 2.
180 U.S. CONST. art. VI, cl. 3.
181 U.S. CONST. art. I, § 10, cl. 1.
182 U.S. CONST. art. I, § 10, cl. 3.

federal government as exclusive treaty-maker and the federal military as the primary and exclusive warmaker.

Writing in the *The Federalist Papers*, Alexander Hamilton recognized the danger posed by Indians to the fledgling government. In *Federalist No. 25*, Hamilton expressed his fear that "[t]he territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in different degrees, is therefore common."[183] In *Federalist No. 24*, Hamilton also recognized the need for military preparedness in dealing with Indians on the Western border:

> The savage tribes on our Western frontier ought to be regarded as our natural enemies . . . because they have the most to fear from us . . . . Previous to the Revolution, and ever since the peace, there has been a constant necessity for keeping small garrisons on our Western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians.[184]

Hamilton argued that the proposed government offered several advantages over the status quo in maintaining an effective defense against Indians. Whereas "there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants,"[185] the proposed federal government could enact and enforce a consistent policy and minimize conflict with Indians. In Federalist 23, Hamilton wrote that "the principal purposes to be answered by union are these the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks."[186]

The Constitution also provided centralized authority to bring more order to the national project of westward expansion. Congress received numerous enumerated powers to enact laws related to the policy of expansion, such as the already-mentioned powers to tax, to borrow, and to create and fund the military. In addition, the property clause gave Congress exclusive jurisdiction over western lands and authority to regulate the area: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[187]

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183 THE FEDERALIST NO. 25 (Alexander Hamilton).

184 THE FEDERALIST NO. 24 (Alexander Hamilton).

185 THE FEDERALIST NO. 3 (Alexander Hamilton).

186 THE FEDERALIST NO. 23 (Alexander Hamilton).

187 U.S. CONST. art. IV, § 3, cl. 2.

Under the authority of the property clause, the Northwest Ordinance was re-enacted in 1789, to quell concerns about the ordinance's constitutionality.

Over time, westward expansion would mean the creation of new states, so the Constitution stated that "New States may be admitted by the Congress into this Union."[188] All states, new and old, were to have the same constitutional stature as the original states, so the Constitution guaranteed that "full faith and credit shall be given in each State" to the public acts of another state,[189] and "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[190] In addition, the United States would guarantee to each state a republican form of government, and promised to protect each state from invasion and against domestic violence.[191]

The Constitution, then, remedied many of the weaknesses perceived in the Articles of Confederation. With regard to the management of Indian affairs, the Constitution brought into existence centralized powers to raise money to support an army, to purchase Indian lands, and to defend the borders of the United States. The Constitution made the organization of a powerful federal military force possible. It gave the federal government exclusive power to make treaties, by the President with the advice and consent of the Senate, and exclusive power to enforce them, through the President as commander-in-chief and the Judiciary. And, in clear anticipation of westward expansion, it gave Congress the ability to regulate new federal territories and to admit new states. The powers for conquest were now in place.

III. THE PLANS FOR CONQUEST: THE NORTHWEST ORDINANCE

The Treaty of Paris (1783) transferred jurisdiction over the Northwest Territory from the British to the United States. The Northwest Territory included Ohio, Indiana, Illinois, Michigan, and Wisconsin.[192] The Ohio Valley is included within the Territory, and describes the land north of the

188 U.S. CONST. art. IV, § 3 cl. 1.

189 U.S. CONST. art. IV, § 1.

190 U.S. CONST. art. IV, § 2, cl. 1.

191 U.S. CONST. art. IV, § 4.

192 Today these lands include roughly the states of Indiana, Ohio, Illinois, Michigan, Wisconsin, and northeast Minnesota. *See* Adam Mendel, *The First AUMF: The Northwest Indian War, 1790–1795, and The War on Terror*, 18 U. PA. J. CONST. L. 1309 (2016); WILEY SWORD, PRESIDENT WASHINGTON'S INDIAN WAR: THE STRUGGLE FOR THE OLD NORTHWEST, 1790–1795 xiii (1993).

Ohio River, east of the Wabash River, and south of Lake Erie. Today, the Ohio Valley includes the state of Ohio and most of Indiana. Three land ordinances described how the Northwest Territory would be organized and governed.

The Land Ordinance of 1784, authored principally by Thomas Jefferson, applied to the western territory "ceded or to be ceded by individual states to the United States, as is already purchased or shall be purchased of the Indian inhabitants."[193] The ordinance provided for "a temporary government of the western territory," and expressed clear desire for settlement of the Northwest Territory by "free inhabitants," meaning white people.[194] In addition, Jefferson produced a handwritten map that partitioned the entire territory into sixteen equivalent regions, designated to be future states. This, before the United States owned or possessed any of the territory. Despite his seeming intention to purchase Indian lands, Jefferson had made his intentions known in a 1780 letter to George Rogers Clark: "the Shawanese, Mingoes, Munsies, and the nearer Wiandots are troublesome thorns in our sides . . . . If against these Indians, the end proposed should be their extermination, or their removal beyond the lakes or Illinois [R]iver. The same world will scarcely do for them and us."[195]

The Land Ordinance of 1785 spelled out further regulations for land distribution in the territory. This ordinance required extensive surveying to divide the territory into fairly uniform townships of six square miles each, which were then subdivided into thirty-six lots of 640 acres each.[196] Surveying was crucial in order to establish clear boundaries for individual plots which could be sold with good title.[197] Surveying adds "documentary intelligence to state power."[198]

The Northwest Ordinance of 1787 is the most well-known of these ordinances. The Ordinance was enacted by the Continental Congress in July 1787, at the same time that the new Constitution was being debated.[199]

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193 Thomas Jefferson, The Ordinance of 1784 (April 23, 1784). *See* Reginald Horsman, *Thomas Jefferson and the Ordinance of 1784*, 79 ILL. HIST. J. 99 (1986).

194 *Id.*

195 Letter from Thomas Jefferson to George Rogers Clark (Jan. 1, 1780), NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/99-01-02-6267 [https://perma.cc/8JVU-D5LS].

196 Land Ordinance of 1785.

197 FRYMER, BUILDING AN AMERICAN EMPIRE, *supra* note 98, at 53.

198 JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 39 (Yale Univ. Press, 1998).

199 Robert Alexander, THE NORTHWEST ORDINANCE: CONSTITUTIONAL POLITICS AND THE THEFT OF LAND 15 (2017).

It has been recognized as one of the four Organic laws of the United States, including the Declaration of Independence, the Articles of Confederation, and the Constitution.[200]

The Ordinance has often been described by historians in celebratory terms. It has been described as the "Great Ordinance," praised for its "brilliantly imaginative provisions."[201] According to historian Jack Rakove, the Ordinance offered a way "both to extend the empire of liberty and to incorporate these liberated territories into [an] extended republic."[202] Rakove also noted, however, that "one people's liberty was another people's loss."[203] And here is the rub. The plans of the Framers, land speculators, and Congress for the Northwest could only be realized through the elimination of Indian residents of the land, elimination by treaty and by conquest.

In essence, the Northwest Ordinance created the blueprint for the conquest of the United States and for white supremacy. Its title is "An Ordinance for the government of the Territory of the United States northwest of the River Ohio." The Ordinance first lays out rules for the inheritance of estates within the territory.[204] The Ordinance created detailed rules for governance of the territory. Under its terms, Congress would appoint a territorial governor, a secretary, and a court consisting of three judges.[205] The governor and the judges had authority to adopt and publish in the territory such criminal and civil laws of the States as they thought suitable for the territory.[206] The Ordinance created a territorial legislature, with one representative for each five thousand free adult male inhabitants.[207] The ordinance specified rights of religious liberty, habeas corpus, trial by jury and rights of due process, "by the judgment of his peers or the law of the land," before any deprivations of liberty or property, among other rights.[208]

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200 Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1823 (2011).

201 Ostler, *Genocidal War*, *supra* note 40, at 3–4.

202 *Id.*

203 *Id.*

204 ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, *reprinted in* 1 U.S.C. s. 2, at § 2 (2006), http://uscode.house.gov/static/1787ordinance.pdf [https://perma.cc/6KTK-Y5X5] [hereinafter NORTHWEST ORDINANCE].

205 NORTHWEST ORDINANCE, §§ 3–4.

206 NORTHWEST ORDINANCE, § 5.

207 NORTHWEST ORDINANCE, § 11.

208 NORTHWEST ORDINANCE, arts. 1–2.

The Ordinance also decreed the boundaries of between three to five additional States that would be formed from the territory.[209] Upon reaching a population of sixty thousand free inhabitants, a new State would be admitted into the Union and into Congress "on an equal footing with the original States in all respects whatever."[210] Ultimately, the territory developed into the States of Indiana, Ohio, Illinois, Michigan, Wisconsin, and northeastern Minnesota.

Significantly, Article 6 of the Ordinance abolished slavery in the territory: "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes wherof the party shall have been duly convicted." The next phrase was a fugitive slave clause, giving slave owners the right to recapture any slaves who escaped into the territory. While this limitation on slavery in the northwest territory is noteworthy as the first federal commitment to abolition, by implication it authorized the expansion of slavery south of the Ohio River.[211]

Article 3 of the Ordinance contained language of good faith and protection for Indians resident in the territory:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.[212]

On its surface, the Ordinance appears to be a benevolent plan of settlement and national expansion, to be accomplished only with the "utmost good faith" towards the Indians. Many historians have understood it in just this way.

Article 3 conforms to norms of international law, which protected Indian property rights from involuntary seizure.[213] It is also an official statement of

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209 NORTHWEST ORDINANCE, art. 5.

210 NORTHWEST ORDINANCE, art. 5.

211 Paul Finkelman, *Slavery and Bondage in the "Empire of Liberty"*, *in* FREDERICK D. WILLIAMS, THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS AND LEGACY 87, 61 (1989).

212 NORTHWEST ORDINANCE, art 3. Interestingly, the commitment to purchase lands of the Indians, stated in the Ordinances of 1784 and 1785, is missing here, replaced by "their lands . . . shall never be taken from them without their consent."

213 *See* Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 ORE. L. REV. 663, 667–68, 672 (2003).

federal standards of conduct towards Indians.[214] The drafters of the Ordinance, and subsequent federal leaders, understood how they were supposed to behave and how their actions were supposed to appear.

The facts of conquest and the behavior of early federal leaders, however, often contradicted the words of the Ordinance and the international standards to which the United States committed itself.[215] At the time the Ordinance was drafted, the United States neither owned nor possessed the lands over which it claimed dominion. At most, the Treaty of Paris (1783) transferred sovereignty, not ownership, over the territory from England to the United States. On the one hand, the Ordinance promised "good faith" and protection for Indian property rights. On the other, the leaders of the United States planned to survey, occupy, govern, populate and create new states in a vast territory that it neither owned, populated nor controlled.

The drafters of the Ordinance seemed to assume, naively, that native people would cooperate and consent to federal control over their lands. But what if Indians refused to give up their lands? What if Indians, as rational people, did not consent to their displacement and removal from the lands of their birth? The Ordinance promises that "their lands and property shall never be taken from them without their consent." As I shall demonstrate, and as many readers may know or suspect, in fact Indian lands were taken from them often without meaningful consent, thus violating the norms stated in the Ordinance. Leaders like George Washington, Henry Knox and Thomas Jefferson often fell far short of the Ordinance's promises in their behavior.

The Ordinance states that the Indians' "property, rights, and liberty . . . shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress."[216] This language, allowing for invasion and loss of Indian property in "just and lawful wars" provides seeming justification for the seizure of Indian lands. As I shall show, the meaning of "just and lawful wars" was defined primarily by the United States' desire for land. According to federal leaders, a war was "just and lawful" if Indians refused to accept the peremptory, unilaterally-set terms insisted upon by the United States and

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214 Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 NOTRE DAME L. REV. 73, 80–81 (1988); Churchill, *supra* note 213, at 680–81.

215 *See* 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, 935–37 (2010); Norgren, *supra* note 214, at 80–81.

216 NORTHWEST ORDINANCE art. 3.

when Indians defended their existing borders against encroachment from whites trespassing on their lands. The Indians' muscular defense of their lands was often characterized as offensive and aggressive, allowing the United States to characterize its military actions as defensive, and therefore "just and lawful."

IV. THE CONQUEST: GEORGE WASHINGTON'S INDIAN WARS

> *Conquest by the United States, unlike conquest by many other nations does not mean tyranny. For our people "choose to maintain their greatness by justice rather than violence."*[217]

One wishes this were so. History, however, demonstrates otherwise. After enactment of the Constitution and the Northwest Ordinance, the conquest of the Northwest Territory took on new urgency. The demands that fueled earlier attempts remained the same: the federal government needed lands to sell to fill the public treasury; restive Revolutionary War veterans had still not received their promised land bounties; land speculators needed to possess their lands to carry out their profitable designs.

Notwithstanding the benevolent language of the Northwest Ordinance, President Washington's aggressive campaign against the Indians populating the Northwest Territory demonstrates that conquest, not benevolence, was the government's consistent desire. Violence was a primary factor in the conquest. There was a nearly continuous state of war between whites and Indians until the late 19th Century.[218] During the colonial era, white Americans had developed what military historian John Grenier describes as "the first way of war": "early Americans created a military tradition that accepted, legitimized and encouraged attacks upon and the destruction of noncombatants, villages and agricultural resources. . . .[techniques used] in shockingly violent campaigns to achieve their goals of conquest."[219] Indeed, this first way of war was white Americans' "preferred tool of conquest."[220]

George Washington was no stranger to this kind of violence, having engaged in it during the Revolutionary War. His early efforts against Indians earned him the name "town destroyer."[221] In 1779, Washington ordered Major General John Sullivan to conduct a campaign against the Six Nations,

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217 Johnson v. Eisentrager, 339 U.S. 763 (1950) (Black, J., dissenting).

218 BLACKHAWK, VIOLENCE OVER THE LAND, *supra* note 14, at 5.

219 JOHN GRENIER, THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER 10 (2005) [hereinafter GRENIER, FIRST WAY].

220 *Id.* at 12.

221 BARBARA ALICE MANN, GEORGE WASHINGTON'S WAR ON NATIVE AMERICA 27, 29 (2005).

the object of which was "the total destruction and devastation of their settlements."[222] The goal of Sullivan's campaign was "to lay waste all the settlements around, with instructions to do it in the most effectual manner, that the country may not be merely overrun, but destroyed."[223] Sullivan proceeded to destroy and burn around 60 Iroquoian towns and surrounding farms.[224] Washington praised the mission, noting the "destruction of the whole of the towns and the settlements of the hostile Indians in so short a time, and with so inconsiderable a loss in men."[225] The Iroquois refer to this destruction as the "holocaust."[226]

In addition to clearing the lands out for the government's use, these attacks upon Indian lands gave Washington a chance to attempt to realize his dreams of land ownership in the Ohio Valley. They provided a "continuation of the war for the lands of the Ohio country that Washington had helped instigate in 1754," and "an opportunity to get lands that Washington had coveted for a quarter of a century."[227] These were the best lands in Ohio that Crawford and Washington had worked so hard to identify. After the Revolution was won, the Indians were the last remaining obstacle in the way of Washington's lands.[228]

Later, as Commander-in-Chief, Washington would preside over a war of conquest to wrest the old Northwest Territory from its native owners. George Washington's little-known Indian Wars, fought between 1790–94, provide a clear example of the United States' conquest of Indians, the country's intent to conquer, and the success of the Constitution as an instrument of conquest. It took three major military attacks, launched between 1790–94, to finally conquer the Indians of the Ohio Valley.

As mentioned earlier, the Treaty of Paris transferred sovereignty over the Northwest Territory to the United States in 1783. Congress created a commission to inform the resident Indians of the United States' desire to "establish a boundary line between them and us."[229] The suggested

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222 *Id.* at 971 [hereinafter MANN, GEORGE WASHINGTON'S WAR].

223 *Id.* at 971; COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION 247, 250 (2018) [hereinafter CALLOWAY, INDIAN WORLD].

224 *See* Bruce E. Johnson, *Foreword* to MANN, GEORGE WASHINGTON'S WAR, *supra* note 221, at 24, 30.

225 *Id.*

226 MANN, GEORGE WASHINGTON'S WAR, *supra* note 221, at 27, 885.

227 CALLOWAY, INDIAN WORLD, *supra* note 223, at 260.

228 *Id.* at 261.

229 Ostler, *Genocidal War*, *supra* note 40, at 5.

boundary gave most of present-day Ohio to the United States.[230] The commissioners approached Indian leaders peremptorily, claiming the country by conquest and demanding acquiescence to the borders sought by the United States.[231] While this approach yielded the 1785 Treaty of Fort McIntosh, it also generated serious resistance from Indian nations inhabiting the area.

Resident Indian nations formed an alliance to negotiate from a position of greater strength and to protect their ancestral lands.[232] In 1786, the alliance, named the United Indian Nations ("UIN"), sent Congress a statement expressing its desires for a peace conference:

> And especially as Landed matters are often the subject of our Councils with you, a matter of the greatest importance & of General concern to us in this case we hold it indispensably necessary that any cession of our Lands should be made in the most public manner & by the United Voice of the confederacy. Holding all partial Treaties as void and of no effect. . . .
>
> We again request of you in the most earnest manner, to order your Surveyors and others that mark out Land to cease from crossing the Ohio until we shall have spoken to you because the mischief that has recently happened has originated in that Quarter.[233]

The UIN wanted for all its members to agree on cessions of land, rather than the preceding practice of negotiations in which a subset of Indians signed treaties ceding land that affected all members. If negotiations failed, the UIN claimed the right to defend themselves and their lands: we "shall most assuredly with our limited force be obliged to defend those rights and privileges which have been transmitted to us by our ancestors."[234] This statement from the UIN arrived in the Continental Congress in July 1787, during the constitutional convention of the United States.

In 1788, Arthur St. Clair, the governor of the Northwest Territory, conducted negotiations with representatives of the UIN.[235] St. Clair, however, insisted that prior treaties, based on the right of conquest, would not be reconsidered and that the boundary proposed by the United States

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230 *Id.*

231 *Id.*

232 *See, e.g.*, GREGORY EVANS DOWD, A SPIRITED RESISTANCE 103–07 (1993); HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 69.

233 *Speech of the United Indian Nations at Their Confederate Council Held Near the Mouth of the Detroit River Between Nov. 28 and Dec. 18, 1786*, AM. YAWP READER, https://www.americanyawp.com/reader/a-new-nation/a-confederation-of-native-peoples-seek-peace-with-the-united-states-1786/ [https://perma.cc/8U28-A8TT].

234 *Id.*

235 SWORD, *supra* note 192, at 74.

was inflexible.[236] Essentially, St. Clair dictated the terms of the Treaty of Fort Harmar, which was signed by a minority of members of the UIN.[237] The majority of members of the UIN had anticipated bad faith and St. Clair's intransigence and refused to attend the conference at Fort Harmar. St. Clair said that the United States "were much inclined to be at peace with all the Indians, but if the Indians wanted war they should have war."[238] Ebenezer Denny, an army officer who witnessed the proceedings described them as "the last act of the farce."[239] The net result of St. Clair's stance was to provoke increased military resistance by the UIN. UIN, desiring a border with the United States at the Ohio River, conducted attacks on persons who attempted to settle on the Ohio River and on military patrols in the area.[240]

United States policymakers began to define their meaning of "just and lawful war" as they organized a response to these increased Indian raids. Secretary of War Henry Knox, in January 1790, recommended seeking peace with the Wabash Indians. Knox was clear, however, that the terms of peace meant either conforming to U.S. demands or genocidal war: "If the Indians should refuse to attend the invitation to a treaty the United States would be exonerated from all imputations of injustice in taking proper measures for compelling the Indians to a peace, or to extirpate them."[241] Knox's statement reveals how important it was to early federal leaders to be able to characterize their military actions as "just" or defensive in response to Indian belligerence.

Extirpate means "to destroy completely: to wipe out."[242] According to historian Ben Kiernan, during the eighteenth century the word was used as a synonym for extermination.[243] Kiernan writes that the word meant "utter

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236 *Id.*; COLIN G. CALLOWAY, PEN AND INK WITCHCRAFT 105–106 (2013).

237 CALLOWAY, PEN AND INK WITCHCRAFT, *supra* note 236, at 105–106.

238 EBENEZER DENNY, THE MILITARY JOURNAL OF EBENEZER DENNY 1776–82 (1859).

239 *Id.* at 1789.

240 Ostler, *Genocidal War*, *supra* note 40, at 7; CALLOWAY, PEN AND INK WITCHCRAFT, *supra* note 236, at 107.

241 Henry Knox, *Notes on the State of the Frontier* (Jan. 1790), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-05-02-0042 [https://perma.cc/5RLQ-WD5T].

242 *Extirpate*, MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/extirpate [https://perma.cc/X859-2JFE] (last visited Feb. 21, 2022).

243 BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR 15 (2009); Ben Kiernan, *Is "Genocide" an Anachronistic Concept for the Study of Early Modern Mass Killing?*, 99 HIST. 530, 530–48 (2014) ("The primary meaning of 'extermination' had become 'total extirpation, utter destruction.'").

destruction," and expressed the contemporary "concept of genocide."[244] When Knox, the Secretary of War, uses the word "extirpate," he is saying that the destruction of Indians is a policy choice if Indians do not acquiesce to U.S. demands. Even if a peace overture by the United States was made in bad faith, as had happened earlier, Indian refusal to cooperate would exonerate the United States "from all imputations of injustice" in carrying out a war. In other words, a war or extermination in response to a refusal to acquiesce in U.S. demands would, in Knox's view, be deemed just. In Knox's formulation, Indians could avoid war only by doing exactly what the United States wanted.

Knox responded to the violence along the Ohio by suggesting that President Washington mount a military campaign because of "the inefficacy of defensive operations" against the Shawnees, Cherokees and the Wabash.[245] The campaign was necessary, according to Knox, because of "the bad effect [violence along the Ohio] has on the public mind and the importance and necessity of extirpating the said banditti if any practicable measures can be devised for that purpose."[246] Knox's orders to General Harmar were crystal clear:

> No other remedy remains, but to extirpate utterly, if possible, the said banditti. The President of the United States, therefore, directs that you and the Governor of the Western Territory [St. Clair], consult together on the most practicable mode of effecting this object . . . . But, all future depradations from the Indians southwest of the Ohio, in considerable numbers, must be prevented, if possible; and, for this purpose, the orders now given . . . must be considered a standing order, until the object of extirpating the murderous banditti before mentioned, be effected."[247]

The ensuing military expedition led by General Harmar began in October 1790. Harmar led a force of 1133 militia and 320 regular troops, totaling 1453 men.[248] His orders from St. Clair were to destroy Indian warriors, Indian towns and their stores of food.[249] Harmar's destination was

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244 *Id.*

245 Henry Knox, *Summary Statement of the Situation on the Frontiers by the Secretary of War*, May 27, 1790, at 146, https://tile.loc.gov/storage-services/service/mss/mgw/mgw4/099/0500/0521.gif [https://perma.cc/8DSE-CRE9].

246 Henry Knox, *Summary Statement of the Situation on the Frontiers by the Secretary of War* (May 27, 1790), at 146, https://tile.loc.gov/storage-services/service/mss/mgw/mgw4/099/0500/0521.gif [https://perma.cc/48LS-923Y].

247 *The Secretary of War to General Harmar* (June 7, 1790), AM. STATE PAPERS 97–98, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&recNum=99 [https://perma.cc/3ZNQ-HG5D].

248 SWORD, *supra* note 192, at 96.

249 *Id.* at 101.

Kekionga, a major hub of western Indian tribes, known today as Fort Wayne, Indiana. As Harmar's army proceeded in its journey, a Shawnee war chief named Blue Jacket commented on the upcoming crisis confronting him and his people:

> We as a people have made no war, but as a people we are determined to meet the approaches of an enemy, who come not to check the insolence of individuals, but as a premeditated design to root us out of our land . . . . We and our forefathers and our children were and are bound as men and Indians to defend [this land], which we are determined to do, satisfied we are acting in the cause of justice.[250]

Harmar's army was thoroughly defeated on October 22nd, 1790. Indian forces were led by Little Turtle, a brilliant military tactician and leader of the Miami nation.[251] Little Turtle twice deceived, surprised and outmaneuvered the U.S. forces and inflicted heavy casualties.[252] Harmar's army retreated in disarray.[253] In the end, U.S. forces lost about 178 in the combat, while Indian forces lost between 10 and 40.[254]

In May 1791, President Washington ordered a surprise attack on the Wabash Indians by a smaller force of 750 mounted militia. Secretary Knox's orders to General Scott authorized him to attack the Wabash towns of Wea and Ouiatanon and inflict "that degree of punishment which justice may require."[255] Scott was instructed to "[spare] all who may cease to resist, and [capture] as many as possible, particularly women and children."[256] These captives were to be held at a military fort as hostages, in order to pressure the Indians into treaty concessions.[257] Upon arriving at the banks of the Wabash River, Scott "discovered the enemy in great confusion, endeavoring to make their escape over the river in canoes."[258] Notwithstanding the instruction to "spare all who may cease to resist," Scott ordered his men to fire upon the

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250 *Id.* at 99.

251 *Id.* at 107.

252 *Id.* at 107–13.

253 *Id.* at 117–19.

254 Ostler, *Genocidal War*, *supra* note 40, at 8.

255 *Knox to Scott* (Mar. 9, 1791), AM. STATE PAPERS 129, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&recNum=130 [https://perma.cc/CW34-PGWX].

256 *See* GRENIER, FIRST WAY, *supra* note 219, at 196–97; *To George Washington from Henry Knox* (Feb. 22 1791), NAT'L ARCHIVES, *available at* https://founders.archives.gov/documents/Washington/05-07-02-0237 [https://perma.cc/K3XM-9PRX].

257 SWORD, *supra* note 192, at 139–40.

258 *Report of General Scott to Secretary Knox* (June 28, 1791), AM. STATE PAPERS 131, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&recNum=132 [https://perma.cc/2GVB-GPXS].

escaping Indians. Scott reported that his men, "in a few minutes, by a well directed fire from their rifles, destroyed all the savages with which five canoes were crowded."[259] Scott then proceeded to burn several Wabash towns to the ground and destroyed their crops.[260] Scott captured forty-one women and children to be kept as hostages.[261] As he left the area, Scott sent the following warning:

> Your warriors will be slaughtered, your towns and villages ransacked and destroyed, your wives and children carried into captivity, and you may be assured that those who escape the fury of our mighty chiefs shall find no resting place on this side of the great lakes.[262]

The second major military expedition seeking the conquest of the Ohio Valley was conducted by General Arthur St. Clair, also the Governor of the Northwest Territory. Secretary of War Henry Knox instructed St. Clair as follows: "But, if all lenient measures taken, or which may be taken, should fail to bring the hostile Indians to a just sense of their situation, it will be necessary to use such coercive means as you shall possess, for that purpose."[263] Knox instructed St. Clair to "use every possible exertion to make them feel the effects of your superiority . . . you will seek the enemy with the whole of your remaining force and endeavor, by all possible means, to strike them with great severity."[264]

St. Clair assembled an army of 2000 men for the war. Again, the ultimate goal was to take Kekionga and to establish a federal fort there. St. Clair underestimated severely the organization, discipline and strength of the Indian confederation forces. As observed by Major Denny, St. Clair was "perfectly ignorant . . . of the collected force and situation of the enemy."

Indian scouts were able to track, undetected, St. Clair's "ponderous, noisy, tree-felling army, with its camp followers, bellowing oxen, and lumbering wagons."[265] The Indian force, numbering between 1,000 and 1,400 fighters, launched a stunningly successful surprise attack on St. Clair's

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259 *Id.*

260 SWORD, *supra* note 192, at 140–41.

261 DUNBAR-ORTIZ, *supra* note 20, at 82; GRENIER, FIRST WAY, *supra* note 219, at 196–97.

262 DUNBAR-ORTIZ, *supra* note 20, at 82; GRENIER, FIRST WAY, *supra* note 219, at 196–97.

263 *Secretary Henry Knox to General Scott* (1972), AM. STATE PAPERS 171, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&recNum=172 [https://perma.cc/U2HJ-MADK].

264 *Secretary Henry Knox to General Scott* (1972), AM. STATE PAPERS 172, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&recNum=172 [https://perma.cc/2CA3-QB9T].

265 COLIN G. CALLOWAY, THE VICTORY WITH NO NAME: THE NATIVE AMERICAN DEFEAT OF THE FIRST AMERICAN ARMY 111 (2015) [hereinafter CALLOWAY, VICTORY].

army. The U.S. Army suffered huge losses, numbering over 600 dead. The federal troops fled the battlefield in complete disarray. This is the largest number of Americans ever killed by Indians in a single battle. President Washington responded to this defeat with dismay and outrage.

Prior to the third military expedition launched against the Ohio valley Indians, the administration engaged in pretextual diplomacy. Secretary Knox, while reporting to Congress, had already concluded that war would be necessary:

> [U]pon due deliberation, it will appear that *it is by an ample conviction of our superior force only* that the Indians can be brought to listen to the dictates of peace, which have been sincerely and repeatedly offered to them. The pride of victory is too strong at present for them to receive the offers of peace on reasonable terms. They would probably *insist* upon a relinquishment of territory, to which they have no just claim.
>
> The United States could not make this relinquishment, under present circumstances, consistently with a proper regard for national character.[266]

Knox offered that, prior to committing to war, it was "necessary to examine whether the prosecution of the war with the Indians is supported by the principles of justice."[267] Even though the Indians had defeated the Army twice, Knox asserted that the Indians would not accept "reasonable terms," that they had "no just claim" to their lands, and that the United States could not, consistent with its national honor, relinquish any lands. Again, peace could only be had on terms dictated by the United States. Given such a stance, how could there be any actual negotiations?

Thomas Jefferson, Secretary of the Treasury at the time, understood that diplomatic efforts at this time were pretextual. Expressing his views and those of other cabinet members, Jefferson wrote that "we were all of opinion that the treaty should proceed merely to gratify the public opinion, and not from an expectation of success. I expressed myself strongly that the event was so unpromising that I thought the preparations for a campaign should

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266 Henry Knox, *Statement Relative to the Frontier Northwest of the Ohio* (Dec. 26, 1791), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-09-02-0204 [https://perma.cc/4JEU-FL2Z].

267 *To George Washington from Henry Knox* (Dec. 26, 1971), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-09-02-0204 [https://perma.cc/2AQT-C7UJ].

go on without the least relaxation."[268] Jefferson and President Washington were impatient for war, stating that the United States Commissioners

> should not permit the treaty to be protracted, by which day orders should be given for our forces to enter into action. The President took up the thing instantly after I had said this, and declared he was so much in the opinion that the treaty would end in nothing that he then in the presence of us all gave orders to Genl. Knox not to slacken the preparations for the campaign in the least but to exert every nerve in preparing for it.[269]

The third, and final major military expedition into the Ohio Valley occurred in July and August of 1794. General Anthony Wayne built a powerful army, "the first United States regular army that could operate without fear of defeat in Indian country."[270] Wayne's army included 2200 infantry and 1500 Kentucky militiamen on horseback.[271] Wayne's mission was to conquer the Indian forces and impose a peace on the United States' terms. Wayne's instructions from Henry Knox made his purpose clear: Wayne was to "chase to the westward . . . all the hostile Indians, and if possible by some severe strokes to make them sensible how necessary a solid and permanent peace would be to prevent their utter extirpation."[272]

Indian confederation forces attacked Wayne's army at Fallen Timbers on August 20, 1794. Wayne's army withstood the attack and eventually drove the Indians from the battlefield.[273] The retreating Indians attempted to seek refuge at the British Fort Miami, but their former allies turned them away without any assistance.[274] Wayne's army had finally defeated the Indian confederation.

Having defeated the Indians, U.S. forces spent the next three days laying waste to the Shawnee homeland, burning Shawnee homes and cornfields to the ground and creating a fifty-mile wide zone of devastation.[275] The U.S. conquest of the southern Ohio valley was settled in the 1795 Treaty of Greenville, in which the Indians surrendered Ohio for $20,000 in presents

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268 *Notes on Cabinet Opinions* (Feb. 26, 1973), NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-25-02-0251 [https://perma.cc/J4PA-KM3A].

269 *Id.*

270 GRENIER, FIRST WAY, *supra* note 219, at 199–200.

271 CALLOWAY, VICTORY, *supra* note 265, at 149.

272 *Henry Knox to Anthony Wayne*, May 16, 1794 *in* ANTHONY WAYNE, A NAME IN ARMS: SOLDIER, DIPLOMAT, DEFENDER OF EXPANSION WESTWARD OF NATION 329 (Richard C. Knopf, ed. 1960), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015003691139&view=1up&seq=7 [https://perma.cc/ZH5S-G7TS].

273 CALLOWAY, VICTORY, *supra* note 265, at 150.

274 *Id.*

275 DUNBAR-ORTIZ, *supra* note 20, at 83; GRENIER, FIRST WAY, *supra* note 219, at 197–98.

and an annual payment of $9,500.[276] In the wake of the treaty, settlers began a land rush onto the surrendered lands, now under federal protection.[277]

The powers granted by the newly enacted Constitution enabled the Framers to consummate their dreams of conquering the Ohio Valley, a project that had eluded them for decades. The federal government could now raise and control a military powerful enough to defeat a confederation of Indian nations. The government could now pay Indians for their land after conquest, thus enabling a pretext of consent to the conquest, as demonstrated in the Treaty of Greenville. Conquest also enabled the dreams of land speculators. The U.S. government could now convey clear title to the lands of the much-coveted Ohio Valley, boosting the value of the conquered land, which was now under federal protection and control. The Constitution implicitly promised statehood for the conquered territories and the Northwest Ordinance provided structure for territorial governance. The joining of the desire, the powers and the plan for conquest provided the path forward for future westward expansion.

This history demonstrates that, without the Constitution, a different outcome might have been possible for a time. The Indian confederation won two major victories against the U.S. Army and was subdued only on the third try. Had the Articles of Confederation, lacking centralized funding and military power, been in place rather than the Constitution, it is likely that effective Indian resistance in the Ohio Valley would have continued for a longer period, postponing and possibly changing the future trajectory of conquest in the United States.[278]

V. THE LESSONS OF THE CONQUEST

What are some of the lessons we can learn from this history? First, the history of white conquest of the land now occupied by the United States is an important part of the story of how whiteness and white supremacy became dominant in this nation. In addition to white supremacy developed through slavery, from control over the black body, we can understand that white supremacy also developed through control of the land. Indeed, references to "westward expansion" and "the frontier" should be understood primarily as expressions for the spread of white supremacy.

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276 GARY CLAYTON ANDERSON, ETHNIC CLEANSING AND THE INDIAN 106 (2014).

277 *Id.*

278 Ostler, *Genocidal War*, *supra* note 40, at 8.

Whiteness began, and continues, as an ideology of supremacy. Using their own, self-serving criteria, white Christians considered themselves superior to non-Christian, non-white heathens. White civilization was always presumed to be superior to non-white "savagery." Early colonizers and the Framers of our national identity had no doubt about the superiority of white civilization. And they had no doubt about their God-given mission to make proper use of the land. At the root of whiteness lies the powerful sense of entitlement to seize and occupy land and space possessed by nonwhites.

The dominion of whiteness was made possible by the determination of whites to use force to seize Indian lands, regardless of the harm and costs inflicted on non-whites. Contrary to much popular belief, it was not the attractiveness of white American ideas, constitutions, law, or culture that yielded white domination of the United States. It was the violent use of greater military power, made possible by the Constitution, that accomplished white supremacy. There was no white supremacy in the Ohio Valley until the U.S. Army won the battle of Fallen Timbers on the third try.

While the Constitution enabled this conquest initially, its subsequent interpretation and implementation throughout the 19th century spread the conquest to the west coast. Violent wars and coerced treaties continued throughout the 19th century. These wars include the Blackhawk War, the Seminole Wars, the Sand Creek Massacre, the genocide of California Indians, the Wounded Knee Massacre, and the US War of Conquest Against Mexico, among other examples.[279]

The historical evidence I have presented in this Article is available to all. Notwithstanding, scholars of the Constitution and constitutional law, for the most part, have not reckoned with the role of the Constitution in the violent conquest of Indians. Leading books on the Constitution and American law make, at most, brief and cursory comments on the fate of Indians and otherwise remain almost entirely silent.

Settler colonial theory gives us insights into why this early history of conquest is largely missing from legal discourse. As stated at the outset, "American history is the most sweeping, most violent, and most significant

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279 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 76–7, 120–23, 123–26, 142–44, 87–103; ALAN AXELROD, CHRONICLE OF THE INDIAN WARS 150–54, 140–47, 196–99, 214–17, 248–56 (1993). *See also* BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE (2016); ROBERT E. HEIZER, THE DESTRUCTION OF CALIFORNIA INDIANS (1974).

example of settler colonialism in world history."[280] Our widespread failure to know and acknowledge this history illustrates two of the key features of settler colonialism: the intentional fallacy and disavowal. The following two sections discuss these concepts in turn. A third section demonstrates the consequences of disavowal: the failure of legal scholars to engage with this evidence leaves us with an incomplete and misleading account of the Constitution and its doctrines.

A. The Intentional Fallacy and the Northwest Ordinance

The intentional fallacy is a form of interpretation that "privileges expressions of intention, no matter how contrary to experience, over collective outcomes, no matter their historical regularity."[281] Such interpretations provide "an ideological alibi for the negative outcomes of Indian administration, positing them as policy failures or unintended consequences instead of systemic regularities."[282] I will illustrate the intentional fallacy by showing the glaring inconsistency between most scholarly accounts of the Northwest Ordinance and the evidence presented in this Article.[283]

The Ordinance is usually described in celebratory tones. For example, historian Bernard Bailyn celebrated it for its "brilliantly imaginative provisions . . . opening up new lands in the West and settling new governments within them."[284] Legal scholar Akhil Amar lavishes high praise on the Ordinance, naming it one of the six canonical elements of America's unwritten Constitution, "occupy[ing] a special niche in American constitutional discourse."[285] Describing its antislavery provision, Amar writes that the Northwest Ordinance "offered antislavery Americans a much purer symbol of what America could and should be— a symbol of the West,

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280 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 1. Indeed, the United States is the world leader in settler colonialism: "inserted in the history of colonialism, America appears less as exceptional and more as a pioneer in the history and technology of settler colonialism. All the defining institutions of settler colonialism were produced as technologies of native control in North America." Mamdani, *supra* note 11, at 608.

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

282 *Id.*

283 Ostler, *Genocidal War*, *supra* note 40, at 5.

284 *Id.* at 3.

285 AKHIL R. AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 247 (2012) [hereinafter AMAR, UNWRITTEN CONSTITUTION].

a symbol of the future, a symbol of hope, a symbol of free soil, free men, and freedom."[286] Another writer describes the Ordinance's "glorious past."[287]

Article III of the Ordinance, the provision relating directly to Indians, stated that

> The *utmost good faith* shall always be observed towards the Indians; *their lands and property shall never be taken from them without their consent*; and, in their property, rights, and liberty, *they shall never be invaded or disturbed, unless in just and lawful wars* authorized by Congress. . . .[288]

Both historians and legal scholars have taken the language of Article III at face value, assuming that the Ordinance reflected the federal government's benevolent intentions towards Indians. For example, Jack N. Rakove interprets Article III as an expression of "hopeful intentions" and "a reassessment of the naïve and unjust assumptions in which Congress had first acted towards the defeated tribes."[289] Francis Paul Prucha, a scholar of Indian Law and history, writes that Article III states a "policy of justice toward the Indians."[290] It is comforting and understandable to interpret the language of the Ordinance as consistent with emergent American democracy and concern for human rights.[291]

But how does one reconcile the apparently benevolent language of Article III with the violent military conquest just described? The Northwest Ordinance referred to treating Indians with "*the utmost good faith*."[292] But the record on the ground shows little good faith. Contrary to the public statements by George Washington, Henry Knox and others ostensibly committed to the purchase of Indian lands and to peace, the record shows that they waged war when Indians refused to agree to the cession of their lands on the United States' terms. For example, despite making a show of negotiating with the Indians, Thomas Jefferson described how he, President Washington and his cabinet ordered expedited preparations for the third and final military invasion of the Ohio Valley.[293] They could hardly wait. There was no good faith if the United States was unwilling to negotiate meaningfully. And Congress repeatedly provided funding for a larger and

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286 *Id.* at 261.

287 Hegreness, *supra* note 200, at 1823.

288 ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, art. III, *reprinted in* 1 U.S.C. at LVII (2018) (emphasis added) [hereinafter NORTHWEST ORDINANCE].

289 Ostler, *Genocidal War*, *supra* note 40, at 5.

290 *Id.*

291 I am grateful to Joseph William Singer for this idea.

292 NORTHWEST ORDINANCE, art. 3.

293 *See supra* text accompanying notes 270–274.

more skilled military capable of defeating the Indian alliance. The Framers' desire for land far outweighed parchment promises and ideals.

The Ordinance promises that Indian "*lands and property shall never be taken from them without their consent*."[294] Having broken from England during the Revolution, the Framers were keenly aware that the success and international acceptance of the fledgling United States depended on their adherence to the highest principles of civilization.[295] Under international norms that the Framers knew, the overtly nonconsensual seizure of Indian lands would have yielded immense criticism and loss of stature for the United States.[296] Henry Knox expressed this idea in 1789, writing that

> The Indians being the prior occupants, possess the right of the soil. It can not be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.[297]

According to Knox, to coerce the Indian nations would stain the national character "beyond all pecuniary calculation."[298] In 1793 Knox wrote that, "If the war continues, the extirpation and destruction of the Indian tribes are inevitable—This is desired to be avoided, as the honor and future reputation of the Country is more intimately blended therewith than is generally supposed."[299] Notwithstanding such statements of restraint, Knox was quick to support his view of a just war when Indians resisted the United States' demands for land, as discussed previously.

The record makes it obvious that Indians did not consent meaningfully to their loss of the Ohio Valley. They fought back in defense of their land, twice routing the U.S. Army. Even Indian agreement to the terms of the Treaty of Greenville cannot fairly be considered consent. The terms of the treaty were largely dictated by the United States and accepted by a defeated and browbeaten people.[300] The United States' course of conduct prior to the Greenville treaty included peremptory reliance on the right of conquest,

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294 NORTHWEST ORDINANCE, art. 3.

295 Ostler, *Genocidal War*, *supra* note 40, at 6.

296 Ablavsky, *supra* note 16, at 1058–59; Ostler, *Genocidal War*, *supra* note 40, at 6.

297 HORSMAN, EXPANSION, *supra* note 139, at 55.

298 *Id.* at 56.

299 *Id.* at 96 (quoting Letter from Henry Knox, Secretary of War, United States of America, to General Anthony Wayne (Jan. 5, 1793) *in* [Wayne]).

300 Barbara Alice Mann, *The Greenville Treaty of 1795: Pen and Ink Witchcraft in the Struggle for the Old Northwest*, *in* ENDURING LEGACIES 135, 191, 194 (Bruce E. Johansen ed., 2004) [hereinafter Mann, *Greenville Treaty*].

fraudulent treaties and bad-faith negotiations.[301] The Treaty of Greenville essentially imposed the terms of the prior Treaty of Fort Harmar, whose legality was consistently challenged by Indian nations.[302] As such, the Treaty of Greenville was one of many examples of the United States engaging in "pen-and-ink-witchcraft."[303] The fact that the Indians signed a treaty whose terms were dictated by the United States after their military defeat is not consent.

The desire to create a façade of consent explains why the Treaty of Greenville included terms of purchase for the lands already conquered. These lands did not need to be purchased to obtain possession, since the United States already conquered the lands by military force. The alleged consensual purchase commemorated in the treaty made it possible for the United States to save face by claiming the transaction was consensual, and therefore consistent with international norms and the language of the Ordinance. The record shows that the United States took Indian lands without consent, while creating documentary evidence that could be argued to be consent. A similar "purchase" happened in the Treaty of Guadalupe Hidalgo, in which the United States paid fifteen million dollars in indemnity after conquering Mexico militarily.[304]

The Ordinance says that Indian nations "*shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress*."[305] To what extent can this war be considered "just and lawful"? Secretary of War Henry Knox offered several arguments for the justice of the war. One alleged justification was that the Indian Union, after two victories over the U.S. Army, would not be "reasonable" during negotiations and might even demand a cession of land from the United States.[306] Having repelled and won two consecutive attacks by the United States, why wouldn't the victors demand a cession of land? The United States' unwillingness to consider surrendering any land shows that the negotiations were largely pretextual given the United States' unwavering demand for more land. It is interesting that Knox felt the need to describe the war as "just and lawful." This description, whether accurate or not, was necessary to conform to the standards in the Ordinance.

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301 Mann, *Greenville Treaty*, *supra* note 300, at 135–79.

302 *Id.* at 184, 189, 191.

303 *Id.* at 194, 197.

304 *See* JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 289–93 (3d ed. 2015) [hereinafter PEREA ET AL.].

305 NORTHWEST ORDINANCE, art. 3.

306 *See supra* notes 267–268.

It is apparent from the record that the Washington administration was willing to wage war when Indians refused to cede their lands peacefully. The Indians' military defense of their lands can be understood as reasonable self-defense against encroachment by whites.[307] But there was little or no tolerance for Indian self-defense. In the end, Washington fought a war of conquest until he got what he wanted, regardless of what Indians wanted and the harm inflicted on them.

Some commentators have understood that this war was unjust. Even one of George Washington's officers, Ebenezer Denny, who witnessed negotiations between Arthur St. Clair and Indian chiefs described the negotiations as "the last act of the farce."[308] Henry Knox, Secretary of War, also understood the meaning of the United States' behavior toward Indians. Reporting to Congress in December 1794, after the decisive battle of Fallen Timbers, Knox wrote that

> It is a melancholy reflection that our modes of population have been more destructive to the Indian natives than the conduct of the conquerors of Mexico and Peru. The evidence of this is the utter extirpation of nearly all the Indians in most populous parts of the Union. A future historian may mark the causes of this destruction of the human race in sable colours.[309]

It is hard to conceive of this as a "just and lawful" war.

One could accept the intentional fallacy and say the intention of the Northwest Ordinance was its benevolent message of good faith, consent and justice towards Indians. While the Ordinance expressed important standards for the just treatment of Indians, uncritical acceptance of this language as truth conceals a larger measure of truth. The violent, long-desired conquest of the Ohio Valley contradicts the benevolent language of the Ordinance. Much subsequent conduct towards native people, like Indian removal, also contradicts the Ordinance. Privileging the intentions stated in the Ordinance over the violent course of conduct that ensued risks sacrificing an enormous amount of meaning. Only by studying the course of conduct can we appreciate the great losses and sacrifices of native people and the greed, violence, and governmental hypocrisy that motivated this Indian war. And only by studying the course of conduct can we better understand the need

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307 Ann E. Tweedy, "*Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 703–07 (2011).

308 EBENEZER DENNY, THE MILITARY JOURNAL OF EBENEZER DENNY 130 (1859).

309 Henry Knox, Report to Congress, Dec. 31, 1794, available at https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&recNum=544.

for and the contours of a remedy. When actions conflict with words, the actions and consequences that ensue may be better evidence of truth than the words alone.[310]

But suppose we interpret that the military attacks on Indian land as the result of incorrigible white settler violence on the frontier and not government policy, as many historians have argued. As stated by Wolfe, such interpretations provide "an ideological alibi for the negative outcomes of Indian administration," positing them as "policy failures or unintended consequences rather than as systemic regularities."[311] The persistent attacks on Indian land, congressional authorizations for expanded military funding and the ensuing Treaty of Greenville, formalizing the land cessions, demonstrate that these were fully acts of government policy. And so with many subsequent land cessions.

Even if one were to blame the violence on rogue, ruthless white settlers, this provides no explanation for why the federal government would defend their violence with its own, nor for why the government would invariably acquire the contested land by treaty. As one defender of Washington's Indian wars noted, "Even if 'it should be admitted that our frontier people have been the aggressors', the efforts of the national government to seek peace had always been rebuffed. Therefore, 'Justice is on the side of the United States.'"[312]

It is no coincidence that the settlers' interests coincided with the federal government's interest in dispossession. Ruthless frontiersmen were merely the leading edge of the conquest.[313] By the time of Jefferson's presidency, the threat of war in the service of Indian dispossession had several steps: "1) white encroachment and atrocity against Indians; 2) bloody Indian retaliation; 3) military invasion, or threat of invasion, of Indian country to protect innocent

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310 This observation allows me to make a general statement about intent and the proof of intent: the surest measure of intention, conscious or unconscious, is the uncorrected, known result of government action. This proposition holds whether the consequences of government action are said to be intended or unintended. If the consequences are labeled unintended, then the failure to alleviate known consequences becomes an expression of intent. Over time, the uncorrected, known consequences of governmental action express the tacit acceptance of these consequences and therefore the intent to preserve the consequences.

311 Patrick Wolfe, *Against the Intentional Fallacy: Logocentrism and Continuity in the Rhetoric of Indian Dispossession*, 36 AM. INDIAN CULTURE AND RES. J. 4 (2012).

312 *See* Andrew R. L. Cayton, *The Meanings of the Wars for the Great Lakes*, *in* THE SIXTY YEARS' WAR FOR THE GREAT LAKES, 1754–1814 373, 386 (David Curtis Skaggs & Larry L. Nelson eds., (2001)).

313 *See* ANTHONY F.C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS 292, 304 (2001).

settlers and punish hostile savages; 4) and finally a peace treaty that required a cession of Indian land."[314]

The "systemic regularity" and intentionality of the conquest of the mainland United States is confirmed by the federal government's subsequent course of conduct. Voracious land acquisition continued apace under the subsequent Jefferson administration, notwithstanding official pronouncements of "benevolence" toward the Indians. Indeed, as described by historian Anthony F.C. Wallace, Jefferson "played a major role in one of the great tragedies of recent world history, a tragedy which he so eloquently mourned. . . . It was a process now known as 'ethnic cleansing.'"[315]

As described earlier, Jefferson was a longtime advocate of western expansion and settlement. Like most American leaders, Jefferson was also a champion of the imagined white nation.[316] In 1801, for example he wrote to James Monroe:

> [I]t is impossible not to look forward to distant times, when our rapid multiplication will expand itself beyond those limits, and cover the whole northern, if not the southern continent, with a people speaking the same language, governed in similar forms, and by similar laws; nor can we contemplate with satisfaction either blot or mixture on that surface.[317]

Despite often speaking a language of benevolence, Jefferson's actions on the ground were coercive and violent:[318] "[A]lthough Jefferson publicly insisted that he would only purchase lands that Indians willingly sold, he showed little hesitation in squeezing tribal leaders until they ceded their territory."[319] William Henry Harrison, his principal negotiator, also known as "Jefferson's Hammer," was famous for "arm-twisting, bribery, and deceit in the pursuit of successful treaties."[320] In a 1780 letter to George Rogers Clark, Jefferson wrote that

> On the other hand, the Shawanese, Mingoes, Munsies, and the nearer Wiandots are troublesome thorns in our sides. However we must leave it to yourself to decide on the object of the campaign. *If against these Indians, the end*

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314 *See* WALLACE, JEFFERSON AND THE INDIANS, *supra* note 313, at 304.

315 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 67; WALLACE, *supra* note 313, at 292, 304.

316 FRYMER, BUILDING AN AMERICAN EMPIRE, *supra* note 98, at 20.

317 *Id.*

318 Ostler, *Genocidal War*, *supra* note 40, at 12.

319 Robert M. Owens, *Jeffersonian Benevolence on the Ground: The Indian Land Cession Treaties of William Henry Harrison*, 22 J. EARLY REPUBLIC 405, 405 (2002).

320 *See* ROBERT M. OWENS, MR. JEFFERSON'S HAMMER: WILLIAM HENRY HARRISON AND THE ORIGINS OF AMERICAN INDIAN POLICY (2007); *see also* Owens, *Jeffersonian Benevolence*, *supra* note 319, at 405, 435.

> *proposed should be their extermination, or their removal beyond the lakes or Illinois [R]iver. The same world will scarcely do for them and us.*[321]

While Jefferson's pursuit of land often took the appearance of negotiations, there was little doubt about the threat of violence underlying the negotiations. Describing colonial records supposedly showing that whites had purchased Indian lands, Jefferson wrote that, "it is true that these purchases were sometimes made with the price in one hand and the sword in the other."[322] In an 1803 secret letter to William Henry Harrison, Jefferson professed that "our system is to live in perpetual peace with the Indians."[323] Notwithstanding, later in the letter Jefferson wrote:

> our settlements will gradually circumscribe & approach the Indians, & they will in time either incorporate with us as citizens of the US. or remove beyond the Mississippi. the former is certainly the termination of their history most happy for themselves. [B]ut in the whole course of this, it is essential to cultivate their love. [A]s to their fear, we presume that our strength & their weakness is now so visible that we have only to shut our hand to crush them, & that all our liberalities to them proceed from motives of pure humanity only. [S]hould any tribe be fool-hardy enough to take up the hatchet at any time, the seizing the whole country of that tribe & driving them across the Mississippi, as the only condition of peace, would be an example to others, and a furtherance of our final consolidation.[324]

In other words, if native nations resisted their dispossession, their lands would be taken by force. In 1807, President Jefferson wrote to his Secretary of War, Henry Dearborn and instructed him that "if ever we are constrained to lift the hatchet against any tribe, we will never lay it down till that tribe is exterminated, or driven beyond the Mississippi . . . [I]n war they will kill some of us; we shall destroy all of them."[325] The significance of this communication should not be minimized: it is an official order from the President of the United States approving the genocide of native people.

The Constitution's fiscal and military powers would continue to be used for military conquest under pretenses of "justice" and Indian "consent," demonstrating the systematic regularity of the government policy of Indian

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321 Letter from Thomas Jefferson to George Rogers Clark (Jan. 1, 1780) (on file with the National Archives).

322 Ralph Lerner, *Reds and Whites*, 1971 S CT REV 201, 208 (quoting [Letter] *in* WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE (1853–1854) 281 n.4 (Thomas Jefferson, H.A. Washington eds., 1854).

323 Letter from Thomas Jefferson to William Henry Harrison (Feb. 27, 1803) (on file with the National Archives).

324 *Id.*

325 Letter from Thomas Jefferson to Henry Dearborn (Aug. 27, 1807) (on file with the National Archives).

dispossession. A few examples will illustrate the point. The Indian Removal of the nineteenth century, despite being cast as "voluntary" by statute and treaty, was another example of coercion backed by force.[326] Between 1828–38, over eighty thousand Indians were relocated to reservations in the far west. Indians who resisted relocation were forced to leave under the threat or actuality of military violence. For example, this is Major General Winfield Scott's warning to Cherokees who had not yet left their lands:

> My troops already occupy many positions in the country that you are to abandon, and thousands and thousands are approaching from every quarter, to render resistance and escape alike hopeless . . . . Will you then, by resistance, compel us to resort to arms? God forbid! Or will you, by flight, seek to hide yourselves in mountains and forests, and thus oblige us to hunt you down? . . . I am an old warrior, and have been present at many a scene of slaughter, but spare me, I beseech you, the horror of witnessing the destruction of the Cherokees.[327]

In one particularly violent incident, the military decided to remove forcefully Sauk leader Black Hawk, the leader of a group of about 1000 Sauk Indians.[328] General Henry Atkinson, the federal commander, warned a Sauk leader that Black Hawk's people "can be easily crushed as a piece of dirt" and that "in a short time they will cease to exist" if they strike "one white man."[329] Following a skirmish with Black Hawk's men, Atkinson declared that should "the Sacs elude us and recross the Mississippi, I will pursue them forthwith and never cease till they are annihilated or fully and severely punished and subdued." Atkinson's men attacked Black Hawk. A combination of U.S. forces, Illinois militiamen and a military gunboat fired upon the Sauks, including many non-combatants, as they tried to escape across the river or find cover. By the end of the battle, three hundred of Black Hawk's people were slaughtered.[330] Future president Zachary Taylor reported favorably that Atkinson's force "killed every Indian that presented himself on land, or who endeavored to seek safety by swim[ming] the river."[331]

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326 Ostler, *Genocidal War*, *supra* note 40, at 13; PEREA ET AL., *supra* note 304, at 207–10.

327 Major General Winfield Scott, *Proclamation to the Cherokee People* (May 10, 1838), TNGENWEB PROJECT (2003), www.tngenweb.org/cessions/18380510.html [https://perma.cc/AK3R-3HKJ].

328 Ostler, *Genocidal War*, *supra* note 40, at 13.

329 *Id.*

330 GARY CLAYTON ANDERSON, ETHNIC CLEANSING AND THE INDIANS: THE CRIME THAT SHOULD HAUNT AMERICA 162–63 (2014).

331 Ostler, *Genocidal War*, *supra* note 40, at 14.

While continuing with the conquest of domestic Indian nations, in 1846–48 the United States launched a war of conquest against Mexico, accomplishing the single largest seizure of land in U.S. history. The United States took half of Mexico's land, which became most of the southwestern part of the country. This war precipitated genocide against California Indians, whose population shrank from 150,000 before the conquest to 30,000 between 1846 and 1870.[332] While other causes, such as disease, contributed to Indian deaths, both the California and U.S. governments played pivotal roles in sponsoring and conducting genocidal violence against Indians: Congress authorized well over one million dollars in retroactive payments to California militiamen and vigilantes, rewarding their killing of Indians; and the U.S. Army, more lethal than the state militia, killed at least 1,688 to 3,741 California Indians between 1846 and 1873.[333]

The celebratory stance of historians and legal scholars toward the Northwest Ordinance may be understandable from a white point of view. The Ordinance created a relatively orderly framework for the spread of white supremacy. But it is deeply ironic and misleading to celebrate it as an important source of natural rights, human rights and freedoms. Whatever rights and freedoms the Ordinance granted to white people, its implementation denied those same rights and freedoms to native peoples killed, impoverished and dislocated in its service.

B. Disavowal and the Silence of the Scholars

A second feature of settler colonial societies is disavowal. Disavowal is defined as "the active and interpretive production of indigenous absence. In settler democratic thought, the absence of native conquest is not assumed or forgotten; it is discursively produced."[334] I will demonstrate disavowal by examining several leading histories and casebooks covering the Constitution and its history. As I shall show, most of these books have nothing to say about the conquest of indigenous America and the violence inherent in the conquest. It is through omission, not lack of evidence, that indigenous absence is discursively produced.

One of the most prominent processes of settler colonial societies is disavowal of their actual origins. As described by historian Walter Dixson,

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332 BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846-73 3 (2016).

333 *Id.* at 14, ch. 6, 230, 354–55.

334 DAHL, EMPIRE OF THE PEOPLE, *supra* note 12, at 4.

"[s]tructures of disavowal, denial, and forgetting comingled with fantasies of chosenness provided Americans with 'an imaginary relation to actual state colonialism.'"[335] Disavowal involves two constituent aspects, both necessary to accomplish Indian absence: first, the invention of a new history which displaces the old; and second, a purposeful amnesia that erases the fact and the violence of conquest.

In settler colonial societies, purposeful amnesia is necessary to make founding violence invisible. This is the "paradox of political founding."[336] The political order is "founded on extra-legal violence that stands outside of democratic legitimacy."[337] This violence is termed "founding violence," when the elimination of native life makes possible the creation of new legal and cultural norms. The evidence shows that the United States was founded and expanded through violence and coercion inflicted on native people.[338] The actual facts of this violent conquest contradict this country's democratic ideals.[339] Conquest, the imposition of foreign law and order through violence, is the opposite of democracy.

In a society founded on the violent conquest of natives, the only way to tell a moral, non-violent origin story is to render the evidence of conquest invisible. The moral and theoretical legitimacy of American democracy depends on erasing these violent origins and erasing the presence of native peoples.[340] The appearance of a government by the people "succeeds if violence in the founding is treated by the hegemonic political identity to have no continuing effects."[341] And so it is with the founding violence inflicted upon native people. After omitting the evidence of state-supported violence at the founding, it is treated as though it had no continuing effects.[342] Thus

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335 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 12–13 (quoting Donald E. Pease, *U.S. Imperialism: Global Dominance Without Colonies*, *in* A COMPANION TO POSTCOLONIAL STUDIES 205 (Henry Schwarz & Sangeeta Ray eds., 2000)). *See also see also* Veracini, *supr*a note 14, at 271, 274 (explaining that settler colonial groups disavowed their origins to "build their own utopias without hindrances").

336 DAHL, EMPIRE OF THE PEOPLE, *supra* note 12, at 3.

337 *Id.*

338 Ostler, *Genocidal War*, *supra* note 40; DUNBAR-ORTIZ, *supra* note 20, at 28–29; HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 1.

339 *See* HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 19 (comparing American colonial violence and the Nazi Holocaust); DAHL, EMPIRE OF THE PEOPLE, *supra* note 12, at 4.

340 DAHL, EMPIRE OF THE PEOPLE, *supra* note 12, at 4.

341 WILLIAM E. CONNOLLY, THE ETHOS OF PLURALIZATION 138 (1995).

342 When I write of founding violence, I mean several forms of violence. Of course, founding violence refers to whites inflicting death and bodily harm to natives. But violence occurs also through the

the paradox of political founding "dissolves into the politics of forgetting."[343] In order for white settlers and their progeny to see themselves as proper founders and inhabitants of conquered land, they must make their predecessors, the real natives, disappear from sight and mind.[344]

The "imaginary relation to actual state colonialism" begins with the invention of a fantasy narrative of "chosenness" in which the story of settler colonists is the beginning of history.[345] The history of colonial America is often told as the history of a new, exemplary collective, free of conflict. For Governor John Winthrop of the Massachusetts Bay Colony, writing in 1630, it was the God-given destiny of British colonists to inspire the world with their new creation: "For wee must consider that wee shall be as a citty upon a hill. The eies of all people are uppon us."[346] Writing in 1782 in New Hampshire, J. Hector St. John Crevocouer celebrated the creation of a new society, "the most perfect society now existing in the world," where "man [was] as free as he ought to be."[347] Crèvecoeur also celebrated the rejection of history and the creation of new origins for whites in America:

> What, then, is the American, this new man? He is either an European or the descendant of an European . . . . *He* is an American, who leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds . . . . The American is a new man, who acts upon new principles; he must therefore entertain new ideas and form new opinions.[348]

It is not the authorship of these excerpts that matters. What is important is that historians repeat such statements as emblematic of the origins of American history. As Frantz Fanon aptly described, "the history which [the colonist] writes is not the history of the country he plunders but the history of his own nation. . . ."[349]

In the context of constitutional law, we can observe the same process of disavowal at work: the need to construct a positive origin story about the

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imposition and enforcement of European law on indigenes. Coercion, whether or not with the force of law, also represents a form of violence. Lastly, purposeful disavowal and forgetting also works a form of violence through the erasure of history and the consequent failures of empathy and justice with regard to Indian peoples.

343 CONNOLLY, *supra* note 341, at 138.

344 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 11.

345 *Id.* at 12–13 (quoting Pease, *supra* note 335, at 205).

346 John Winthrop, *A Modell of Christian Charity* (1630), *reprinted in* 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 31, 47 (Charles C. Little & James Brown eds., 1838)

347 J. HECTOR ST. JOHN CRÈVECOEUR, LETTERS FROM AN AMERICAN FARMER 50 (Fox, Duffield & Co. 1904) (1782).

348 *Id.* at 54, 56.

349 FRANTZ FANON, THE WRETCHED OF THE EARTH 51 (Constance Farrington trans., 1963).

Constitution which displaces the actual story of conquest and violence. Constitutional law scholars create a celebratory origin story that often begins with several key founding documents, the Declaration of Independence, the Articles of Confederation, the Constitution, and the Northwest Ordinance.[350]

Akhil Amar's *America's Constitution: A Biography*, provides an example. Amar's book is learned and elegant. This book fits, however, the pattern of settler colonial disavowal. First, the glorious beginnings. Amar's first two chapter titles tell the story: "In the Beginning" was the Preamble and the Constitution provided "New Rules for a New World."[351] In Amar's view, the Constitution is the beginning of legal history, engendering a new world. Amar compares the creation of the Preamble to the divine:

> In the beginning, God said, *fiat lux*, and—behold!—there was light. So, too, when the American people (Publius's "supreme authority") said, "We do ordain and establish," that very statement would do the deed. "Let there be a Constitution"—and there would be one. As the ultimate sovereign of all had once made man in his own image, so now the temporal sovereign of America, the people themselves, would make a constitution in their own image.[352]

Amar continues by describing the nature of liberty: "No liberty was more central than the people's liberty to govern themselves under rules of their own choice; and the Preamble promised to secure this and other 'Blessings of Liberty' not just to the Founding generation, but also, emphatically, to 'our Posterity.'"[353] This statement is deeply ironic when one considers the violence and denial of liberty to native Americans.

Amar also lavishes high praise on the Northwest Ordinance, naming it one of the six canonical elements of America's Unwritten Constitution, "occupy[ing] a special niche in American constitutional discourse."[354] Amar describes the Ordinance's significance:

> As time passed, Americans poured prodigiously into the Northwest thanks in no small part to the Ordinance's inducements, and in the process settlers began to endow the Ordinance with a special symbolic sanctity. For the region's numerous residents, the Ordinance was in effect their primary

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350 *See, e.g.*, AMAR, UNWRITTEN CONSTITUTION, *supra* note 285, at 249 (discussing Martin Luther King, Jr.'s use of themes drawn from the Declaration of Independence, the Constitution, and the Northwest Ordinance to describe "the American dream").

351 AMAR, UNWRITTEN CONSTITUTION, *supra* note 285, at 3, 55.

352 *Id.* at 8.

353 *Id.* at 10 (footnote omitted).

354 *Id*. at 247.

> constitution—their basic frame of government and their highest source of law, their Magna Carta. Indeed, to many northwesterners the promises made in this sanctified text seemed to be prior to and even higher than the federal Constitution itself.[355]

According to Amar, the "Ordinance thus reinforced the idea—an idea also clearly visible in the Declaration—that certain higher-law rights preceded all legitimate government."[356] Amar refers to the Ordinance's ban on slavery in the Northwest Territory as "the golden apple in its silver frame."[357] Amar writes that "the Northwest Ordinance offered antislavery Americans a much purer symbol of what America could and should be—a symbol of the West, a symbol of the future, a symbol of hope, a symbol of free soil, free men, and freedom."[358]

Discussing the Ordinance, Amar adopts the "empty wilderness" fantasy about populated Indian lands and makes them disappear in his prose: "Like the unconquered summit beckoning mountaineers, the West was simply there, drawing men to it, and no responsible group of planners could ignore its looming presence."[359] Amar then asserts that "[t]he story of America cannot be told apart from the story of the landmass itself."[360] I couldn't agree more. What is remarkable, and deeply ironic, is that Amar thinks he is telling the story of the land when in fact he ignores a major part of the story; the dispossession of native Americans. Amar also refers to western lands as a source of "vast wealth," but says nothing about the Constitution's role in seizing that wealth.[361]

Amar's treatment of Indians is incidental and cursory. In *America's Constitution* there are brief references to Indian reservations, Indian citizenship, and Indian wars, the latter with no elaboration.[362] Similarly, Amar's *Unwritten Constitution* ignores Indians. The book's index, while featuring an entry for "India," lacks entries for Indians, Native Americans and Treaties.[363]

Fitting the pattern of settler-colonial disavowal, Amar establishes a celebratory (even divine) origin myth for the Constitution and the Northwest Ordinance. At the same time, he avoids entirely any consideration of the

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355 *Id.* at 261.

356 *Id.*

357 *Id.* at 261–62.

358 *Id.*

359 AMAR, AMERICA'S CONSTITUTION, *supra* note 285, at 270.

360 *Id.*

361 *Id.* at 271.

362 *Id.* at 642, 28, 46.

363 *See Id*. at 607, 609, 613.

founding violence that actually enabled American possession of Indian lands. Thus is constructed the "imaginary relation to actual state colonialism."[364]

From the point of view of native Americans and critical scholars, Amar's non-existent treatment of the relationship of the Constitution and the Northwest Ordinance to the dispossession of Indians is deeply problematic. The Northwest Ordinance was the plan for conquest and white supremacy, crafted before the United States possessed the land it described. The white presumption of control over this land made the subsequent wars and violence inflicted on Indians virtually a foregone conclusion, awaiting only the construction of a military force of sufficient might to kill and expel the territory's native occupants. Against the evidence of the actual invasion and conquest of native America, Amar's words ring hollow. The "golden apple" was poisoned from the start. Amar's dulcet descriptions illustrate well the intentional fallacy identified by Wolfe, the tendency to privilege official words over more consequential patterns of official action.[365] Amar privileges the words of the Constitution and the Northwest Ordinance, giving them an exalted place far removed from the violent conquest and dispossession that actually happened under their purview.

Amar asserts "that certain higher-law rights precede[] all legitimate government."[366] Integrating the evidence of violent white conquest over Indians makes this proposition deeply problematic. Presumably, concepts of "higher law" would not include the racist and violent dispossession of native people. In practice, however, "higher law" meant just such racist dispossession and conquest, a proposition amply demonstrated by the course of conduct ranging from British colonists to newly minted Americans. If governmental legitimacy depends upon the precedence of higher law rights, then the denial of such rights to native people and enslaved people casts doubt on the U.S. government's legitimacy. On the other hand, if the concept of "higher law" floats freely and independently of the actual course of conduct, then the concept means little, and government legitimacy based on that weak abstraction also means little. This is the paradox of political founding, in which violent origins undermine the legitimacy of allegedly democratic societies.

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364 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 12–13 (quoting Pease, *supra* note 335, at 205). *See also* Veracini, *supr*a note 14, at 274 (explaining that settler colonial groups disavow their origins).

365 Wolfe, *supra* note 281, at 4.

366 AMAR, UNWRITTEN CONSTITUTION, *supra* note 285, at 261

As another example of settler colonial disavowal, consider Lawrence Friedman's classic *History of American Law*. His references to Indians are summary and sporadic, but at least he recognizes occasionally the harm done to Indians. He writes, for example, that

> [T]he history of American settlement, if you wanted to sum it up in one sentence, was a history of dispossessing the native peoples; sometimes violently, often with cruel and callous disregard of their rights and very humanity.[367]

The problem is that Friedman gives us, in effect, only the one sentence.

Friedman also recounts that "as time went on, the natives were dealt with more harshly, degraded and discriminated against, treated as an alien, hostile group very often, and there were bitter and bloody wars and battles."[368] This breathlessly run-on sentence gives us the barest acknowledgement of an enormous amount of mistreatment of Indians, almost as though Friedman were actually running away from the horror he barely describes. And again, he gives us only the one sentence. In addition to being run-on, notice Friedman's use of passive voice. "Natives were dealt with more harshly." "There were bitter and bloody wars and battles." Who dealt with the Natives more harshly and discriminatorily? Why were there bitter and bloody wars, and who was responsible? Passive voice evades the assignment of responsibility for these bad acts, which are presented as just having happened. We can, however, assign responsibility. White people, both the military and frontier residents, treated Indians harshly and discriminatorily. President George Washington and his cohorts were responsible for the Indian Wars recounted above.

Despite the epic length of Friedman's book (828 pages) and the degree of detail he lavishes on other subjects, he offers no detail to help us understand how dispossession and abuse of Indian rights happened. Despite its title, this *History of American Law* offers us nothing on the role of law in the dispossession and conquest of Indians.

Constitutional law casebooks also largely disavow the role of the Constitution in the conquest and dispossession of Native Americans. Many constitutional law casebooks contain only incidental references to Native Americans.[369] One casebook with a substantive treatment of the United

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367 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 26 (4th ed. 2019).

368 *Id.* at 5 (footnote omitted).

369 *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 568, 572, 580, 583, 585, 605–06, 1528, 1535 (7th ed. 2013); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1892 (5th ed. 2017) (citing to the casebook's index) and *id.* at 276–80 (covering *Seminole Tribe of Fla. V. Florida*, 517

States' relationship with Indians is the book authored by Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar, and Reva B. Siegel.[370] The first discussion of Indians occurs early in the book, in a note titled "American Indians and the American Political Community."[371] The note discusses several prominent cases in Indian law, including *Johnson v. M'Intosh* and the *Cherokee Cases*, that created the legal status of Indians. The note comments usefully on the discontinuity between allegedly binding natural law and the conquest of Indians.[372] The book contains two other substantive notes, on the nature of Native American citizenship and whether Indians are a "race" or a political classification.[373] The book also contains several other, more incidental mentions of Indians. Except for discussing some of the cases that ratified the conquest, the Brest, Levinson book, like the others, offers no discussion of the crucial role the Constitution itself played in the dispossession of Indians.

C. The Implications of Disavowal

The disavowal of the conquest of native America, and the consequent scholarly production of the "imaginary relation to actual state colonialism"[374] has profound implications for our understanding and study of the Constitution. First, there is the gaping doctrinal hole in failing to understand the Constitution as an effective instrument of conquest, not just at the inception of national history but throughout that history and into the present. Second, there are serious pedagogical limitations and consequences from failing to engage with this history. I will discuss each of these implications in turn.

U.S. 44 (1996), in which the Court held that Congress could not abrogate states' sovereign immunity by allowing tribal petitioners to bring suit against states governments under the Indian Gaming Regulatory Act).

370 PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (5th ed. 2006) [hereinafter BREST ET AL.]. Ironically, Akhil Amar is one of the co-authors of this casebook. He should read the above-described section of his casebook and consider the implications for his individual work.

371 *Id.* at 177–82.

372 *Id*. at 157.

373 *Id*. at 346–50, 1151–54.

374 HIXSON, AMERICAN SETTLER COLONIALISM, *supra* note 10, at 12–13 (quoting Pease, *supra* note 292, at 205). *See also* Veracini, *supra* note 14, at 274 (discussing the historical erasure of Indians and its implications).

1. Doctrinal Consequences of Scholarly Disavowal

Scholarly disavowal of the conquest has left a gaping hole in our understanding of what the Constitution and the Northwest Ordinance mean. One of the most important processes in American history and the formation of American identity, in which law played a crucial role, has been discursively dismissed from relevance and even existence in our understanding of constitutional history.

I anticipate that some readers will argue that one reason to omit this history is because it isn't really constitutional law. One could argue that the proper domain of constitutional law is the Constitution itself and the exposition of its meaning by the Supreme Court. On this view, the history of the military conquest of Indians is simply not constitutional *law*. I do not believe that this potential objection is persuasive, for the reasons that follow.

While some readers may sympathize with this view, it raises troubling questions about the nature of constitutional law and legal methodology generally. It cannot be argued credibly that the conquest of native America was unimportant. The conquest and removal of Indian nations, and the subsequent conquest of Mexico and annexation of half of its lands, produced the area that we call the continental United States. The conquest of Indians was enabled by the powers granted in the Constitution, directly after its enactment. If constitutional law and legal methodology manage to ignore such a fundamental process as the conquest, which, as I have described, was fully pursuant to and enabled by the Constitution, then something is deeply wrong with what we consider to be constitutional law.

Constitutional law, as presently understood, is almost entirely circumscribed by judicial review and by the presumed finality of Supreme Court interpretations of the Constitution.[375] Yet *Marbury v. Madison* has limited our understanding of constitutional interpretation to only what the Court says. Other government actors also interpret the Constitution with finality. George Washington and his cabinet and military officers interpreted and applied the war making and financial powers of the Constitution to accomplish the long-desired conquest of the Ohio Valley. The Constitution was interpreted as an instrument for the conquest of Indians, a conquest that eventually spread through the whole continental United States. These same constitutional powers would subsequently be used to conquer Mexico and to seize half of its territory. And then they would be used to seize and control

375 *See, e.g.*, Blackhawk, *Federal Indian Law*, *supra* note 16, at 1787, 1799, 1805 (arguing for a less court-centric paradigm of constitutional meaning).

Puerto Rico and the other Island territories possessed by the United States. These conquests and seizures of land are a fundamental part of the meaning of the Constitution, whether the Court has said so or not. Limiting the domain of constitutional interpretation to the Supreme Court creates a fundamental blindness and myopic understanding of what the Constitution really means.

Leading constitutional scholars have argued that the interpretation of the Constitution by George Washington and his Administration provides important evidence of constitutional meaning. Akhil Amar has argued that the Washington Administration's practices form a crucial part of the "unwritten Constitution."[376] Amar writes,

> [T]he Founders in government took law and made it fact. Over the ensuing centuries the constitutional understandings that crystallized during the Washington administration have enjoyed special authority on a wide range of issues, especially those concerning presidential power and presidential etiquette.[377]

Professor Jack Balkin writes that "[t]he practices of the Washington Administration immediately after adoption of the Constitution are generally thought relevant to understanding the original meaning of Article II."[378] Additionally, the Supreme Court uses evidence "that the first Congress either took, approved, or acquiesced in some action as a virtually irrefutable indication of the constitutional validity of that action."[379] Such insights make it especially surprising that scholars like Amar have not explicated the constitutional meanings of presidential war making and conquest as illustrated by the actions of Congress and President Washington in conducting the Indian Wars.[380]

Ironically, though, even if we accept the notion that Supreme Court interpretations of the Constitution are the proper and virtually exclusive domain of constitutional law, constitutional scholars have also ignored many Supreme Court decisions that ratify and extend American conquest. In *Johnson v. M'Intosh*, Chief Justice Marshall adopted the colonial discovery doctrine as constitutional law, attempting to justify the dispossession of Indians and establishing exclusive federal control over the purchase of Indian

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376 AMAR, UNWRITTEN CONSTITUTION, *supra* note 285, at 307–32.

377 *Id*. at 309.

378 Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 657 (2013).

379 Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 184–85 (1993).

380 *See* Mendel, *supra* note 192, at 1309, 1323 (discussing the implications of the Northwest Indian War on constitutional interpretations).

lands.[381] In *Cherokee Nation v. Georgia*, Marshall defined the status of Indians as "domestic dependent nations."[382] In *Worcester v. Georgia*, perhaps the high point of Court recognition of Indian sovereignty, the Court struck down a Georgia law that regulated the presence of whites on the Cherokee reservation.[383]

But then the Court retreated and decided that Congress had plenary power over native nations. In *United States v. Kagama*, the Court recognized Congress's plenary power over Indians by displacing tribal law and allowing the enforcement of the federal Major Crimes Act as applied to two Indians on a native reservation.[384] In *Lone Wolf v. Hitchcock*, the Court extended the plenary power doctrine to allow the federal government to partition and regulate reservation lands, regardless of the lack of Indian consent, as defined in a solemn treaty between the United States and the Kiowa, Comanche and Apache nations.[385] Describing *Lone Wolf*, Professor Joseph William Singer wrote that "[t]here is no other word for this than conquest."[386]

In *Tee-Hit-Ton v. United States*, the Court considered whether the Forest Service's sale of rights to timber growing on lands long possessed and occupied by Alaska natives constituted a compensable taking. The Court concluded that, absent native ownership approved by Congress, there was no taking:

> Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets,

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381 21 U.S. (8 Wheat.) 543, 567–69, 589 (1823). One exception is Brest, et. al., *Processes of Constitutional Decisionmaking*. *See* BREST ET AL., *supra* note 370, at 157 (discussing *Johnson v. M'Intosh* as an explanation of "why Native Americans lost the right to lands upon their discovery (and conquest) by European states"). Professor Joseph William Singer characterizes *Johnson v. M'Intosh* somewhat differently, emphasizing Chief Justice Marshall's recognition of residual native sovereignty and his refusal to endorse subsequent conquest without native consent. *See* Singer, *supra* note 8, at 205 ("[T]he *Johnson* opinion puts a brake on future conquest: no more seizure of tribal lands without consent of the tribes and no regulation of internal tribal affairs without a treaty by which the tribe agrees to federal regulation.").

382 30 U.S. (5 Pet.) 1, 17 (1831). *See generally* PEREA ET AL., *supra* note 304, at 211–18 (analyzing various cases in which the United States has interpreted legal questions regarding Indians and discussing subsequent implications).

383 31 U.S. (6 Pet.) 515, 562–63 (1832). *See generally* PEREA ET AL., *supra* note 304, at 211–18 (analyzing various cases in which the United States has interpreted legal questions regarding Indians and discussing subsequent implications).

384 118 U.S. 375, 384–85 (1886).

385 187 U.S. 553, 568 (1903).

386 Singer, *supra* note 8, at 43.

> food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[387]

As noted by one scholar, the only "sovereign act that can be said to have conquered the Alaska Native was the *Tee-Hit-Ton* opinion itself."[388] Thus, unlike virtually any other property owner, the government can take native property and resources without compensation, contradicting the 5th Amendment.

More recent court decisions have continued the conquest of Native America by eroding the sovereignty and dignity of native culture and religious practice. The California Court of Appeals, for example, held that a sacred Miwok graveyard containing the remains of two hundred persons was not a cemetery under California law. Accordingly, this court allowed the graves to be dug up to make way for a housing development.[389] The Supreme Court has concluded that the First Amendment neither protects sacred Native religious sites[390] nor Native religious practice[391] when these conflict with federal or state prerogatives. The Court also interfered with the ability of Native Hawaiians to limit eligibility for service on a board managing native assets to native kin.[392]

The recent decision in *McGirt v. Oklahoma* shows a better way: the Court enforced a standing treaty with the Creek nation, holding that the Creek reservation still had its full, undiminished extent as promised in the treaty, since it had never been clearly nullified by any act of Congress.[393] With the exception of the *McGirt* case, these cases show that the conquest of Native America continues through court decisions that subordinate Native interests to majoritarian wishes.

This constitutional law of conquest also encompasses the conquests of Mexico and Puerto Rico. In 1846, upon a pretext, U.S. President Anthony Polk authorized the military invasion and seizure of Mexico, its weaker southern neighbor.[394] The conquest resulted in the Treaty of Guadalupe Hidalgo of 1846, which ceded the northernmost half of Mexico

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387 Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 274–75 (1955).

388 Nell Jessup Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J. 1215, 1244 (1980).

389 Wana the Bear v. Cmty. Constr., Inc., 128 Cal. App. 3d 536 (1982).

390 Lyng v. Nw. Indian Cemetery Ass'n, 485 U.S. 439 (1988).

391 Emp't Div. v. Smith, 494 U.S. 872 (1990).

392 Rice v. Cayetano, 528 U.S. 495 (2000).

393 140 S. Ct. 2452 (2020).

394 *See* PEREA ET AL., *supra* note 304, at 283.

to the United States, though the land was still owned by Mexicans.[395] Congress constituted three federal offices, the California Land Claims Commission, the Surveyor General of New Mexico, and the Court of Private Land Claims, each of which applied U.S. property law, in English, to determine the validity of Spanish and Mexican land grants made under very different standards.[396] Many Mexican landowners lost their lands when their original grants were deemed invalid under U.S. law.[397] Many Supreme Court decisions ratified these losses of land. In *Botiller v. Domínguez*, for example, the Court held that Congress had unilateral power to abrogate the treaty of Guadalupe Hidalgo.[398] With respect to the claims of Mexican landowners, *Botiller* is analogous to the *Lone Wolf* case in Indian law.

The constitutional law of conquest has played a major role in the continuing colonial status of Puerto Rico. The United States gained control over Puerto Rico in the Treaty of Paris of 1898.[399] The Supreme Court approved of federal dominion over Puerto Rico in *Downes v. Bidwell*, holding that the island was an "unincorporated territory" subject to plenary congressional power.[400] The Court wrote that

> No construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. . . . If those [American territorial] possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible.[401]

Significantly, the Court relied on *Johnson v. M'Intosh* extensively in reaching its holding, linking the conquest of Native America to the possession of Puerto Rico. The *Downes* decision has allowed Congress to treat Puerto Ricans less favorably than citizens of states under federal statutes. It is also worth noting that Puerto Ricans resident on the island, though U.S. citizens, lack voting congressional representation and the right to vote for president.[402]

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395 *Id.* at 289–93.

396 *Id.* at 297–301.

397 *Id.* at 301–305.

398 Botiller v. Dominguez, 130 U.S. 238 (1889).

399 *Supra* note 304, at 346–48.

400 Downes v. Bidwell, 182 U.S. 244 (1901).

401 *Id.* at 287.

402 *Supra* note 304, at 359–60.

Despite their inability to participate in the political process, they are fully subject to federal law, hence their colonial status.[403]

All of these Supreme Court decisions are interpretations of the Constitution clarifying the relationship between the federal government and conquered peoples. In other words, all of these decisions are constitutional law. Why have most constitutional scholars ignored them?

This significant body of constitutional cases, along with others, can be understood as the conquest line of cases. Clearly, the silence of constitutional law books and treatises on conquest reflects something other than a lack of case law.[404] At least one of these cases, *Downes v. Bidwell*, has received some attention. Some scholars of constitutional law, including Sanford Levinson, have described the importance of *Downes v. Bidwell*.[405] Levinson argues eloquently for the inclusion of *Downes* into the canon of constitutional law to encourage discussion of American expansionism, particularly of the late nineteenth and early twentieth centuries.[406] And although he mentions briefly the Louisiana purchase and the annexation of Texas, he does not develop or identify further the fuller theme of American expansionism from the inception of the Constitution.[407] If a case can be made that the American expansionism of the late nineteenth century warrants attention from scholars of constitutional law, then the greater American expansionism of the late eighteenth and early nineteenth centuries, of which *Downes* is a later expression, certainly warrants attention. Given the constitutional history and law presented in this Article, I can think of no good reason why constitutional law scholars refrain from understanding the Constitution as an instrument of conquest and expansion from its inception.

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403 The Supreme Court has recently confirmed Puerto Rico's colonial status. In *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022), the Court reaffirmed Congress's ability to treat Puerto Ricans less well than States, which re-confirms Puerto Rico's status as an "unincorporated territory."

404 For example, the constitutional materials available on the war powers as such are very thin—only a fragment of discourse at the constitutional convention and the *Prize Cases*, yet constitutional law textbook authors include them.

405 *See* Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 121, 122 (Christina Duffy Burnett & Burke Marshall eds., 2001) (arguing the importance of *Downes* and the *Insular Cases* in the canon of constitutional law).

406 *Id.* at 122, 126. To date only Levinson's casebook has included *Downes v. Bidwell*, despite his argument.

407 *Id.* at 128–30.

Scholarly silence about these cases extends to silence about the influence of colonialism on other important constitutional doctrines.[408] Professor Maggie Blackhawk has shown the influence of colonialism and conquest on constitutional provisions and doctrines such as the Treaty Power, separation of powers, the war powers, and the plenary power doctrine.[409] This should come as no surprise. Of course such a massive and momentous process as the dispossession of native America would shape and be shaped by constitutional law.

The initial history of the war powers was sculpted during George Washington's war against the native inhabitants of the Northwest Territory, described above. Notwithstanding the doctrinal importance that scholars say they place on the actions of George Washington and the early Congress as authoritative interpretations of the Constitution, the meanings that can be derived from these actions are almost entirely missing from descriptions of the war powers. Washington's three invasions of the Northwest Territory, each pursuant to Congressional authorization and funding, demonstrate a cooperative model of war making that should form part of the conversation about the scope of the war powers.[410]

The remarkable degree of American disavowal becomes apparent when we see that important books on the Constitution and constitutional law have literally *nothing* to say about the role of the Constitution and its law in the conquest of the continent. In this way, disavowal has been extraordinarily effective. The appearance of a government by the people "succeeds if violence in the founding is treated by the hegemonic political identity to have no continuing effects."[411] And so it is that today, the conquest is treated as though it had no continuing effects.

2. The Missing Pedagogical Lessons from the Conquest

Disavowal of the conquest also results in serious pedagogical limitations and resulting consequences. The failure to engage with this history spreads the "imaginary relation to actual state colonialism." Imaginary renderings

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408 Blackhawk, *Federal Indian Law*, *supra* note 16, at 1806–46.

409 *Id.* Professor Natsu Taylor Saito has published an excellent study of colonialism and the development of the plenary power doctrine. *See* Natsu Taylor Saito, *Settler Colonialism, Race, and the Law: Why Structural Racism Persists*, *in* 2 CITIZENSHIP AND MIGRATION IN THE AMERICAS 1, 215–16 (2020) (studying the development and exercise of plenary power over persons of color).

410 Blackhawk, *Federal Indian Law*, *supra* note 16, at 1825–29. *See also* Mendel, *supra* note 192, at 1310–11.

411 CONNOLLY, *supra* note 341, at 138.

of history generate many harms. Both teachers and students will rely on an incomplete sense of what the Constitution means. They will also have an inadequate sense of what law actually does, and of need for and nature of present remedies for the harms of the conquest.

The failure to engage with the conquest promotes ignorance of the real, devastating harms done to native people by whites, who continue to benefit from their dispossession of Indian lands. Scholarly silence means that most scholars, teachers, and students of constitutional law will simply never be aware of the role of the Constitution in American expansion nor of the role of violence in its implementation. Leading constitutional scholar Sanford Levinson, in his discussion of *Downes v. Bidwell*, candidly acknowledged that he had no idea that such a case even existed prior to a conference on Puerto Rico and American expansionism, despite the fact that the case was well known to scholars of American colonialism in Puerto Rico.[412]

This is one deep effect of scholarly disavowal of the conquest: leading experts on the Constitution may not know this history nor consider it in their appraisal of the Constitution. Or, worse, if they do know the history, they suppress it.

The false understandings of history and law caused by disavowal breed complacency, since students never understand the violence and racism lying at the very foundation of this society. Because of disavowal, we credit the words of law more than the probative and dispositive course of conduct occurring pursuant to those words. Because of disavowal, we fail to see constitutional law and treaties as results of and agents of violence at the founding and after. Because of disavowal, we assume an attitude of benevolence and progress about law and fail to engage in sufficient skepticism about law and its oppressive possibilities.

Ignorance of the history of conquest and its violence supports white supremacy by promoting falsely the idea that the United States has been, and remains, more just than is warranted by the evidence. A full understanding of structural racism requires incorporating the lessons learned from the forcible, ostensibly legal and constitutional seizure of lands from Indians. White supremacy established itself pursuant to explicit military and fiscal powers granted in the Constitution and pursuant to the plan in the Northwest

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412 On Sanford Levinson's admission, see his essay *Installing the* Insular Cases *into the Canon of Constitutional Law*, *supra* note 391. On prior knowledge of *Downes v. Bidwell*, see, e.g., JUAN F. PEREA, ET AL., RACE AND RACES 331–38 (1st ed. 2000); Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases* (1901-1922), 65 REV. JUR. U.P.R. 225 (1996).

Ordinance. The Framers never imagined anything other than white dominion over the land and its original owners.

Study of the conquest and dispossession of Native Americans offers us a powerful way of understanding with greater depth important aspects of our culture. If we understand the United States as a society designed for the military domination and dispossession of non-white persons, it is easier to understand the deeply embedded desire to expand and conquer militarily that underlies American expansionism. In addition, the sense of entitlement to Indian lands and disregard for indigenous peoples' human rights evident in the early uses of constitutional powers by George Washington and his associates demonstrates a deeply embedded sense of white entitlement to space and land that continues today.[413]

These are some of the avenues of analysis that are lost in the interests of disavowal and the propping up of falsely benevolent national, constitutional and legal origins. With respect to the role of conquest in our fundamental law, we dwell in a land of ignorance and blind faith in the benevolent origins of our society and the Constitution. How can lawyers claim to be critical thinkers and analysts of law if we ignore the substantial evidence of conquest in our fundamental law and fail to analyze its past and present ramifications? As I wrote with regard to the denial of the significance of slavery in our fundamental law, "by failing to alleviate this ignorance, we contribute to the cultivation of new generations of colorblind warriors--new lawyers, judges, and law professors—who will assert, without knowledge or understanding, that a Constitution fully enmeshed in slavery and racial hierarchy is now magically 'colorblind.'"[414] As with the denial of slavery, the failure to engage with the evidence of conquest results in the continuing mass production of "colorblind warriors," blind to the deep roots and practices of white supremacy built into our fundamental law. In this time of reckoning with structural racism, let us not continue to forget America's second original sin.

The study of conquest is not merely of historical interest. Today law still functions to further conquest and produce injustice, but also to preserve and protect native sovereignty. The conquest line of cases described above shows that Supreme Court decisions continue to further the aims of conquest. Important aspects of native culture such as burial grounds, religious

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413 *See, e.g.*, Cheryl Harris, *Whiteness as Property*, HARV. L. REV. (1993); I. Bennett Capers, *The Law School as a White Space*, MINN. L. REV. (2021).

414 Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1152 (2012).

practices, and property rights continue to be subordinated to majoritarian desires.[415]

On the other hand, native nations remain vibrant units of government, exercising sovereignty and governmental powers. Current constitutional and statutory law recognizes and protects limited native sovereignty. The recent *McGirt* case, for example, enforcing treaty rights and protecting the full extent of the Creek reservation in Oklahoma, is a landmark decision representing a paradigm shift in the protection of native sovereignty.[416] Certain federal statutes also protect Indian sovereignty. The Indian Self-Determination and Education Assistance Act of 1975, for example, provides a "legal framework within which tribes can exercise their right to self-determination and self-governance, while jump-starting and developing the capacity for government-building activities."[417] This is the direction of justice, supporting native sovereignty.

CONCLUSION

As a pioneer in the technologies of native dispossession and removal, the United States fully demonstrates the disavowal and the intentional fallacy characteristic of settler colonial societies. Our consensus constitutional history disappears the violence and injustice inflicted on native people for the sake of empire. We dwell, for the most part, in that fantastical land of the "imaginary relation to actual state colonialism."

Ignorance is not bliss when it comes to justice. We must recognize "the irony that the tools of civilization were themselves instruments of acute suffering" for native people.[418] We must recognize the profound, instrumental role that law played in the dispossession and conquest of native America.

We owe it to current generations of native people to understand and take responsibility for the incalculable losses of life, land, wealth, education and well-being inflicted on them by white conquerors at all ranks of society.

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415 *See supra* notes 379–389.

416 *See* Matthew M.L. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 1003, 1001 ((2022).

417 *See* Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 4 (2014); MATTHEW M.L. FLETCHER, FEDERAL INDIAN LAW 115 (2016).

418 BLACKHAWK, VIOLENCE OVER THE LAND, *supra* note 14, at 5 (citing BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920 126 (2001)).

By nearly every measure—poverty, health, life expectancy, suicide rates, victimization by serious crime—native Americans are the poorest and worst off of Americans.[419] The unjust reciprocal of this native suffering is the wealth and comfort enjoyed mostly by white people living on stolen land. We owe it to current generations of native people to protect their reservation lands, their burial grounds, their religious practices, and their cultures. We owe it to them to honor our treaties with them, and to negotiate with them as equals at all times. We owe them their sovereignty, their power, and our respect.

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419 According to 2018 data, American Indians and Alaskan natives have the highest rate of poverty in the country, 24%, compared to a poverty rate of 9% for whites. *Poverty Rate by Race/Ethnicity*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/4724-6V7T] (last visited June 10, 2022). The rates of child poverty for American Indian and Alaskan native children is also the highest, 34%, the same as Black children and much higher than the corresponding rate for white children, 11%. *Indicator 4 Snapshot: Children Living in Poverty for Racial/Ethnic Subgroups*, NAT'L CTR. FOR EDU. STATS. (Feb. 2019), https://nces.ed.gov/programs/raceindicators/indicator_rads.asp [https://perma.cc/K6KZ-ZTH7]. The median household income for American Indian households was $40,315, significantly lower than the national average of $57,652. NAT'L CONG. OF AM. INDIANS, *Indian Country Demographics*, http://www.ncai.org/about-tribes/demographics [https://perma.cc/F5T6-RYZH] (last visited June 1, 2020). Statistics on the physical health and welfare of native peoples tell a similar story. The life expectancy of American Indians is 5.5 years less than for all other Americans. *Id.* Native Americans die of heart disease, diabetes, chronic liver disease and suicide at rates higher than all other racial groups. *Id.* American Indian and Alaskan native youth die from suicide 2.5 times more often than all other racial groups. *Id.* American Indians are also victimized by serious crime at very high rates. *Id.*